BECKY BURR: Great. Thanks, everybody, and welcome to what I hope will be an efficient call this morning. I did circulate the latest draft of the updated supplemental rules for IRP, which reflect suggested language from Sidley and ICANN's comments and proposals on that. Based on that review and on our discussion, I think that there are really three issues that we need to talk about today. The other issues are really drafting questions about 24 hours' advanced notice for emergency release and the like that I think that the legal team can just hammer out reasonably between themselves. They're just practical issues.

But there are three substantive issues that we need to focus on. And I thought, rather than trying to look at the language, I tried to make the discussion a little simpler and pull out, extract the salient points here.

So the issues are under what circumstances, if any, subsequent modifications to the updated rules will apply to IRPs that have already been filed at the time newer rules go into effect; what the standard for in-person hearings would be; and whether or not, if the standards for in-person hearings were met, whether those hearings would be limited to argument on the legal points, or whether witnesses and cross-examination would be permitted; and if so, under what standard are they. I think that should be relatively straightforward.

So let's see. If I can have full control, Brenda? Great, thank you.

So section 2, on scope. The current language provides that the updated supplementary procedures apply when they go into effect, which would be October 1st is the date. The rules currently provide, as drafted, that

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IRPs commenced prior to the effective date continue under the existing supplementary rules. And although we've gone back and forth on a number of issues about this, the complexity of trying to retroactively apply rules to things [in between] is daunting.

We have language in there right now that says – in part, because we know that these updated supplementary rules will be reviewed again and looked at as we are finalizing the standing panel and the rules for that. The current language says that if the updated supplementary procedures are subsequently amended, then those changes will not apply to any IRPs standing at the time the changes take place, unless a party successfully demonstrates that application of the former rules would be unjust and impracticable, and would [affront] and would not affect any parties' substantive right. And then there's a provision that says the other party can object to it.

ICANN continues to be concerned that the sort of shifting rules –

OPERATOR: [crosstalk] has left the meeting to speak with meeting support and will rejoin soon.

BECKY BURR: That it additionally complicates things, gives rise to motions practice delay and additional costs, without conferring a real benefit on this. And they propose a [byline test] that essentially say that the IRPs commence prior to the effective date of any subsequent changes continue under the rules that were in effect when the IRP was filed.

David?

DAVID MCAULEY: Thanks, Becky. I put in chat a suggestion. I think the word – anyway, I put in the chat a suggestion with respect to the concern that ICANN raises. We've discussed this a couple of times. And earlier, we talked about the idea that rules changes should be differentiated between whether they affect substance or just process and procedure. And I think Holly spoke to that.

I understand and appreciate ICANN's concern, but it seems to me that this language actually strikes the right balance. And by putting the matter into the IRP's discretion, I think the concern about unnecessary complication can be well managed. So that's my thought. Thank you.

BECKY BURR: I'm sorry, [are you saying] why you think it could be well managed [crosstalk] –

DAVID MCAULEY: No, I think both by the fact that the IRP will have discretion to determine how this will play out, and also by the way the language has been reconstructed in what you have in slide 2. I suggest a slight change to that language, but I think it sort of gets it right.

BECKY BURR: Okay. And what would the slight change be?

DAVID MCAULEY: The way I read it, about the fourth line in, I thought the word "not," where it says, "Would not affect the parties' substantive rights," I thought that word "not" was actually not right. And I would prefer that it say, "Would significantly affect a party's rights." And I put that in chat a few minutes ago.

BECKY BURR: Okay, great. I'm sorry. I'm paying attention to too many things at once. Could I ask Holly or Ed to address that particular point, whether that language, whether the application of the former supplementary procedures would be unjust and impracticable, and either would materially or significantly or did not affect any parties' substantive right.

HOLLY GREGORY: I understand what David is suggesting, and I think it is workable. I think what the language was trying to say before was that another party wouldn't be substantially disadvantaged by moving away from the former supplemental procedures that would otherwise apply. But I think David's language does the same. I think it's more than just simply taking out "would not," but saying something along the lines – David, if you could repeat it. I think it was, "Would materially affect any parties' substantive rights."

DAVID MCAULEY: What I said was significantly, but materially, to me, is the same.

HOLLY GREGORY: Okay. Significantly is fine.

DAVID MCAULEY: Thanks.

HOLLY GREGORY: So the proposal is that, "Unless a party successfully demonstrated that application of the former supplementary procedures would be unjust and impracticable, and would significantly affect any parties' substantive rights." I'm not sure about that.

BECKY BURR: Well, I think what you're trying to say – let me just articulate this – is that it would be unjust and impracticable to a person who was seeking to apply the new rules, and application of the new rules would not harm the other party, would not disadvantage the other party materially. Right? Is that it?

HOLLY GREGORY: I think that's what we were trying to say. I think… And David's suggestion is different in that I think he's focusing on it would materially affect the party who's asking for the essential waiver of the former rules. And therefore, that [crosstalk] –

BECKY BURR: I think David, in the chat… I think that we now are on the same page about what the meaning is and the way you put it. So basically, it would be, "Unjust to the parties not to apply the modified rules, and it would not materially disadvantage the other party."

Okay, Kavouss. And Kavouss, apologies, that for some reason you hand appeared up after David's, in my queue. And you asked a question about whether this is a private call. This is not a private call. It's our typical call. So, yes, Kavouss?

KAVOUSS ARASTEH: Yes, good day to all. Becky, you know me from long time, two years ago. I am opposing any qualifying or subject [light]: "as appropriate," "significantly," and so on, so forth. So I am against the use of the "significantly," because it requires judgment. However, last proposal from Holly seems appropriate. I wish that you repeat the last proposal, which remove my doubt about what "significantly" means and who decides on "significantly," and also perhaps remove the doubt of David.

I have also put two other proposal in the chat. In order to save the time, please kindly look at that one. Your last sentence or the last part of the sentence, is not clear. And also, the time, something you mentioned, "take effect" is not effect. Either we have to say, "comes into force," or, "effective date." "Take effect" is not the proper text. So these are the two suggestions I make, in favor of the last proposal of Holly and replacing "take effect" by something else, such as "comes into force" or "effective date." And the last portion, I need some clarification because it is not clear. Thank you.

BECKY BURR: Thank you, Kavouss. Okay. So your proposal is to change "take effect" into something like "comes in force" or "the effective date." That seems fine.

Holly, if I could ask you to repeat your last description of what we have agreed on, or what we think, we're talking about the approach to modifying the "Would not affect parties' substantive rights." And then Kavouss is asking for clarification on the final sentence, "Such requests are to be resolved by the IRP Panel in the exercise of its discretion."

KAVOUSS ARASTEH: Yes. You ask me, or you ask Holly? Which one, please?

BECKY BURR: I'm going to ask Holly to respond to those things, Kavouss.

KAVOUSS ARASTEH: Okay. Okay. I'll wait.

HOLLY GREGORY: Thank you. Thank you, Kavouss. So let me give you the language. And I'm going to start with the clause that begins at the end of the second line of the language on the slide, where it begins, "Unless." So we would make your change about "take effect." And then the sentence would read, "Unless a party successfully demonstrated that application of the former supplementary procedures would be unjust and impracticable to

the requesting party, and would not materially disadvantage any other parties' substantive rights."

BECKY BURR: And then just a brief explanation on the final sentence in that part.

HOLLY GREGORY: Sure. Well, this is an issue when a party makes this demonstration. I don't know how you can remove the need for someone to apply judgment about whether the standard has been met. That would be resolved by the IRP Panel. The IRP Panel would have to decide whether the requesting party had met the standard of showing that application of the former supplementary procedures would be unjust and impracticable, and would not materially disadvantage any other parties' substantive rights. So that's all that that final sentence is saying.

BECKY BURR: Okay. David and then Kavouss. Avri has raised a substantive issue. I just want to see if we can nail down this language first and then jump to the bigger issue that Avri has raised.

DAVID MCAULEY: Thank you, Becky. I would just like to say that I respectfully disagree with Kavouss on the issue of the word "materiality," or "significantly," or whatever it is. And so I thought I shouldn't be silent on this. The language that we've come up with is all being done in the context of changing rules that are in place when an IRP proceeding is underway.

And I think the word "materiality," or the concept, helps address the concern that ICANN has, which is ICANN's concern in the bottom of that slide is a legitimate concern. And I think that when I said before that I think this is the right balance that's been struck, taking the [mind at] concern, I don't think we should ignore the concern. It's a fair one. When you're changing rules from the default rules that they're proceeding on midstream, I think the concept of materiality is a fair one to insert. Thank you.

BECKY BURR: Thank you, David. Okay, Kavouss, I see your handing. I'm hoping that Holly answered your question.

KAVOUSS ARASTEH: Yes, I have no problem with the last suggestions by Holly. I have no difficult to insert "materiality," but I have difficulty with "significant," "major," "minor," "small," "big," and so on, so forth. So I have no problem with "materiality." If it is not there, you can put it there. And I agree with what's proposed by Holly, if other people agree. If they want to introduce "materiality," I have no difficulty with that. But not "significantly," and I appreciate very much that he disagrees with me. It is [perfectly okay] to disagree with anyone he wishes. Thank you.

BECKY BURR: Thank you, Kavouss. Okay, I think we have [radical] agreement on that. Now, Avri has raised an issue that I think is an important one for us to discuss her. So what she's put in chat is, "But I find it problematic, as a

substantive matter, that we're maintaining that current IRPs are not affected by the changed rules."

Avri?

AVRI DORIA: Yeah, thank you. So my point is very similar to the point that was just made on materiality and substantive rights. That of course, changing anything to do with the procedure would be out of the question for the complication of process reasons that are mentioned, that we just went through. But I see absolutely no reason why the same rule we've applied to future changes about there being an option for applying the substantive rights changes that we are introducing to a current action.

I have a couple reasons for this. One, there are IRPs that are in process that continue, and they continue for a while. And the fact that they will be decided based on a different set of rights than have been established in the new bylaws, articles, and procedures is one of the places where I see the problem.

I also see the problem in us introducing a reason for people to stall, going in for extending [VPs] or for playing games with deadlines and such over the intervening period if we say, "Sorry, none of the new rights are applicable if you go in before October 1st, but afterwards you are." And this [inaudible] has been offered, seems like it would be totally applicable to the current situation, in terms of materiality and things that have that kind of substantive impact. So that's my reason. Thanks.

BECKY BURR: Thank you, Avri. And I think everybody here, I'm sure, knows that I too am concerned about the fact that the standard of review here is materially different in the sense that it is a de novo review of whether the Board, or whether the action or inaction that was complained of violates the bylaws, while the current bylaws have a significantly different standard involving the, essentially, good faith of the Board in reaching a decision, as opposed to, whether the Board was in good faith or not, did the action violate the bylaws.

The problem that I have been wrestling with is that I think we have a situation where there are a number of IRPs that I think have been submitted to the panel for decision-making at this point. And that question is, would we be essentially saying, "Okay, you can completely reopen and relitigate that"? The practical consequences of that are daunting to me. And I wonder, Avri, what your thoughts are on that.

AVRI DORIA: Okay. Sorry, I had to find my unmute. I guess, in the same respect that we thought it would be daunting before to change any rules, rules that we do not know what their impact will be, that that same kind of anticipated problem is… So this rule that we've just discussed, which says that there is an ability, as long as it doesn't severely disadvantage, etc. And I understand that this may complicate some of the current procedures. And I have to say, none of my clients that I advise are currently in IRP. So I'm certainly not arguing for anything that I have going, not that I'm a lawyer, not that I ever really help in these things,

other than to read things and ask questions, which is pretty much all I do.

So I understand the problem, but I also understand the ability of the panel and such to deal with the issues and to actually be able to judge, does this material really affect a case? So that these folks can't go back and, once the rules have changed, go for another IRP based on the fact that the mission, and to say that because you were before…

We've already approved the new bylaw and are working on procedures. They just haven't gone into effect yet. I think there's just such an element of prejudicial [rooting] in that, that that's why I see a problem. I understand that some things may need to be relitigated. But in the fact of what we're trying to look for is a measure of justice against the mission of ICANN, I think it's necessary to deal with that particular one-time issue. Thanks.

BECKY BURR: Thank you, Avri. Kavouss, do you have a question or a comment on this point?

KAVOUSS ARASTEH: On the point that Avri mentioned, no. What I want, to we avoid complicated situation. We can inject many, many ideas. But that would be unimplementable. If you talk about substantive judgement, procedural judgment, and so on and so forth, that is a very, very vast issue in the court, and so on and so forth. Let us not get into that much detail. The language you propose, slightly amended, is something that

was discussed on CCWG, in the IRP and I think, for the time being, is sufficient. We do not need to go further.

My question is around the last paragraph. If you allow me, I can make the question or take the question. If not, I'll still wait.

BECKY BURR: All right. If you could just wait for one moment while we're thinking about… Avri is, as she put in chat, not talking about the procedural issue. I think that question is standard under which the conduct of ICANN is evaluated. And as everybody is saying here, this is a tough issue. And I just need to say, for full disclosure purposes, I am not absolutely familiar with all of the IRP cases that are pending. But I suspect that at least some of them involve New gTLD applicants for which Neustar is the backend registry provider, not that we're involved in any of the IRPs.

So, Avri, you're not suggesting the introduction of new evidence or a rewrite of submissions. The lesson would be…

AVRI DORIA: If I may? Apologies, Kavouss, your hand is up. But to answer that one, it's basically, very often we see IRPs submitted that have bothered to explain some of the problems with mission and some of the problems with other. And very often, it comes out saying, "Sorry, we can't talk about that, because that doesn't meet the standard." So I am saying that basically, if the people, in their submissions, did include such arguments, then the fact that we have changed the rules for the future,

in terms of those arguments being reasonable, those arguments being in scope, that because they are now in scope elsewhere, they could be considered to be in scope in the current proceedings.

I'm not suggesting that because we have changed the rules, everybody can – "Okay, let's rewrite based on the new rules." Yes, there would be arguments and such, stating that, "In our [inaudible] said ABC. It was deemed as out of scope under previous rules. Under new rules, we claim it is in scope," etc. And then there's the materiality judgment, the reasonability judgment, or whatever judgment that panel is making about the application of the new rules and substantive rights.

But so maybe that lessens the complication a little, or the burden. And basically though, it's in the rules that the IRP Panel is subject to, that I think we need to apply this new condition that we just agreed to for the future to the past. Thanks.

BECKY BURR: So, Kavouss, has asked for your concrete proposal. And what I hear you saying is where claimants have made arguments, that would be… I'm just trying to figure out, because I've gone back and forth on this and struggled. I think it is a really hard issue.

What's the rule that you're proposing here?

KAVOUSS ARASTEH: Are you asking me, please?

BECKY BURR: I was asking Avri.

KAVOUSS ARASTEH: Yes. I was starting to say that please, Avri, propose a concrete amendment, rather than explaining it. What is [crosstalk] element?

BECKY BURR: Kavouss, she's asked for a second to contemplate it. I think that's fine. While Avri is contemplating this, why don't we go on to the other point you had, Kavouss?

KAVOUSS ARASTEH: Yes. Yes. My point is that in the paragraph before that, you say – or we say – any party to a then-pending IRP may oppose the request for application of amended supplemental procedure. So far, so good. Then we say that such requests are to be resolved. We are talking of opposition to the request. Now, we say the request. There is a mis-link or lack of bridge between the last part and the one before.

Perhaps it could say, "Due to the fact that such requests are to be resolved." So we have to link the last previous part. Otherwise, this request may be considered that we are talking of opposition. So perhaps we have to reach [this] together. Thank you.

BECKY BURR: Okay. I understand your point here, that we want to make clear that such request… Maybe we can say, "Requests to apply updated amended

supplementary procedures will be resolved," rather than, "Such requests."

KAVOUSS ARASTEH: I suggest that the link would be, "since," or, "due to the fact that such," we add either "since" or "due to the fact that." Thank you.

BECKY BURR: Okay. Thank you, Kavouss. David, I see, is noting that we may need more time than one hour and I think, in addition, it might make sense to give Avri some time to think about what the rule she would propose is. So what I suggest now is that we continue through this, since we only have an hour this morning. We'll probably need to get another time on the calendar quickly. But let's continue to the other points and hold this one for a moment.

I want to go back to Malcolm, who apparently asked to add something, wanted to add something to the agenda, and I missed that. Malcolm?

MALCOLM HUTTY: Yes, I wanted to raise an issue with the language in the section on the timeline. Did you just want to know what it was I wanted to add, or do you want me to start that topic?

BECKY BURR: So in the timeline bar, that's the next step that you want to discuss that?

MALCOLM HUTTY: Yes, the timeline, not specifically the number of days, but when the clock starts running. There's a discrepancy there between the language and what our final report requires.

BECKY BURR: Oh, this is the 45 or 30-day issue?

MALCOLM HUTTY: It's when that clock starts running. I don't have any view on whether it's 30 or 45 days, or any other particular number of days, but when those number of days start running from. That's the issue.

BECKY BURR: Okay. So let's add that to this, after we get through this.

MALCOLM HUTTY: Thank you.

BECKY BURR: Okay. Thank you, Malcolm. Next we're going to talk about the standard for an in-person hearing. I think that we have agreed on previous calls that there should be a reasonably high bar. That serves in the interest of justice and to further the purposes of the IRP with respect to an in-person hearing. Many people, but not all folks, have supported the concept of balancing, on the one hand, having the necessary [inaudible]

resolution and furthering the process, but those considerations outweigh the time and [financial] spent on an in-person hearing.

ICANN had some concerns about the language and thinking about some other ways in which it might be cabined. They have come back with alternative language on the right hand that essentially, I think, as a substantive matter, they have two substantive changes. So on the one hand, the language that we discussed basically requires the party who's asking for an in-person hearing to make a showing that it's necessary for their resolution of their claim and purpose of the IRP, etc. ICANN would like to essentially create a [plausible] presumption and obligate the party to demonstrate that with clear and convincing evidence.

So the panel would not only have to decide that, "Yes, we agree, an in-person hearing is necessary for a fair resolution of the claim and to further the purposes of the IRP, and those considerations outweigh finance expense concerns." They would also have to determine that the party requesting an in-person hearing has made that demonstration with clear and convincing evidence.

And ICANN has also added a language to the effect that in no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have previously been presented but were not. So let's take this in reverse order, at that.

I am fine with the language about you can't use these hearings for new arguments or evidence that you could have brought before. That seems quite reasonable to me. I don't think I have a clear opinion one way or

another about that rebuttable presumption and a requirement for clear and convincing evidence. So let's have a discussion about that.

Kavouss?

KAVOUSS ARASTEH: Yes, Becky. I'm sorry, the language of Sidley is right. There's no problem with that. Maybe David is also lawyer, but the language proposed by ICANN is more simple, more clear, and precise to understand or to be understandable by everybody. So I am much more comfortable with the ICANN language. Thank you.

BECKY BURR: David? David, you may be on mute.

DAVID MCAULEY: Pardon me, sorry. I agree that the ICANN language is clear, as Kavouss just said. But I think it's a little too tight. I support the Sidley language on the left. I could support the ICANN language on the right, with some changes. First of all, where they use the word "evidence," I don't think "evidence" is the right word. It seems to me that when you argue about whether something like this doesn't necessarily depend on evidence alone, but the circumstances that apply, and they just may be apparent. It depends. It might be something for judicial notice, [as held] in court, that kind of thing.

But with respect to the language, I made a suggestion in chat that we delete a fairly longish phrase. Let me read it. "Which are limited to

circumstances where, upon motion by a party, the IRP Panel determines that the party seeking an in-person hearing has demonstrated, with clear and convincing evidence." I would ditch that, and in its place, I would put, "Where, upon motion by a party, the IRP Panel determines that the party seeking an in-person hearing has clearly demonstrated."

I think, as written by ICANN, it's a little too tight. And I think this would be a better alternative. So thank you very much.

BECKY BURR: Okay. Can you just read that line once more? I like it a lot. I think it emphasizes some things and makes it much easier for me. "The presumption against an in-person hearing may be rebutted only under extraordinary circumstances, where, upon motion by a party, the IRP Panel determines the party seeking an in-person hearing has clearly demonstrated"?

DAVID MCAULEY: Yes, I would use the language, "Where, upon motion by a party, the IRP Panel determines that the party seeking an in-person hearing has clearly demonstrated." That's the language I think. Thanks.

BECKY BURR: Thank you, David. Malcolm?

MALCOLM HUTTY: I think I can just say, actually, yes, what David said. I was coming in with my own arguments, but I think David's solution deals with everything I was going to say. So support to that.

BECKY BURR: Thank you very much. Sam has put in chat, "How about "clearly and convincingly demonstrates'"? Sam, could you… I want to turn to Kavouss, but I'm going to turn to you after that and ask you to tell us what "convincingly" adds to that.

Kavouss?

KAVOUSS ARASTEH: Yes. As I said, I'm comfortable with the ICANN language. I understood the problem of David is "and convincing evidence." If that is replaced by something else, I have no problem. But the other part of the text for me is more [inaudible] and more clear. So may I ask my distinguished colleague, David, to just propose an alternative for the part that he doesn't like, "convincing evidence"? Put it in a different way. But I would like to maintain the wording and language and the structure of the ICANN, except this part that David does not [repeat]. Maybe we can have another language. But I don't want to go to the left-hand side. I want to maintain the right-hand side, with the changes proposed for "convincing evidence." Thank you.

BECKY BURR: I'm just going to type in what I think David has proposed, so hold on one second. Because I want to make sure we have this. I think the virtue of

what David has proposed is that, "It may be rebutted only under extraordinary circumstances, which are limited to circumstances where." I don't think we need the, "which are limited to circumstances where," because we are clearly describing what those circumstances are.

And then the issue is the concern about the evidentiary standard that's getting lobbed in here. So replacing the phrase, "demonstrated with clear and convincing evidence," to say, "has clearly demonstrated." And that's what I've typed in there.

David?

DAVID MCAULEY: Thank you, Becky. In response to that, and in response to my colleague, Kavouss, and in response to Sam's entry in the chat, where she said, "How about 'clearly and convincingly demonstrates'?" instead of "clearly demonstrates," I think I could live with what Sam says. I think it's redundant. I think "clearly" and "clearly and convincingly" are the same when used with the word "demonstrate."

But with further responding to Kavouss, what I'm doing in my proposal is also getting rid of the word "evidence" too. That's another aspect of what I'm doing. And I think that what is shown to a panel in these cases is not simply based on evidence. Some of this stuff may or may not be provable. It may simply be facts that exist, that everybody is aware of. Circumstances, I don't know. It's hard to define right now, but courts tend to do things called taking judicial notice of circumstances that exist.

And so I just think the word "evidence" is a little constrictive here, that may be unduly constrictive. And so anyway, that's my response to Kavouss and to Sam. Thank you.

BECKY BURR: Thank you. And I note now your question to Sam is the same as mine, which is what are we getting by adding "convincingly" here? Sam, do you want to speak to that?

SAMANTHA EISNER: Sure. So in our earlier conversation, like last week, we were talking about extraordinary circumstance. And one of the concerns that we had raised was that we were introducing a new type of standard without a lot of guidance. And so what we've done is we have the extraordinary circumstance language, but clear and convincing evidence is a signal to people – particularly within the American judicial system, but there are probably levels of this that are understood in other judicial systems – that there are different levels of burden of proof. And that's what we were trying to express by the use of a familiar phrase.

So in the American system, if you only have to demonstrate something, typically the default is you do it by a preponderance of the evidence. You don't have to make an extraordinary showing. You just have to make a showing. And so we put in "clear and convincing" so that we weren't back at the place of trying to create a new standard. We were using understood terms that would signal that when we say, "extraordinary circumstances," we mean that the people who are participating in the proceeding need to demonstrate more, that we

want it to help tie that knot and get rid of some of the uncertainty that we saw in there. And we thought that this was a very…

By using some generally understood language, at least within the American judicial system, we could help move to that higher standard, without having to have a lot of other additional language, or try to identify circumstances that might be overbroad or not broad enough. And so that's why we provided this language.

BECKY BURR: Okay. I'm getting a sense in the room – and I will turn to David and Kavouss – that the room is generally okay with the ICANN language on the right, with the exception of this requirement for clear and convincing evidence, and that the weight of the room is going towards the language that requires the party to clearly demonstrate the element there.

David?

DAVID MCAULEY: Becky, thank you. I agree with what you just said. Thank you.

BECKY BURR: Thank you. Kavouss?

KAVOUSS ARASTEH: Yes, Becky. I have read, two or three days ago, in [appealing] of the court referring to the convincing evidence. So if the link is clear, and just

say that the convincing evidence, [satisfies] for me. But I think we need to have this convincing. Thank you.

BECKY BURR: Well, I'm a little confused, because in the chat you said that "clearly convincing" is too strong.

KAVOUSS ARASTEH: Yes, but I propose to delete "clear," and "clearly convincing" –

BECKY BURR: [crosstalk] convincing evidence.

KAVOUSS ARASTEH: Yeah, only convincing, without any adjective. Thank you. Convincing evidence, and so on, so forth, without any additional qualifiers.

BECKY BURR: Malcolm? Or David, and then Malcolm?

DAVID MCAULEY: Becky, old hand.

BECKY BURR: Okay, thank you. Malcolm?

MALCOLM HUTTY: Well, if we want to come back to that "convincing" thing, I think the removing the "evidence" word is a very helpful suggestion from David. So how about, "The IRP Panel is convinced that."

BECKY BURR: So that's on that. Go on, Amy. I saw that hand go up.

AMY STATHOS: I think we'd rather see "clearly" than "is convinced that."

BECKY BURR: Okay. So, "If the parties seeking an in-person hearing have clearly demonstrated all of the requirements." Okay. Can I ask, Kavouss, is your hand up?

KAVOUSS ARASTEH: Yes. You delete the word "evidence." Demonstration could be something, [not] without any evidence. I can demonstrate something, but no evidence other than demonstration. So why you would delete the word "evidence" here? Why the word "evidence" is deleted? So I think the proposal of Malcolm was perhaps much better [in the middle], provided that IPE is convinced. Put it in that way, and deleting [inaudible] the term that it is convinced. So delete everything. "It is convinced," and then [inaudible] demonstration evidence, it is convinced. Maybe that is more [crosstalk].

BECKY BURR: Okay, thank you, Kavouss. ICANN staff is saying that's standard. They don't think it's workable. I think that there is a strong degree of discomfort with the "clear and convincing evidence" phrase that brings in a whole bunch of case law about what it means. That evidence could have a particular meaning that would preclude the IRP Panel from taking judicial note of all of the circumstances before them.

I'd like to suggest that we ask… And I think Holly is saying that the original proposal was the clearest. I like – oh, Amy, go ahead. Amy, you might be on mute.

AMY STATHOS: Yeah, sorry about that. I think I just want to make sure that we're remembering that the idea was that this is in extraordinary circumstances. So I just want to make sure that whatever we end up with doesn't back off of that concept at the beginning of the phrasing, where it says, "Extraordinary circumstances." Because what I'm trying to do is describe extraordinary circumstances, and not just under any circumstances that you can show these three things. But they have to be extraordinary.

BECKY BURR: I guess that's a very interesting construction, because I actually was thinking that what was extraordinary is that you demonstrate that it's necessary, for a fair resolution of the process, that an in-person hearing is necessary for the purposes of the IRP and that the consideration of fairness and furtherance of the purpose of the IRP outweigh. That what's extraordinary is meeting all three of those things.

What you're proposing is somehow a clause that weighs [the bar] even higher than that. And that certainly is not what I took away from the last conversation, but I could be wrong.

Holly?

HOLLY GREGORY: Hi. Becky, that was exactly the comment that I was going to make, which is I think we need to not forget that there are three additional clauses here, which are really important and which define the extraordinary circumstance. And so to Amy's point, I don't think we need the convincing evidence concept here. We've got a language that would say, "Where, upon a motion by a party, the IRP Panel determines that the party seeking an in-person hearing has clearly demonstrated that," one, then two, and three. So it's quite a high standard, and I think it's a very clear standard, as drafted with David's adjustment.

BECKY BURR: Okay. Thank you very much. Amy, is your hand old or new?

AMY STATHOS: Yeah, so I guess the question though is we're just trying to help the panel figure out what that means. And that's why we were putting in the "clear and convincing." Because what does "clear" mean? So I'm just trying to make sure that the panel has enough guidance on what it takes to show those three things.

BECKY BURR: Okay. So what [crosstalk] –

AMY STATHOS: [crosstalk] one of the things I thought we were tasked with is trying to figure out under what circumstances would it be. And so that's what we kind of added in there to demonstrate that, without coming up with examples. But trying to come up with something that gives the panel some guidance.

BECKY BURR: I guess I'm just having the same trouble I had when you were talking about coming up with examples, which is it seems to me this is a high bar. We've said there's a presumption against in-person hearings. That it is a presumption that may be rebutted only under extraordinary circumstances, where there's [affirmative] determination by the panel that the requesting party has clearly demonstrated that all three of these things – one, two, and three – all three requirements exist.

And so maybe it's putting it in a question quite baldly. The question is, why do we think a panel wouldn't be able to determine whether a party has made a clear demonstration that all of these things have been met and that they need additional guidance?

Quickly, Holly and then Malcolm, and then we're going to have to wrap this up. And I will get on the calendar for further continuation of this as quickly as possible.

HOLLY GREGORY: [crosstalk] an old hand. My apologies.

BECKY BURR: Thank you. Malcolm?

MALCOLM HUTTY: Thank you, Becky. And thank Amy for her illumination of the alternative interpretation that this could possibly bear. And I don't want to be contentious, but actually, I would like to exclude the interpretation that Amy drew on it. The idea that the panel could decide, even though the normal case is that we don't have any present hearings, but in this particular case, it's clearly this case that we need it for fair resolution of the claim, and we need it to further the purpose of the IRP, and these considerations outweigh the time and expense, and that we still wouldn't do it for some reason? That seems, to me, to be wrong.

So I would actually want to prevent there being an interpretation of extraordinary circumstances that might be something that was extraordinary even within that subset, and make it clear that it is the fulfillment, as you said, of those things. That constitutes the extraordinary circumstance. So my proposed correction would be change, "Which are limited to circumstances where," which seems to have that ambiguity that allows both the interpretation that you gave, Becky, and the interpretation that Amy gave, that I would prefer to avoid, and to change that –

BECKY BURR: [crosstalk]

MALCOLM HUTTY: – that made it very clear that it is the circumstances that are the extraordinary circumstances.

BECKY BURR: And I think that's what the language David proposed would do. It would eliminate that [phrase]. Okay, I'm going to – because it's 10:00, and number of us are due on another call that started two minutes ago, I am going to get back on everybody's calendars as quickly as possible to continue this discussion, because we're getting to a point where we really need to move this forward to the CWG and the community.

Thanks, everybody, for a great session. And –

KAVOUSS ARASTEH: Before you're ending this call, I am not in favor of the word "circumstances." It is making more and more difficult. So the other thing is we have to demonstrate evidence, and this evidence should be convincing. That's all. I don't want to put it in the complex language, circumstances. What circumstances? Who decides on that? I'm sorry. I don't agree with that. Thank you. Thank you, and I will [crosstalk]. Good day to all.

BECKY BURR: Thank you very much, Kavouss. All right, thanks. Our conversation will be continued. Thanks, everybody, very much. And David, maybe you can

draft a note about the evidence. And, Malcolm, please send me a note about the fourth agenda item, and I will add it.

Okay, thanks everybody. We will talk soon.

[END OF TRANSCRIPTION]