BECKY BURR: Thank you very much, and thank you all for participating in the call this morning. We have a few people who appear in the room as telephone numbers. So if you could just identify yourselves on the list here, and then when you participate in the chat, then you appear in the chat with your name. That's excellent.

Okay, I want to apologize first of all for not giving additional time to review the document that we're going to talk about this morning. We wanted to get the proposed revisions in the best possible shape to bring them to the group for discussion this morning. Let me just reconfirm, as I did on the e-mail list, that we're not going to make final decisions today, but we will be working through this. This is also a new – although we talked about it on our last call – this is a reasonably new document to many people, so it will take some getting used to.

The document that you are seeing is a markup that reflects consensus between ICANN legal and the CCWG Council with respect to the supplementary procedures that would need to be put in place to implement – although, obviously, there's still work for us to do – the implement the CCWG recommendations with respect to the independent review process as of October 1 on the transition date.

You will see that there are questions for the group to consider. Many of the issues were issues that the CCWG report left to the IRP Implementation Oversight Team (that's us), and not all of them can or need to be addressed at this point. But we do need to modify these supplementary procedures and have those in place.

I'm just going to skip down, just noting the contextual note that these are supplemental to the International Center for Dispute Resolution arbitration rules, which are what currently govern the IRP process. In general, to the extent that the ICDR rules address an issue consistent with the way the IRP is administered, we defer to those rules. This is really to get us to close the gap.

You will see that there – so what you're seeing is a redline here that compares the existing supplemental procedures for the ICANN IRP. Deletions are marked with a cross out, and additions are marked with a different color change. There are many new definitions here.

A "claimant" obviously is "any legal or natural person … material affected by a dispute." So we are going to have to define "disputes," as you will see here. This also incorporates the standing requirement, "an injury or harm that is directly and causally connected to an alleged violation of ICANN's Articles of Incorporation or Bylaws."

Can I just make a note for ICANN and for Sidley? I think that we may need to modify this to incorporate the PTI causes of action here.

"Covered actions" are "any actions or failures to act … that give rise to a dispute." All of these things I think are fairly straightforward.

The "dispute" definition I think is substantive, and we need to make sure that we've covered all of the issues in the report. So, as we said in the report, any action or inaction that causes ICANN to exceed the scope of its mission, any action or inaction that is inconsistent with the Articles of Incorporation or Bylaws, results from decisions of process-specific expert panels that a claimed to be inconsistent with the Articles

of Incorporation or Bylaws, result from a response to a document access request, and arose from claims involving any rights of the Empowered Community.

Let's just pause for a moment to look back at the first and second one. I have a question for our drafters here as to why we have phrased 2 to be limited to violations of the Articles of Incorporation or Bylaws, why we have limited that to actions or inactions taken in response to advice from an Advisory Committee. What if it's just a plain old action taken by the Board on its own or the staff on its own.

Ed, I see your hand. Could you answer that question for us?

EDWARD MCNICHOLAS: Yes, it is. I think the key [bit] there is that "covered action" is any action or inaction that violated the Articles or Bylaws, and then it's including but not limited to, so those are particular examples. The example SO/AC was there to make sure that there was no ambiguity about that being included. But that was not meant to be exclusive. I believe this section was picked up directly from the Bylaws.

SAMANTHA EISNER: I agree with that. I'm just confirming again, but that's where that language came from.

BECKY BURR: Okay. So this is including but not limited to, and the definition in general is violations of the Articles of Incorporation or Bylaws, so that works for

me. It looks like from the chat that that is working for other people. Other comments on this first definition of "dispute"?

Okay, B is claims. These are the PTI provisions, so they have not enforced the contractual rights with respect to the Naming Function Contract or that they're direct customer disputes that are not resolved through mediation. That seems to refer quite closely to what we have said in the report.

Can I just go back? I want to just make sure that we've got this. I think in the definition of "claimant" we need – oh, I see. So what we're saying is everything under the definition of "dispute" – I guess my question for the legal drafter is whether the definition of "claimant" needs to clearly pick up the two PTI causes of action.

EDWARD MCNICHOLAS: I was trying to raise my hand. The definition of "dispute" was pulled straight from the Bylaws, and it was intended to pick up the PTI actions in B and C. I'm trying to find the definition of "claimant" to see if that is…

BECKY BURR: Yeah, I think that the definition of "claimant" covers A but may not cover B and C. I just think that's something that I'd like to ask you guys to go back and look at to make sure we've got that covered.

EDWARD MCNICHOLAS: Yeah, I see where we would need to alter the definition of "claimant" there, "the claimant must suffer an injury." Yeah, I see you're drafting point there.

BECKY BURR: Okay, great. So going down to the definition of "Emergency Panelist," just to make sure, this may be a new concept. It "refers to a single member of the Standing Panel" that would be "designated to adjudicate requests for interim relief or, if a Standing Panel is not in place at the time," somebody "appointed by the ICDR."

In a long-term – once the Standing Panel is formed, the concept is that there would be an Emergency Panelist who would be designated by the Standing Panel itself to respond to emergency requests for an interim emergency relief, proactive relief, that kind of thing. We didn't really work through this particular – although we contemplated that there would be a mechanism available to request and receive interim relief, we hadn't really talked about the mechanism. So this is the mechanism that has been suggested by the drafters. It works for me. Does anybody have any questions or concerns about the concept or the approach?

Okay, then we have definitions for the IRP Panel. One thing to keep in mind as we are going through here is the Standing Panel refers to the large group of at least seven members, and an IRP Panel is actually what is defined here to cover what we have been talking about as a decisional panel. So just a note for understanding as we go through here.

Okay, then we have a Procedures Officer concept. A Procedures Officer – this is after the ICDR Rules if anybody is having trouble following me

here – a Procedures Officer is also a concept that, although we provided in the proposal for the consolidation and intervention and joinder, we didn't really specify the mechanisms by which that would take place. The drafters have proposed creation of a Procedures Officer who would be "a single member of the Standing Panel" that would be "designated to" deal with these kinds of "requests for consolidation, intervention, and joinder." And as we said, until the time the Standing Panel is in place, there would be should appointed by ICDR while they are the provider here.

Any thoughts on that concept? David is typing. David, do you have something to – okay, you have a comment on joinder later. Okay.

Okay, one definition that is useful just to note – I don't think it's controversial, but it helps make the document more understandable as we go through this – is the "purposes" of the IRP as a defined term. The purposes "are to hear and resolved disputes (also a defined term) for the reasons specified in the ICANN Bylaws." You'll see that shorthand used throughout the document.

And then the Standing Panel is our omnibus panel of at least seven members.

Going down to "scope," this really is sort of an internal note talking about how the supplemental rules interact with the ICDR Rules for so long as ICDR is our provider. Here we specify an order of precedence, which is to say that these updated supplementary procedures take precedence over the ICDR Rules at any particular time.

David has two comments on scope, so now is your opportunity.

DAVID MCAULEY: Thank you, Becky. On scope, I thought two things. One is I think we should take care to address items like appeals and consolidated cases to make sure that in case there's a pleading or something that comes before the rules change, we know what happens if there's another bit that comes after the rules change so that if there's a conflict between timing and what rules might apply, we can sort that out.

Then on the second point, I thought it might be a good idea to add the Bylaws to the inconsistency provision so that at any time the Bylaws would take precedence over either the rules or the supplemental rules, and the Bylaws should be the final point of reference.

Those are my two comments, and I'll add them in the chat too. Thank you.

BECKY BURR: Thank you, David. I'm very glad to have you back with us. It sounds like you're still in the mending process.

This is an interesting and I think potentially important point that deserves some discussion, particularly references to the Bylaws. Sam, do you have a response?

SAMANTHA EISNER: I do. I think we would fully agree with that idea that the Bylaws need to take preference, but that's why it's so important that we do this exercise very carefully and make sure that we have the things from the

Bylaws that we think we need in here or they're already covered in the ICDR Rules themselves. Because from what we understand, the panelists through the ICDR, they have to follow their rules. We can't tell them in their rules that they have to go follow the Bylaws. We have the obligation in bringing forth supplementary procedures to make sure that the supplementary procedures have everything we expect to have in there.

That's the sense that I've gotten in some conversation about how we can make sure that the providers can accept these rules and concerns about consistency of the Bylaws. That is really becomes our obligation to make sure that things are included within the procedures themselves because typically within providers, and maybe a different provider would handle this differently, but at least with ICDR our understanding is they can't require their panelists to then go and follow the Bylaws as well. That's why they have a set of procedures and rules.

BECKY BURR: Okay, so just summarizing this, I think we all agree that the Bylaws from our perspective that the ultimate source and authority with respect to the IRP proceedings is the Bylaws. Having said that, I think Samantha is requesting a point based on interactions with the ICDR provider saying that they need a fully fleshed out document that is essentially self-contained and incorporated into the supplemental rules to the extent the rules are inconsistent with the Bylaws.

I think David is agreeing or is saying that in that case we really absolutely need to have very carefully assured ourselves that we have really reflected the Bylaws in here, and I think we'll agree on that.

I just want to go back to David's other point, which is talking about what would happen where there are appeals and consolidated cases or whatever and somehow in between the time a dispute was originally filed and then there was an appeal of that, if there was an amendment of the supplemental procedures, what would happen?

I think that's an interesting and hard substantive question because there's a due process question about the fact that rules or the supplemental procedures themselves can be amended during the pendency of a dispute.

It's also an interesting question that I don't think we've talked about but we should definitely put in the hopper for discussion is a process by which the supplemental procedures could be modified. Because, of course, the supplemental procedures are not governed, they're not Bylaws essentially.

David is proposing that we could apply the later rules, so the most recent rule would apply. But give the party an opportunity to show that it's being harmed or prejudiced by the application of the revised rules and, therefore, on the basis of equity have the previous rules apply. That seems like a reasonable manner to proceed. Any views on that? If not, could I ask the lawyers – okay, Sam?

SAMANTHA EISNER: I just wanted to confirm. So we're talking about applying these rules based on this form of the IRP to existing IRPs?

BECKY BURR: I think that what David is saying is these rules can change, and they can change while an IRP is pending. So you file under one set of rules, and then suddenly the rules have been revised. What does that mean? What is the panel supposed to do? I think David's suggestion was that we say the later rules, the later supplemental procedures apply unless the claimant makes the case that it is harmed by the application of the most recent rules. That's what the suggestion is. Ed?

SAMANTHA EISNER: Can I follow up on that before Ed goes?

BECKY BURR: Yes, sure.

SAMANTHA EISNER: I think from our perspective, there needs to be a bit of a delineation here. Right now we're in the process of a major overhaul of the rules to a new form of IRP with a different standing requirement and different things, right? This update is a very big breakpoint because people are actually operating under a different form of the IRP come October 1. So I think we have two questions on the table.

First, we need to make sure that we're not doing anything that alters the course of the IRPs that are currently underway that were under [a form].

Then there's the separate question of once we have these updated rules, we understand and I think that we're all in agreement on this call that we're going to likely need to do some iterations to the updated rules as we continue to go through this process. We have a goal that we really need to get a set of supplemental rules in place very quickly that address the Bylaws and then if the IOT has some further innovation on those points, we can get the rules updated.

So there's the question of the [iterative] updates on the updated rules to reflect what we can call our 2016 IRP. But I don't think we should put any statements in here that would impact and require that the 2016 IRP rules become applicable to cases filed under the 2013 IRP and are already proceeding under that. So I think we need to consider these things separately.

BECKY BURR: Okay, so Sam is proposing that we need to have – and I take it that you're okay with David's suggestion for cases filed under the new supplementary procedures as we iterate along that. And then what we need to have is separate discussion about what, if anything, happens to IRPs that have already been filed. Is that correct, Sam?

SAMANTHA EISNER: For the most part, yes. I think that we do have from our understanding the general case in arbitration is that the rules that apply to any case so the rules that were in place at the time of the filing of the claim. And so I don't know if that is just a simpler way to go as we proceed and try to make different rules around that.

BECKY BURR: I don't think we need to decide that right now. I think that we need to make it as a discussion point and we can come back on that. I just want to make sure that, in terms of proceeding going forward, for cases filed under these supplemental procedures once they're adopted the question is, do we stick with the rules that apply or the rules that applied when you filed or do we say the new supplemental procedures apply unless you show prejudice?

So that's just one point. I've got Ed, and then Amy, and then Holly in the queue.

EDWARD MCNICHOLAS: I just wanted to say that I think it's fine. The idea that we would need to have the continuation of the old rules for pending IRPs that are pending today makes a lot of sense. Going forward, oftentimes procedural changes are applied, and the way that David suggested where if procedures change in the mid-course and an operator changes from allowing 25 page briefs to 20 or 30 page briefs then going forward, all the briefs in the action are governed by the new page limit because no one should be prejudiced by the page limit. But there is an out if the rules change would affect your substantive rights, then it doesn't apply

to you because your substantive entitlements are frozen at the time of the filing. And so I like David's suggestion of having it be the rules which should be procedural in nature would apply going forward which would alter that last sentence in scope, but that if someone thought that it was somehow affecting their substantive rights and was not merely procedural then they would make that case to the panelists under that particular circumstance.

BECKY BURR: Thanks, Ed. Amy?

AMY STATHOS: Yes, thank you. I do think we need to look at this because I definitely agree that if there's a substantive issue addressed in the rules or the procedures that the ones that are pending when you file are what need to apply, because you need to really create certainty and predictability so that you can understand under what rules you're operating the minute you file which I think is pretty standard. I think the possibility of whether there are some procedural rules such as what Ed was saying about page limits and such may be an option, but I think we need to figure out how to draw that line because I do think it's an important line to draw.

BECKY BURR: Okay. Holly?

HOLLY GREGORY: Greetings all. I apologize, I'm unable to chat and the comment I just would have made in the chat, I was going to make the substance versus procedure point that I think both Ed and Amy have made and so I fully support that. Thanks.

BECKY BURR: Okay, so if I could just ask the legal drafters to have an offline discussion and come back to us with a proposal on that. It sounds like the way forward. And then I just want to note that I personally want to have a conversation about the substantive standard given through the changes and I want to understand that. And I think that's the conversation we don't need to have right now for existing IRPs. It's a conversation we don't need to have right now, but I do want to have that conversation so that we all understand what that means.

Okay, so I've still got Amy. Amy, do you have a new hand?

AMY STATHOS: Sorry, no. Let me take it down.

BECKY BURR: Alright, so we're going to put that on as a to-do for the drafters. We then go down to the composition of the Independent Review Panel, and just recalling from the definition, the IRP panel is the three member decisional panel and this provides that the claimant and ICANN each select one panelist from the Standing Panel and the two panelists select the third panel. It does provide that if a Standing Panel is not in place or if resource constraints on the Standing Panel are such that there is no

availability, then ICANN and the claimant can select panelists from outside the Standing Panel. And I think that's something we do need to provide for in periods where there's a lot of call on the IRP process.

This provides that if the two party's selected panelists can't agree on the third panelist there will – which I assume are the ICDR rules – apply to the selection of a third party, and if a panelist resigns or is incapable of performing its duties or removed, then a substitute arbitrator shall be appointed pursuant to the provisions of these updated procedures.

Can I ask one of the drafters to explain the last couple of sentences in this section? Because there's reference out the rules and then there's an internal reference to the updated supplementary procedures, and I guess my question is, if the two panelists selected by the parties can't agree what happens? And if a panelist becomes unavailable mid-proceeding, what happens?

Ed or Amy or Holly? Can you help us on this?

EDWARD MCNICHOLAS: To jump into the fray here – the issue here is that there's going to be a reference out to the ICDR rules. The question is whether we want to proceed with the [fault] rule or not. I don't know that this has ever come up. Maybe perhaps Sam could –

BECKY BURR: Well it has, I think. It did come up, didn't it, in the dot connect Africa?

EDWARD MCNICHOLAS: Maybe Sam would be better to speak to this [for] experience.

BECKY BURR: Amy?

AMY STATHOS: Yes, well it came up in the sense that we actually had a panelist pass away, and so the party that appointed that panelist picked another panelist.

BECKY BURR: And is that essentially what's provided for in the ICDR rules?

AMY STATHOS: Frankly, I really can't say. I think it's currently in IRPs we agree on a process for selecting panelists which generally is each party will select a panelist and then there is various ways that we go about selecting the Chair. But generally, if either one of the two party selected panelists have to leave or resign or what have you, then the party who selected that panelist gets to pick the replacement.

BECKY BURR: And if the third panelist becomes unavailable then presumably the two existing panelists would do it. So essentially you just repeat the process for [inaudible]?

AMY STATHOS: Yes, I would say that that's probably the case. It's never happened with the Chair, but in that case it would probably be the manner in which this Chair was originally selected would be the same manner in which you would select that person's replacement.

BECKY BURR: Yes. Okay. That makes sense.

EDWARD MCNICHOLAS: That does follow through in the supplemental procedures where there's a particular article on replacement of an arbitrator. And that essentially forces a cross reference back to the initial procedures for appointment. The only catch there is that if there is a three person panel and one panelist disappears, the two panelists do have the ability to continue under their rules by themselves unless they determine they need a third panelist. And if they need a third panelist then they go back to the original procedure.

BECKY BURR: Okay, although I think that's a totally interesting way to proceed, and at this point we probably should look to the procedure that's already specified and in place here as opposed to introducing a new element of change which we may want to do at some later point.

So going down to the time for filing, we have, "A claimant shall file a written statement of a dispute with the ICDR no more than X days after a claimant becomes aware or reasonably should have been aware of the action or inaction."

I take it we did not have a specific time period recommendation in the report, David?

DAVID MCAULEY: Thank you, Becky. To be honest, I don't remember if we had a specific one in the report. I was just going to make two comments. One is, I'm glad that this talks about days as opposed to business days because business days vary around the world. To me, it seems like 30, 45, or 60 would be the right number, so I would go for 45. But I particularly wanted to note my support for Footnote 14 which basically says, "Timeliness of a claim is dependent upon the payment of fees." I think that's extraordinarily important. And I'll put these comments in the chat as well. Thank you.

BECKY BURR: Okay, thank you. Okay, so the time period was not mentioned in the proposal. David has put 45 days on the table. What's the current requirement, Amy or Sam?

SAMANTHA EISNER: Amy, is it 30 or 60 days past the release of the minutes in the briefing material?

AMY STATHOS: Yes, it's 30 days following the posting of the Board briefing materials, which includes the resolution and rationale of the decision.

BECKY BURR: Okay, and that must take into account all of the reconsideration and all of that stuff, is that the notion?

AMY STATHOS: It depends on what the basis for the claim is, right? So if the challenge is, let's say, a BGC decision on reconsideration it would be when the minutes of the BGC meeting are posted, because typically actually the full determination of the BGC is posted long before the minutes are. That's what encompasses the rationale. So we do wait for the minutes, although from a BGC decision on reconsideration it's generally posted within a few days after the decision.

BECKY BURR: Okay. So David has said 45 or 60 days. Other views on that and, Robin, I'm thinking maybe you can help refresh us on the timing discussions with respect to reconsideration, because I know that was part of the work that you did in terms of the timing issues.

Robin's going to type her answer.

Okay, shall we [try] a straw man of 45 days in here, so Sam was recalling 30 days increased from 15. So there was a concern about shortness going of 45 days up from 30 would be consistent with that. Okay. Obviously, we're not making any final decisions but we suggest 45 days straw man in here. Okay.

Next we go to the conduct of the Independent Review. And this actually has some substantive issues that we need to discuss.

“The panel would conduct its meetings by electronic or telephonic means unless the IRP panel its discretion determine that other means would in unusual circumstances further the purposes of the IRP.”

So this somewhat softens the language of the existing supplemental rules which refers to the hearing from extraordinary. This provides a greater degree of deference to the panelists in seeking to further the purposes of the IRP, so it goes back to fundamental principles.

But it still says basically, we want this to be as efficient as possible, and so electronic or telephonic proceedings are really what we would like to look for.

And then it goes on to say, “In the unusual circumstances that an in-person hearing is deemed by the panelists to further the purposes of the IRP, all witness statements would be submitted in writing in advance and telephonic hearings would be subject to the same limitations which is to say that witness statements would be provided in advance and the panel may deem that in-person or electronic testimony is necessary to further the purposes of the IRP.”

This reflects what I thought was the sense of the group when we talked about this the other day. David, you’re asking is there any way to put a high hurdle on a panel calling for live testimony. I think that the language has in here been a fairly high hurdle, referring to it as an extraordinary event. But in some cases the panel themselves have said

essentially, we need to be able to determine what kind of testimony is necessary to do this.

I agree if it's being abused that's a problem here, but let me just say there's a clear debate to be had on this point which is, do we as a group want to say, no – live hearings should have to pass a very, very high hurdle, or do we want to say – the panelists, that while we prefer electronic or telephonic means of conducting this, if the IRP panel determined that in-person hearings, for example, would serve the purposes of the IRP they should do so. I think that's a real question that if we haven't – and I thought we had settled on a more deferential approach – but we may not have. Sam?

SAMANTHA EISNER: As Becky would know, in the back and forth between the firms as we were looking at this language, ICANN had language that was that you can see was struck out and then other language was recommended by Sidley on this.

This is one of those areas that, clearly this is an item that the IOT can further discuss and should further discuss the scope of discovery and the limitations that we would wish to have put on the panels relating to discovery is really one of the most important aspects I think that this group can face. Because if you look at the purposes of the IRP, it includes items of efficiency which go not only to time but also to cost. And so within ICANN we have experience with panels even when they have a clear prohibition against live witness testimony and in-person hearings, have proceeded in that manner. And we also know from

experience that when IRPs are taken to an in-person hearing that the costs involved in those are exponential.

So there are many different factors that I think we need to consider and maybe provide more guidance to the panels if we were to include some other deferential language. So if we look at this as an iterative document, we would propose from the ICANN side that we start off with more restrictive language that better reflects the status quo of how these proceed so that we can get to a point where we have some clearer guidance of when we expect that deference to be exercised and the types of situations that the panel should consider, including things like cost, time, and those sorts of things that would further the other purposes of the IRP.

BECKY BURR: Okay. Ed?

EDWARD MCNICHOLAS: Just to speak about the proposed draft here. The mechanisms here would be to default to having the very efficient hearings that we have today, but then to provide latitude for the panelists and their discretion to, if they think in a particular case that the purposes of the IRP require further in-person or live testimony, to allow them that flexibility there. Obviously, the whole process depends upon the reasonable exercise of discretion by the IRP panelists, and we could alter that over time if there were abuse or it was becoming too expensive.

There is an inherent restriction in this draft with regard to the purposes of the IRP which speak to the way in which the community, through the proposal and then in the Bylaws, through that whole process articulated what they wanted the IRP to do. And so those constitutional terms about what the purpose of the IRP would do would be something that the panelists would have to consider their discretion to be guided by and one would hope over time that there would be a development of a common law of when circumstances were sufficiently exceptional as to allow for in-person or live testimony. One would think that would only be in circumstances where the panelists thought it was important to judge the credibility of witnesses or felt that a interactive form would be more conducive to understanding the dispute.

BECKY BURR: Amy?

AMY STATHOS: I just wanted to come in and again talk about the fact that I think we do need to discuss this more, and changing it now without that further discussion could be difficult. As Sam had said, in terms of the efficiencies and the accessibility, one of the issues that we face is with cost it's been almost an order of magnitude more when we've had live testimony at the hearings where we've had that in two circumstances. One, Becky, that you'll recall in the ICM Registry matter and then with the DCA matter. And I just think that that's something that we need to consider quite strongly.

I'm not sure that even if we have some language in here that allows for the discretion of the panel it's sufficiently restrictive just having the words "unusual circumstances" may not cover it. And if we do need to reflect what the community was talking about, I think we would need to add more language in here so that the panel does actually consider what the community was talking about in terms of accessibility and affordability of the process. Because I don't think that would be sufficiently covered in what we have now for the panel to actually consider that.

BECKY BURR: I just want to clarify this. Does the current language include, "In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP, then the in-person hearing shall be limited to argument only." Is that the current language?

AMY STATHOS: Yes.

BECKY BURR: Okay, so the current language does provide latitude for the panel to require an in-person hearing as an extraordinary event.

AMY STATHOS: Right. But with no witness testimony.

BECKY BURR: Oh, to argument only. But in fact, in those two cases that you're referring to the panel basically said, "We want a witness here. We want witness."

AMY STATHOS: No.

BECKY BURR: One thing that I'm trying to –

AMY STATHOS: Let me clarify. So when the ICM matter was on, that limitation was not in here. That limitation was placed. That limitation meaning no witness testimony at hearing. That was added by the experts in 2013 when the expert group looked at the procedures and made some changes to the Bylaws relating to IRP. And so it was only the DCA panel that heard witness testimony that did so contrary to the Bylaws.

BECKY BURR: Okay. So the DCA panel basically said, "We believe that in order to do this, notwithstanding the prohibition on witnesses, we're going to hear witnesses."

So we're going to come back and we're going to talk about this again next week. I think that this is something that we should all sort of reflect on and maybe have some discussion on the list over the course of the week on it and then come back to this so that makes sense for people.

Okay. So this is still very much a discussion point and we hear the concerns about sort of what the status quo and what changing it does with respect to accessibility and cost on the one hand and also then just the interests of making sure that the purposes of the IRP are fully served by those rules. So that's on our list for further discussion both over the course of the week and at our next call.

Written statements is pretty straightforward. I'm just trying to look at a bunch of provisions. Going down to Section 7, consolidation, intervention and joinder. There's no existing supplemental rule for consolidation, intervention and joinder. But we did in the CCWG proposal talk about making sure that this would be available.

So if I could ask one of the drafters. I see David. I'm sorry, your hand's up.

DAVID MCAULEY: Thanks Becky. I was just going to say about this paragraph that I think it's a good idea to give the panel some discretion in this area. But I also think we might want to look for an objective cutoff time because once evidence starts coming in, it may be unfair, it might be confusing to have people joining in after a certain position. And also on consolidation, I wanted to add that there ought to be a cumulative page total so that if there's one party on one side and a number of parties on the other, the one can't be sort of overcome by briefs from the multiple side party. But I'll put these comments in chat. Thank you.

BECKY BURR: Okay. Thank you. So if I could just ask one of the drafters to sort of walk us through it. I mean, as I read it, it's basically saying that a procedures officer would be appointed from the standing panel – so that's from the larger panel – to consider requests for consolidation, intervention and joinder.

And that consolidation, intervention and joinder would be allowed at the discretion of the procedures officer and that consolidation would be appropriate when the procedures officer concludes that there's sufficient common nucleus of operative facts that the joint resolutions of the dispute would foster justice and an efficient resolution and any person or if they qualified to be a claimant. So anybody who would be materially affected by the action or inaction of ICANN would be permitted to intervene with the permission of the procedures officer.

And I think that this is something that ICANN has had some experience on as well. So Amy, do you want to offer any thoughts on this section?

AMY STATHOS: Hi. Yeah, sorry. In terms of the consolidation and joinder issues, the experience that we've had relate a couple different matters. And both of these relate to the New gTLD Program issues. One is where one party wanted to file an IRP on a couple of different strings and so while the decisions were not the same, they just filed on the same string so it was on both strings. So it was on different issues but the same party.

And then in another matter, we had a situation where it happened to be the same lawyer that represented a couple of different parties and they wanted to consolidate the cases and we had no objection nor did the

panel. So those are the nature of the experiences we've had where there's been a consolidation, if you will, of different issues versus different parties.

BECKY BURR: That's interesting. And what about interveners? Because I think that was something that we had talked about as it was important to make sure that all of the relevant parties were at the table.

AMY STATHOS: Right. So we have had a situation where particularly with the New gTLD Program, in some instances, while we are limited to the standard of whether the Board did something that violates its Bylaws or Articles of Incorporation, many of the arguments have related to actually other conduct or something along those lines. And when you're at this issue, at least with the new G, generally it's because there was contention or an objection and somebody won and somebody lost. And neither of those parties was ICANN. Or somebody is being put on hold because the IRP is moving forward.

So we have had some instances where the parties who are either on hold or whose application is being challenged through the IRP have wanted to even present briefing or something along those lines and participate. And I think the one instance where the actual request was given up to the panel, the panel declined to allow that party to participate.

BECKY BURR: And did the party decline for equity purposes or because they didn't have a mechanism for doing it that we would provide by this?

AMY STATHOS: I think in that instance, it was the panel who had said what we're really talking about Board conduct, so your input would not necessarily be relevant. But there might have been a flavor of all of those things that you mentioned. I can't off the top of my head remember what the procedural order said about it. I can certainly go back and look though.

BECKY BURR: But it would be helpful, I take it, to affirmatively contemplate a situation where sort of one party is making a claim about actions and violations of the Bylaws but another party is directly affected as well even if on the other side.

AMY STATHOS: Is that a question to me? I'm sorry.

BECKY BURR: Yeah, that was sort of a question but I think it was sort of a reiteration f what I heard you say. You said also that it might be helpful to contemplate on this situation.

So going to David's point, I think what he's talking about in terms of consolidation and joinder and intervention and the like, that courts commonly have rules particularly if it's not an intervener on the side,

but where sort of the parties are coming together with somewhat similar claims, that it doesn't announce a sort of doubling the page limits, that a choice to come in does have effects on limiting and allocating page limits across the group of claimants so that it's not a mechanism for just doubling the page limits and permitting greater argumentation for the sake of that. And that, I definitely understand how that works.

We have some page limits here, but I think for this one, if we could ask the drafters to sort of put their heads together and think about what would be appropriate here and come back with a proposal, that would probably be the best way to proceed.

Okay. Going down to eight, discovery methods. I think that there's no existing supplemental rule on discovery. And this is a really complicated and important issue because it really does go to efficiency, accessibility, cost on the one hand and due process on the other. And it's critical that we really draw a balance here with respect to what we come up with.

I think, Sam, your hand's up if you would like to talk to this issue, speak to this issue.

SAMANTHA EISNER: Thanks. Becky, along those lines, I think that the discovery issue and this is a place where there's a large change from the status quo in the existing IRP procedure and this is, again, a place where I think we all agree that the IOT has a lot of work ahead of it in terms of what the ultimate discovery procedures around the six month IRP process is supposed to look like and would best meet the needs of the IRP and

also, again, measured against that request for the six month timeframe and the efficiency and the burden on the parties who are participating.

So this is another place where in the drafting, there was probably a fairly, this is one of the places where, like the hearing issue, there were the most apparent differences the ICANN Team working on this and the Sidley Team that we still have continuing concerns about suggestions of [inaudible] which is depositions, interrogatories and requests for production or admission will generally not be permitted unless the IRP panel determines that discovery is necessary to further the purposes of the IRP.

The granting of discretion, again here, without a focus on, as David suggested, the existence of documents that were already available through the [inaudible] and as that process is being developed through the CCWG, the idea of depositions which can be very expensive, including a lot of attorney time and witness prep time and everything you need to get to there. And there's also no sort of limitation on depositions or interrogatories or requests for production here.

And so we do have a concern about starting off with a baseline that we haven't really discussed fully in terms of the types of guidance or limits that we might wish to put on the panel so I think that this is another place where we expect that there would be robust conversation within the IOT but for the initial set of supplementary procedures that we're hoping to get in place so that we can move forward and not have a time issue with the transition, is this really the right baseline to set in right now without further discussion?

BECKY BURR: Okay. Thank you, Sam. Ed?

EDWARD MCNICHOLAS: Yes. I just wanted to agree that there certainly, this is a time for discussion of this. The question about whether discovery would be allowed was put off during the proposal process in favor of discussing it now and it seems to be the appropriate time. The issue does come to where most discretion will be afforded to the panelist to adjust procedures in light of particular circumstances.

And so I would say that yes, the panelist would take account of all of the relevant facts and circumstances including whether documents were otherwise available, including the nature of the dispute, whether they thought… And the issue is here, the due process concern, is that if ICANN is in possession of documents that have not been turned over or otherwise made available, whether due process would require that the panelist have some ability to force those documents to be made available. Or likewise, if the claimant has documents that ICANN needs, there is no process otherwise by which ICANN can force the claimant to produce documents, documents which may well undercut their claim. And so the suggestion here would be to have some sort of discretion.

Now that you could be by having a requirement that each party produce documents that they have that are material so there's not a discovery process in which there's a request for the sun, the moon, the stars, people say I give you nothing, and there's a fight, something in the middle which would make the American process so expensive. It could

be simply a requirement on each side that they produce to be policed by the panelist that there's abuse on either side. And so we see a little bit of that on the U.S. rules on disclosure requirements.

The other one would be to have something that would give the panelist discretion to order whatever level of discovery the parties wanted in light of the dispute. That would be significant because I don't think it will affect accessibility at all because if you are a small party who does not have resources, you're not going to be the one asking for discovery but if it's a large commercial party in a complex dispute that they have with ICANN, this would free the panelist up to have that procedure available to them so that they could have the ICANN, the IRP procedures, expand or contract as necessary in light of those particular facts and circumstances.

So that's, I think, the range of debate and I certainly agree with Sam that there's a lot of debate to be had here.

BECKY BURR: Okay. I think, again, I completely agree. This is a critically important discussion and it has significant implications on all sides. I propose that we have discussions about this on the e-mail list over the course of the week, that people consider these issues and that we talk about and I think a significant amount of time on our next call will need to be devoted to the questions that we've identified regarding the conduct of the proceeding hearings and discovery. So we're going to, just in the interest of getting this issue on the table but then moving us forward for

a more thoughtful discussion over the course of the week and then following up next week.

Okay. Going to summary dismissal, this is consistent with the current state of affairs and also the recommendations that there must be a process for quickly dismissing claims that are abusive and here we say that don't demonstrate that they've been materially affected by the dispute which is the standing requirement that we put in or that the claim lacks substance or is frivolous or vexatious.

So that, I think, is consistent with the IRP, with the recommendations in the proposal, although I think that there was some discussion about the term "vexatious." Robin, do you recall that coming up in the context of reconsideration requests? David McAuley finds vexatious to be vexing. I agree.

Robin? Okay. I think that Robin is correct, that it was lacks substance or is frivolous. I think let's make sure we go back and check that for next time.

We're in the sort of nine minutes to the top of the hour and I know this has been a long call so I want to just make sure that we end on time.

So let me just take a look at the interim measures of protection which is the next one. I believe that this language is quite closely modeled on the ICANN Bylaws. Amy or Sam or Holly or Ed, correct me if I'm wrong, but please review those so we can go over them. And that the standard that has been put in here is consistent with the language in the Bylaws and the recommendation.

So the next item is the standard of review, and again, I believe this language is taken directly from the ICANN Bylaws. But please, do read this carefully for our next call.

The IRP panel decisions language is likewise consistent with our [inaudible] Bylaws. The form and effect of an IRP is either essentially just documentation but then reflects the language in the language that's in the Bylaws themselves.

A new item that we need to discuss at greater length next week is the appeal of an IRP panel decision although I believe that this is drafted based on the final proposal and needs some careful consideration.

So just in order to permit us to get through and then costs we need to look at. So we haven't gotten quite all the way through this document, but I hope that what we have done has helped people to sort of understand what it is and to lay out what I think are definitely the issues that are going to require careful thought on the part of the IRT.

So over the course of the next week, I'll try to kick off discussions on both the conduct of the proceeding and the discovery issues. I hope everybody will take the opportunity to carefully read this document and then we'll get together next week for another in-depth discussion of this.

And I just want to close by thanking all of the attorneys, Amy and Sam and Holly and Ed and their team, who really worked hard to get us a document that was substantive and that we could really work through in a detailed way.

So with that, I do plan a call next week and I'm hoping that we will be in a kind of weekly call rhythm now that we've gotten some documentation here. And is there any other business, any other comments?

Okay. Yes, so David mentions we are in a running up to August 12th kind of deadline here so we know that that's a day on which ICANN needs to report back to the commerce department so we want to make sure that we are not holding up that progress report.

So thanks to everybody and thanks to hanging in there with us while we worked out a good mechanism for getting this in front of people and I will speak with you on the list and next week in-person. Thanks, everybody.

UNIDENTIFIED MALE: Thanks.

UNIDENTIFIED FEMALE: Thank you.

[END OF TRANSCRIPTION]