BECKY BURR: Thanks everybody. I think we're going to be light on attendees today because I think we're in the full swing of summer holidays, but I did want to continue on our discussion from last week on the interim Supplemental Rules to be in place once the new Bylaws go into effect. Notwithstanding the fact that we will be going over the rules for this from soup to nuts, but in the meanwhile using the arrangement in place with ICDR we wanted to bring the rules into conformance with the Bylaws requirements.

Tijani, I see your hand. Do you have a question? Tijani, if you're speaking, we can't hear you. Okay, Tijani, I think you may be on mute or having audio trouble. So hopefully we'll solve that problem.

What I want to do today really is have two substantive conversations really not on the language itself, but on the issues that we touched on and discussed last week with respect to the conduct of the hearing and with respect to issues related to discovery. I think it is fair to say that we have two goals which hopefully are not inherently competing but clearly they do pose some issues for us.

The first is we want to make this process as streamlined and efficient and as accessible as possible. And in furtherance of those goals the rules that ICANN has had in place to date have focused on the exchange of written documents, electronic or telephonic discussions when actual discussions were needed, significant limits on face-to-face hearings including limiting those hearings to argument only, no [con] fact witnesses, and no particular provision for discovery of documents other than to the extent that the ICANN documents access policy permits a

claimant to get access to certain documents. And so the language currently says that only in highly unusual circumstances would there be face-to-face hearings and the like, and there's no provision for discovery.

In the draft document that Sidley drafted, they suggested that we essentially say that the norm should be that the issues would be resolved on the papers to the extent possible relying on electronic or telephonic hearings, but that there could be face-to-face hearings if it was appropriate to further the purposes of the Independent Review Panel. So essentially taking a principled position that the default would be no face-to-face hearings but that face-to-face hearings could take place. The standard would be if it furthered the purposes of the IRP. And some folks on the call last week – not just ICANN's lawyers, others on the call – talked about the importance of putting a high bar for face-to-face hearings for purposes of efficiency and accessibility and the like.

So that's one topic that I would like to have a substantive discussion about. The other was that the – as the drafted suggested by outside counsel to the CCWG – there was a general statement that the parties would exchange papers and materials. There wasn't a provision for an elaborate discovery process, but an obligation to exchange relevant documents and information. And again, people on the call – and again not just ICANN's lawyers – said discovery is really, really, expensive. It's the thing that bogs down that makes U.S. litigation incredibly time consuming and costly, and we should really limit that. And so that's the second question that I want to have a substantive discussion about this morning.

I'm going to ask again, Tijani, your hand is up. Let's see if we can hear you now.

TIJANI BEN JEMAA: Okay. Hello, Becky. First of all, I would like to tell you that I have to leave this call at 14:00 because I have another call after that. The second point I sent in the mail. I don't know if you received it.

BECKY BURR: I don't know. I was driving. If you sent it yesterday I was driving up from North Carolina to Washington. So I may not have received it.

TIJANI BEN JEMAA: No, I think it was before yesterday. I sent it on the [Inaudible].

BECKY BURR: Why don't you tell us the substance please?

TIJANI BEN JEMAA: Yes. Because I didn't attend the first call, so I am afraid I have something that I missed but I had questions about the rules. Normally we have to get the Rules of Procedure for the IRP and not for the specific provider ICDR. And I also asked about the time or [constabulation] which is an obligation in the Bylaws, and we didn't address it in this document.

BECKY BURR: Okay, thank you, Tijani. Let me see if I can respond to that. Yes, ultimately what we will be doing is writing rules for the ICANN Independent Review Process. We have a lot of work to do to get there, including issuing an RFP for a provider to support the process, also soliciting Expressions of Interest for potential panelists, and reviewing the procedures from beginning to end.

Because it is not realistic to get that work done by October 1st when the new Bylaws go into effect, what we contemplated in drafting the Bylaws was that we would amend the current process that is in place, which is essentially arbitration provided through the International Center for Dispute Resolution with a set of IRP-specific Supplementary Rules. And so what we are doing in this exercise is amending the ICANN-specific Supplementary Rules to make sure that we have covered the requirements that are in the Bylaws and that were articulated by the CCWG Accountability report.

Now that report does contemplate further work in terms of a comprehensive procedure set, but for purposes of ensuring that we are ready to go on October 1st when the new Bylaws go into place and that we can substantively meet the requirements of the Bylaws but for the creation of the Standing Panel, that is the nature of the exercise.

I believe in terms of timing, I should turn to Sam and/or Amy in terms of what needs to be done for your August 12th report. I believe there's an August 12th report due to NTIA?

SAMANTHA EISNER: Yes. Before August 12th what we'd like to do is be able to – so that report is a report to NTIA of the implementation status across all the proposals, and clearly the implementation of the IRP to the Bylaws is one of those areas – so what we're going to hope to report to NTIA is that we have a group that we've achieved an updating on the supplementing of procedures to accord with the Bylaws and that we are working with a provider that is in place to get those properly implemented in time for the hopeful transition on October 1st. And if there's anything that we could also achieve towards starting to put a Standing Panel in place, that would be a great effort to do also. So I don't know if we want to also devote some time or maybe have a call next week or maybe some work in between on developing an initial call for Expressions of Interest for those who want to serve on the Standing Panel so we can start having some movement on that as well.

BECKY BURR: Thanks. And yes, I was planning to talk about next steps in terms of actually calling for Expressions of Interest for potential members of the Standing Panel because we definitely want to get that started. That's a critical piece.

Tijani, I hope that answers your question.

Now if we could, I'd like to go back to the substantive questions, and I think let's take them in reverse order and if I can, what I would like to do – and I think that all of us have set this up as a discussion – so I'd like to ask Holly or Ed to describe the language that they have suggested related to discovery, and essentially exchange a document and then I'd

like to ask Sam or Amy to talk about how this issue has been handled going forward and what their observations are with respect to this.

And let me just say, any decision that we make as part of this – for example, were we to decide to preserve the status quo – that does not mean that we are preserving the status quo for all future purposes. So we could decide for purposes of expediency not to include the language about discovery methods – which is in Section 8 of the draft that I said – preserve the current approach, but actually deal with this issue more holistically in our broader review once these interim rules are in place.

So Holly or Ed, could one of you just talk about the language that you've proposed.

ED MCNICHOLAS: Unless Holly wants to proceed. The language proposed essentially sets a default rule that there would not be discovery available, and that electronic are the status quo, but it recognizes that in fact panelists have, and actual IRPs already changed that, and allowed different forms of briefing, different forms of presentation of arguments, different forms of discovery, so it gives the panelists discretion to change the procedures for discovery to allow discovery when there is some need that they feel that's consistent with the purposes of the IRP. And so it's just a default and then allows the discovery to be available if necessary.

The thought behind that is that if one of the purposes of the IRP is to resolve disputes, that if we want the IRP to work for not only small disputes but large disputes, that it has to be able to scale and change with the type of dispute and if it can't do that, then those sorts of

disputes will just wind up in court which is obviously something that the whole IRP process is trying to avoid. So I think that's a 30,000 foot description of the language. I don't know if Holly, if you wanted to add anything more to that.

HOLLY GREGORY: No Ed. I thought you did a great job.

BECKY BURR: Thank you. David, I see your hand up so we'll go to you before we turn to Amy or Sam.

DAVID MCAULEY: Becky, I'm sorry. If you want to go to Amy or Sam that'd be fine with me.

BECKY BURR: Okay. So just as the document we sent around notes, there is a note from ICANN Legal on this. And Amy or Sam, if you'd like to speak to that, that would be great.

AMY STATHOS: Sure. Sam, feel free to jump in here anyway. To start, let me tell you kind of what happens now. In terms of what discovery has ever been allowed in a current IRP or past IRP, it has been and continues to be limited to potential document production, and that document production is limited to the parties being required to explain in detail

the value of the documents that they are seeking from the other party. There has never been and has never been anticipated any other type of discovery whatsoever such as depositions, interrogatories, or requests for admission, or things that are normally consistent with what happens at least in United States litigation processes. But it has been limited to, once the party has identified what they think are relevant documents and presented that to the other side, sometimes the parties agree on those and sometimes they don't, and then they take the issues to the Panel and the Panel has decided what level of discovery is allowable.

So that's kind of what happens now. There are certain IRPs where there is no document production whatsoever, because some of the issues that are at hand, particularly at least right now what you're talking about is the actions that the Board has taken, just discovery isn't just isn't relevant to the action at issue that's being challenged. And as that stands even, in the document production world, particularly with the size of ICANN staff and the nature of the issues, that in and of itself is quite burdensome just all alone as just document production let alone with the depositions and interrogatories. Depositions are something that I think would be pretty devastating to the accessibility and affordability aspect of any IRP, because what you have is parties around the world essentially that could be challenging these and you've got to get usually pretty much people in the same room. And that's one of the very extreme difficulties that we would have in terms of I think from a community standpoint of affordability and accessibility.

BECKY BURR: Okay, thank you. Holly, your hand is up, and then… actually, let me go to David and then Holly.

DAVID MCAULEY: Okay, thank you. Thanks, Becky. With respect to this, I think that there is a reasonable limitation on depositions, interrogatories, requests for admissions. I think that, in my opinion, those all make great sense. In the latest draft there was also a limitation on requests for production of documents, and there I think we need to dive a little bit deeper. One of the things we need to do here, in my opinion, is to make sure that the IRP is fair. And in doing that I think we're going to tie in this some right of inspection in the DIDP which is going to be subject to the Work Stream 2 sub-team on transparency. There's going to be changes in DIDP. Those changes may satisfy what's needed here, but I think it's important that a claimant have a right to inspect documents in some form or fashion.

It's virtually impossible for a claimant to describe a document that they need if they haven't seen it. They know- at least they're alleging some materiality – that they have been harmed by action that ICANN has taken. There's some substance to this. It's not a frivolous claim or else it would have been dismissed. They have to have some way to take a look, and I think a right of inspection as opposed to the depositions, etc. has to be afforded here.

Tangentially, one of the things we're looking for in IRP is a fair and objective determination as to whether ICANN went beyond the Bylaws or Articles. And so that has to be by a third party that we're calling the

Panel. The other things that we want are we want this not to be a war of attrition like U.S. litigation is, and we want the cost to be reasonable. There has to be ways for parties to take a look to see the value of their case. They may dismiss their own case if they can't find anything.

And so I think all of these things need to feed in here, and when the standard for the Panel is that they can allow discovery of some sort in furtherance of the purposes of IRP, I would agree with ICANN there, that's a little bit too lax. And they use the word "extraordinary" I think in one of their comments. I think we need a high hurdle to let the Panel expand discovery, but I think we need some basic discovery along the way – such as the right of inspection – that should be expressed in DIDP, and if it's not sufficient there, then it should be in these rules. Thank you.

BECKY BURR: Thank you, David. Holly?

HOLLY GREGORY: I was really thinking along the lines I think that David was. It was a question really for Amy, in the current process – I want to just make sure I understand it – how is a party to know what documents to ask for? What kind of specificity do they have to use in asking for a document? Can they broadly describe documents relating to the subject matter, or do they have to be something that's more particularized? And if so, how do they know what to ask for?

AMY STATHOS: Basically right now what they do – and this is standard practice in litigation in and of itself – is that you don't need to know the exact document you're looking for. You know what the issue is that you're challenging. You know the topic area. Almost certainly you know some of the material that's been relied on because ICANN posts a whole boatload of documents that support the decision that it's making in almost all circumstances. So you have to understand what the issue is, and then you ask questions and you ask for documents surrounding that issue.

So right now what people are required to do is say, "Look, we want documents that relate to the Board decision that aren't already public on such and such day that they made that decision." Then you explain why having those documents would be relevant to you presenting your position on it.

So it's not that somebody has to know, "Well, I want Document X." Because of course you're not going to know what documents exist. But it's the topic area, the subject matter, the decision that's being challenged, that you ask specific questions about and then you ask for the documents that relate to that. That's how it works now. And that's generally how normal litigation would work as well. Never you'd need to know exactly what documents you're looking for.

BECKY BURR: Sam?

SAMANTHA EISNER: I think what I was hoping to say, Amy actually already covered.

BECKY BURR: Okay. So what I am hearing is a general view that the hurdle should be very high indeed for anything related to depositions or interrogatories, but that with respect to documents, there's an important protection that needs to be in place here. I'm just wondering how this would work. We have the DIDP, and Avri, you've got a point in the chat that I wish you'd expand on in the conversation if I can put you on the spot.

AVRI DORIA: Sure. I assume you were talking about the point about in the DIDP with this needing to talk around the existence of a document that may or may not exist. What I've noticed in a review of many and in those in which I've been somewhat of a participant, that it really is a hit-and-miss document and if you don't hit the exact words or the exact description of such in a DIDP, you get an answer telling you that you've missed.

And you really have no idea on the degree of miss. And there's no post review. And if something does show up later where you were off by perhaps a couple degrees of words, there's no – I'm not sure the right word but – there's no repercussion for that. One is always really firing in the dark on the DIDPs, and I think the success rate of DIDPs when looked at analytically shows a history of people not being able to actually put their finger on what was there.

So I think there's an arbitrariness perhaps, or at least what appears to be an arbitrariness from outside the box to what is seen as being appropriate and on subject and what might not be. So I definitely see a problem in the way that mechanism works. That's part of the reason why it's in more Work Stream 2 work, I think. But I don't think that the IRP can be fair if that is the only way one has of discovery. And I'm sure I don't use the proper legal terminology, but I'm trying to make myself clear. Thank.

BECKY BURR: Thank you. Legal terminology is not a requirement. Sam?

SAMANTHA EISNER: I wanted to address a slightly different issue which has to do with the deposition part of this. I would recommend on the deposition part – because depositions have not been part of the IRP state and because of the potential costs that could be associated with them and burdens and how depositions could be used in a limited or not limited fashion in the deep sense in which it could get into the full ICANN team, etc. – that maybe that's something that we would take off the table for now for later IOT decision, but not make a presumption on depositions without really thinking that process through some more. It is a place where we can really increase the costs to both the claimant and to ICANN, and of course ICANN's costs are being paid out of the community's funds and could really chase down a lot of items and we need to understand what materiality and what relevance threshold we have here as well so that the IRPs which are on very limited issues of whether or not ICANN is

acting towards its Articles of Incorporation or its Bylaws, that those aren't being used in lieu of a more stringent discovery standard that might be put in place when someone then proceeds to litigation.

So I think we need to, of course, as Avri was talking about and others have mentioned, we need to focus on the fairness of the IRP and making the IRP meaningful but also making it efficient and not building in processes that make it actually a more attractive pre-tool to litigation as opposed to being used for the actual IRP purposes. And I think that we would move those until later so we could discuss that more among the IOT.

BECKY BURR: Okay, so I think David McAuley has noted that he is not hearing much support for depositions, and I am not hearing much support either. One of the things – I don't know why because I just printed out the document that I sent around and that document does have in it a note from ICANN Legal that proposes alternative language, and that is not showing up here. Here is what ICANN proposed. I don't think we're going to be able to resolve it unless we actually see it in front of people, but I just want to read it in for people.

So ICANN recommended the following language:

"On the motion of either party, the IRP Panel may, subject to the attorney/client privilege, work [inaudible] doctrine or applicable law, order the parties to produce to the other side and to the IRP Panel documents or electronically stored information in its possession, custody, or control, that are material to the resolution of the claims and

defenses in the dispute. Requests for documents will contain a description of specific documents or classes of documents along with an explanation of their relevance and materiality to the outcome of the case. Depositions, interrogatories, and requests for admission, will not be permitted."

It seems to me that something along this line might be workable, but what people are concerned about is the requirement that you have a description of specific documents or classes of documents along with an explanation of their relevance and materiality to the outcome of the case. That is what I hear people saying is that's difficult to do if you don't know what the documents are.

I'm wondering is there any way of getting that language – Brenda, I don't know why. I think it just has to do with how the document's being displayed perhaps. David Post, you can talk to. I see you're typing.

David McAuley, yes. Sorry, I see your hand belatedly.

DAVID MCAULEY: Thanks, Becky. I do have the document in front of me and I think it's a very good effort by ICANN Legal. But I do have some concerns in it. Let me tell you what the concerns are. As I said, I think it's a good approach, but let me just read a little bit.

"The Panel can order the parties to produce to the other side and to the IRP Panel documents or electronically stored information in its possession, etc. that are material."

I think that the standard should be that are relevant. Materiality tends to be ascertained once this thing is seen. It's very hard to say, "This document or this thing is going to be material." So I think the word "materiality" is premature in this respect and the word ought to be relevant.

Later there it says, "Requests for documents shall contain a description of specific documents or classes." I thought what Amy said earlier in this conversation – that is that the request could be for documents that relate to a subject matter – is the better standard. We can't be specific. The claimant couldn't be specific. But a claimant could say, "Here's what the subject matter is. I would like to inspect documents that relate to this."

So those are my comments with respect to that ICANN Legal comment. Thank you.

BECKY BURR: Okay, thanks. Amy? Amy we can't hear you if you are speaking.

AMY STATHOS: Yes, sorry. Yes, I think David's changes I think are definitely worth considering, because I do think that and agree, as I said before, that I don't think people should be required to ask for the specific document. I do think we can look at that and talk about things that are relating to a particular topic or subject matter or a particular decision that's being challenged. And I definitely think that we can look at revising that to a degree based on what David was talking about.

BECKY BURR: Okay, great. So I think with respect to the production of documents, something along the lines modified to not make it an unsustainable burden on the claimant to understand what documents are there when they can't do that. Let's just go back to the question of depositions and interrogatories for a moment. I'd like to get a sense of the group on an approach to this.

Right now, they're not permitted and that's one proposal from ICANN Legal. On the other side is depositions and interrogatories being permitted if they are necessary to further the purposes of the IRP. David McAuley indicated earlier that with respect to depositions and interrogatories, the "necessary to further the purposes of the IRP" doesn't strike him as a high enough bar given the community's focus on efficiency, expediency, and swift resolution of IRP.

Further thoughts on where we'd like to come out on this? Do we want to have language that suggests that they would be permitted only in extraordinary circumstances where the purpose of the IRP cannot otherwise be served without them? Do we want to have the prohibition language? Do we want something in between? Holly?

HOLLY GREGORY: I'm thinking about David's point and what language we could use. I read "necessary to further the purposes of the IRP" I read that to mean that you can't further the purposes of the IRP without the information. So I sort of hung that on "necessary." To me, "necessary" is already a pretty high standard. But we could add – in the interest of fairness – a

"necessary to further the purposes of the IRP" and "in the interest of fairness," but I'm not sure that "in the interest of fairness" adds much. So I'm struggling with how we would add a higher standard than "necessary."

BECKY BURR: I think the problem may be "to further the purposes of the IRP" because there are lots of things that you can do to further the purpose of the IRP at the margins. I think I was suggesting just for the sake of discussion "the purposes of the IRP cannot be met without that." So it's a slightly higher standard than that.

David's got his hand up. David, maybe you have thoughts on that.

DAVID MCAULEY: I do, Becky. I thought the formulation that you gave just a couple of minutes ago was a very good one. Let me just reply to Holly a little bit. Holly, I agree with you that the stark word "necessary" carries with it the meaning that we want, but I also think Sam had a valid point earlier when she spoke about the Panel's history and the fact that they walk by a number of these things pretty easily. Again, getting back to what we want here is we want an objective determination of questions done fairly, at reasonable cost, and I think ICANN has a legitimate right to have some certainty as to how the system's going to work and that the Panel will be operating under rules that sort of reign it in to do what its purpose is which is to give an objective decision on certain questions. And so I would disagree. I think the word "necessary," while it carries all

the freight we need, in light of the circumstances of the past I think we might need more here. So thank you very much.

BECKY BURR: Okay, David Post has proposed some language I think that was consistent with what I was talking about with "necessary for a fair resolution of the claim." So I think the sentiment is, with respect to depositions and interrogatories, those really should be extraordinary. They should not be something that happens in the ordinary course, but where a fair resolution in the claim cannot be made without that. And perhaps we could even have some language to strengthen that a little bit further.

What I'd like to suggest on this topic is that ICANN circulate an attempt to capture what we're talking about here, or actually, Holly, I think you had said you had some language also. Maybe you can circulate it and ICANN can react to it.

HOLLY GREGORY: Yes, I can circulate it right after the call.

BECKY BURR: Okay. So thanks for this discussion. This is a really important thing. We have to get it right, and this has been a helpful conversation.

The other substantive discussion that I wanted to have relates to Section 5 of the amended Supplementary Rules relating to conduct of the Independent Review. In this, the current language says that there

would be no face-to-face hearings and that things should proceed by electronic or telephonic means except in extraordinary circumstances. The proposal from CCWG Counsel is that the IRP Panel would conduct its proceedings by electronic or telephonic means unless the IRP Panel in its discretion determines that other means would in unusual circumstances further the purposes of the IRP. And ICANN Legal has noted in response that because this is a change from status quo, that there's further conversation that's necessary and they have proposed language and said, "The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the IRP Panel, the in-person hearing shall be limited to argument only. All evidence, including witness statements, must be submitted in writing in advance. And telephonic limitations are subject to the same limitation."

So the question here really is, how high a bar should be set with respect to in-person hearings? Which, of course, will increase the costs and likely the time necessary to resolve an IRP claim, and once that bar is set, the limitation with respect to limiting this to argument only. And I think we have general agreement that any kind of face-to-face or telephonic hearing would be limited to legal argument and all evidence must be submitted in writing in advance without any live witness testimony.

I would like to invite some discussion about what the bar here should be. Robin is proposing that we use the "unusual circumstances" language as opposed to the "exceptional circumstances" language. Which is consistent with what… David?

DAVID MCAULEY: Thank you, Becky. I was just going to mention that I was following the chat and agreed with those that were saying the exceptional bar or whatever it is, the bar should be the same as the one we just discussed. In other words, a high hurdle before this could be done. I was just going to agree with that concept. Thank you.

BECKY BURR: Okay, so are we suggesting that essentially – I guess the question is that the high hurdle is, it's necessary, you can't resolve this without a face-to-face hearing. It's necessary for a fair resolution of the claim – which is where we came down in general terms on the discussion of discovery.

Yes, Holly is proposing we should have one standard of high hurdle. I agree with that and maybe… Holly, do you have a comment?

HOLLY GREGORY: Yes, this is in response to some of the suggestions for using "unusual circumstances" instead of "exceptional circumstances" versus "extraordinary." I don't think it matters that much which of those phrases you use. But whatever we settle on should be the one standard for when things are really going to be viewed as highly out of the ordinary, and are meant to pose a high hurdle so it doesn't become a typical process. [Inaudible] otherwise it's difficult to [inaudible] what do we mean by unusual versus extraordinary versus etc.

BECKY BURR: Okay, so I think that there's pretty strong support for the notion that we have an identical language standard for the hurdle, and Sam is suggesting that there has to be some guidance about what that hurdle would mean and when it would be used.

And I think, Sam, what I am hearing people say is that the high hurdle is when the Panel determines that whatever it is – the face-to-face hearing – is necessary for a fair resolution of the claim. I don't know if you're asking for more by way of guidance in terms of what that hurdle would mean, Sam?

SAMANTHA EISNER: Thanks. I just have a concern that saying that it's something that the Panel would determine is necessary for fairness in the hearing does one of two things – it either tells the claimant that if they allege something is necessary for fairness that the Panel would then consider that it's necessary for fairness, or it makes the IRP subject to a lot of briefing about whether or not fairness would dictate a certain type of discovery tool or hearing if this goes to both of them. And so it could be used to not set a high bar where we're expecting a high bar to be set if we don't give some guidelines of how we expect it to be used, or it could be used to actually really increase the costs and the time needed for an IRP because you'll spend a lot of time fighting about what fairness means in that instance.

I'm worried that, again, as we noted in the ICANN comments that we're at a place where I think that we need to have some further discussion about this and maybe provide some further guidance that it's not just,

"Panel, do you think it's fair, if you think it's necessary," but really detail what that means. What would unavailability of certain things do? What are the types of circumstances that we really think that that would be appropriate in as opposed to just rushing in and making this a standard that can either be very loosely applied or raise the costs of proceedings excessively. If we go to a live hearing it's something that could actually raise it twice – if you fight about the fairness and then you actually go to the live hearing, that's where you have two places where you've now made the process less efficient and more costly to all the participants.

BECKY BURR: So Holly, I like your suggestion in chat. I hope –

HOLLY GREGORY: So in terms of guidance, I think maybe what we need to do is frame this in terms of the really important and critical value to ICANN and to the community in having a dispute resolution system that is efficient and is cost effective, and that in order to undertake the kind of discovery or the hearings that we've been talking about there has to be a determination by the Panel that the interests and fairness outweigh the concerns about the efficiency. I think that could be one kind of guidepost. But I'm not sure how far we can really go beyond that, but I think maybe, Sam, if we got together and could discuss what kind of guidance you think might be helpful to the Panel and to the parties in determining this. Maybe that's how we should spend some time together and then come back to the group.

BECKY BURR: Sam, do you have a new hand?

SAMANTHA EISNER: No, that's old.

BECKY BURR: Okay, so I think what I am hearing is a high hurdle "necessary for a fair resolution of the hearing," anxiety that "necessary for a fair resolution of a hearing" doesn't provide enough guidance, suggestions that there be some requirement that the Panel balance these considerations – so "extraordinary circumstances necessary for a fair resolution" and that those considerations should be balanced against the considerable community interest in the efficiency and an efficient resolution of the dispute.

Maybe what we need is to see some language on it. David McAuley has suggested in chat that maybe the full Panel make determinations about those circumstances. I'm wondering how people feel about that. I have to say it makes me a little nervous from an efficiency standpoint because, of course, the entire Panel would need to be brought up to speed on the facts necessary to determine whether the balance, the standard, has been met. But other views on that point? Amy?

AMY STATHOS: Yes. Thanks, Becky. That is one of my concerns as well. A) If you have to get – and we're talking about seven – it may not be seven, right? Seven is the minimum. We actually could have 15 members that are… so we need to consider that, and we still haven't I don't think even figured out

how those Panel members are going to be compensated if it's a flat rate or hourly rate. So then getting them all up to speed to determine whether something is necessary for a particular issue, I think could be very cost prohibitive.

BECKY BURR: Yes, it worries me a little bit. And David is suggesting that sending questions like these to a special panelist on – we did have the sort of special panelist role in terms of interim relief kinds of questions.

I'm wondering whether we can ask Sidley and ICANN to wrestle with some alternative language. Holly, if you could circulate something quickly, get it to ICANN Legal, and if you guys are not able to resolve it quickly, maybe we just come back with two side-by-side suggestions for the standard and how that would apply. I'd really, really, love to have alternative language in front of people by the end of this week so that we can actually discuss it on the list. I'm really conscious of the fact that we're getting into August and we may not have everybody on the calls, but if we have some discussion on the list, we'll get the benefit of broader participation.

I see Holly and Amy are agreeable on that, and I think that's how we should proceed. So everybody, please keep your eye out for language on that so we can get a robust discussion on the list.

Those issues are really the issues that were significant in terms of our discussion last time. I just want to focus on Section 2 on the Scope question which has some additional language here. So basically the updated Supplementary Procedures apply in the form in effect at the

time of request for an Independent Review. “IRPs commence prior to these options as these updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time the IRPs were commenced. So under this rule, IRPs that have been filed would proceed according to the existing IRPs. In the event that these updated Supplementary Procedures are further amended, such procedural amendments will apply to any IRPs pending at the time of such amendments, but a party may challenge the application if it would affect their substantive rights in the IRP”.

I wanted to draw everybody’s attention to that. I have one problem here – and I’m going to step out of my chairing role here – which is that the substantive standard against which ICANN’s behavior is measured, under the current rules, is very, very, different than what we have talked about in these discussions.

I just want to see if I can get to the current language. If you will just bear with me, I just want to pull up the current substantive standards.

Okay, Independent Review – under the current standard, Independent Review Processes – “The IRP Panel must apply a defined standard of review about whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. And it’s required to focus on whether the Board acted without conflict of interest in taking its decision whether the Board exercised due diligence and care in having a reasonable amount of facts in front of them, and whether the Board members exercised independent judgement in taking the decision believed to be in the best interest of the company.”

I will just say, because I've been on the record many, many, times about how troubling I find that standard – I confess I am a little conflicted about the ordinary rules here. But that standard is profoundly different than the novo review of whether the Board acted consistent with the Bylaws or not. I'm wondering if anybody else shares this concern about essentially saying those people who got stuck with the old rules are stuck. On the other hand, I'm also conscious of what changing the rules in the middle of the process means. So are there other people who have thoughts or views on this?

So David is agreeing with me. It's troubling but we don't know how to fix it. Can I just ask how many IRPs are out there and where in process are they?

AMY STATHOS: I think there's about eight or nine, and essentially they're at all different stages of process and we're obviously expecting more. As you know, when you get to the end of the program – because they're all about the New gTLD Program at this point. There's really nothing related to anything else. And with the end of the New gTLD Program we're at the ones where these are the hardest ones. These are the ones that have been in contention that have been challenged that are going to continue to be challenged. So we're expecting a few more certainly, but right now I think there's about eight.

But some have just been filed. Some there's a panel in place. Some there's a couple panel members. Some there's already been briefings. So it's all across the board.

BECKY BURR: David McAuley.

DAVID MCAULEY: Thanks Becky. I just wanted to reiterate what I put in chat. I'm conflicted like you are, and I also wonder if we tried to apply the new rules retroactively whether we would be going beyond our remit as to what was decided in Work Stream 1. I have to go back and take a look, but it's a very difficult question, I think, and really hard to fix. Thank you.

BECKY BURR: I think that's right. And I think there is a question about our remit, but I feel like I need to put that anxiety I have about the standard on the table. Many multiple attendees are typing. Maybe we should take this issue to the group.

I think that we should contemplate it. I do think that there are meaningful consequences one way or another but I think we should at least think about those.

And David Post, I put the language into the chat from the ICANN Bylaws.

Other comments or thoughts? I don't think that this is anything we can resolve on this. So Avri is suggesting that there needs to be a way to deal with an IRP initiated recently or during the transition period while we're still working on this. So again, I think that this language is still a little bit on the table, and maybe we should contemplate that and have some further discussion on the list here.

So in terms of these rules, that's a substantive change that was made. In addition there was just a little drafting issue with respect to the definitions of a dispute that was resolved here. If I can find that.

So what I'd like to do is circulate a clean draft of the language with hopefully language about the hurdle for face-to-face hearings and other things, a joint suggestion from ICANN and Sidley, if not a sort of side-by-side language. I'd like to really circulate that by the end of the week. I'd like to have further discussion about this point about applicability for recently filed IRPs and the substantive standard that is applied.

Robin is asking will any of our sub-groups' work go out for public comment? I guess we need to think about the timing. ICANN has the ability to adopt the Supplemental Rules. I don't think that there's anything that requires the Supplemental Rules to be the subject of public consultation, but I also think it makes sense to publish these and take comments on them.

Sam and Amy, I'm just wondering if the group has recommended language and that's put out for public comment promptly so that public comment could be clearly taken into consideration and the Supplemental Rules could be tweaked if they needed to be based on that, would that be a problem in terms of reporting to the Commerce Department?

SAMANTHA EISNER: I think that I'm not sure that there's a requirement for the Supplemental Rules themselves to go out for public comment. I think that if there are broader deliberations that the IOT wishes to take that maybe the IOT

would wish to take those results out to public comment. And that's something that could be done in the staged approach that we've been considering so that we could update the rules as needed to meet the Bylaws and to allow a process to run on October 1st and then there could be the further work of the IOT and if there's more within the IOT work that the IOT themselves agreed were really important to get further public input on, we could take those out. And I think that both of those things could happen without any risk to the timeline in terms of the U.S. Department of Commerce item.

Returning to the previous conversation, I think that we do need to be really careful that we don't take steps that we're actually changing the remit of the proposal or what was expected within the proposal or change standards that people have already filed and briefed papers on. There's not a clear remit in the CCWG proposal as I see it, and there's also language within the CCWG proposal that says that this work is a guide for future actions which also doesn't denote to me that it applies retroactively.

I think that's an area that we have to be very careful with in understanding that the whole reason that we looked at the IRP within the CCWG is that the standard itself was not deemed sufficient, and so changes were being made to it to go forward but there really wasn't discussion within the CCWG on how it could or should apply to cases that were already pending. So I just wanted to put that in there.

BECKY BURR: Yes, I totally agree with you. We can't blow things up, but I just wanted to think about this.

I guess it's for us to discuss. I think that Sam is correct. I don't think that there's a requirement that ICANN put these out for public comments. I don't think that there's any problem with – and I think it might make sense – for the CCWG to take note of the work of the IRP Implementation Team and publish the interim rules for comment which would be part of the staged informing our discussions going forward and could result in tweaks to these rules as well. So I think that's my proposal for how we deal with this.

We are not going to be done with implementation oversight by September 30th because we're going to go through a fundamental review of the procedures in a soup to nuts way, but what we're trying to do here is to make sure that we have something in place that is consistent with the new Bylaws on September 30th or October 1st when the new Bylaws take effect. And I'm not saying "hopefully," I'm saying when they take effect.

Okay. Holly, your hand is up?

HOLLY GREGORY: I wanted to ask a question about your expectations for the next draft. Other than the places where we are going to be proposing this new language that we've identified, in terms of the red line are we to just accept all the other changes that have been made today?

BECKY BURR: Unless there is any disagreement, I think that the issues that we discussed today are the issues where we hadn't come to closure. We'll publish something that shows a red line from the existing Supplementary Procedures but I also want a document that allows us just to focus on these substantive issues because that's my sense of, from our call last week, where concerns and issues were and for the most part the group was pretty comfortable with the language that was consensus language from the ICANN and Sidley Legal teams.

HOLLY GREGORY: Terrific.

BECKY BURR: David?

DAVID MCAULEY: Thank you, Becky. Relative to what Holly just asked, the one thing that we really can't accept yet are questions in footnotes just because they're posed as questions. And so I intend to bring up some on the list in the next couple days. One example I'll use is the footnote, I guess it was 18 – I strongly support the idea that claims should not be considered timely filed unless fees are paid. So there's a number of questions like that peppered throughout, some footnotes, and I think we ought to try and address those next week, too. I don't think they can just be accepted. Thanks.

BECKY BURR: Absolutely.

HOLLY GREGORY: Would it be helpful if on this next draft I'll bold the places where we have questions in the footnotes so that they're easy to find?

BECKY BURR: That sounds great. That sounds perfect.

Okay, in the meanwhile our next order of business is to issue a call for Expressions of Interest with respect to the Panel itself. I think that this is something that the group as opposed to the lawyers can draft based on the CCWG report. So I'm wondering if I can call for volunteers for a small drafting group to put together a straw man call for Expressions of Interest for the Standing Panel based on the language in the CCWG Accountability report? David McAuley will volunteer. I will volunteer to work with that. If there are other volunteers, please let us know but hopefully we can save some legal fees on that.

Is there a deadline? David, you and I will, since we're the volunteers and Robin, I'll set up a call for the three of us. I think it might be a fairly simple process and the sooner we get it done the better. Okay, and David Post will pitch in, too. Excellent.

Alright folks. Unless there are any other comments, I'm going to give you back eight minutes of your morning – for Robin, it's really early morning – and we'll talk next week at this time. Brenda, if you would send around an invite reminder that would be great.

Thanks, everybody. Good work this morning, a lot of substance. Bye-bye.

UNIDENTIFIED FEMALE: Thanks.

[END OF TRANSCRIPTION]