BECKY BURR: Thanks very much. Welcome, everybody, and thanks for calling in. I'm hoping that using the slides to focus the issues will enable us to be efficient. Our agenda is pretty much the same as it was on the last call, with the exception of the one inconsistency that Malcolm Hutty identified that we should address. So I've rearranged, because I think it's pretty straightforward, to take care of that one first.

Brenda has asked everybody in chat who are listed by a telephone number if you could identify yourselves to her so that we know who to recognize when people have their hands up. I think there are at least two people – it looks like L.A. – who might be in that circumstance.

With that, let's just go on to start the substantive discussion. Malcolm noted last time that there was an inconsistency between the final report of the CCWG and the draft-updated supplementary procedures with respect to the time by which an IRP must be filed. The final report says the complaint must be filed within a certain number of days to be determined by the IRP Subgroup – that's us – after the complainant becomes aware of the alleged violation and how it allegedly affects them.

The draft supplementary procedures say that a claimant should file a written statement of dispute no more than 45 days after a claimant becomes aware or reasonably should have been aware of the action or inaction giving rise to a dispute.

Now, obviously the reason that you would put in that "should have been aware of" is so that you don't have to deal with long, after-the-fact disputes, where someone says, "I didn't know I was affected."

Clearly, also, because these IRPs sometimes relate to disputed rights between one party who's a complainant and another party who is not, there is some reason to be concerned about people sitting on their rights or not, exercising them.

On the other hand, the language in the final report is that you're limited to when a complainant becomes aware of the alleged violation and how it allegedly affects them.

Because this is a change from the CCWG recommendation, I want to slide that and see how people are inclined to handle this. Views?

Nobody has views. Yeah, I'm sorry Malcolm is not here to explain his concern further. I think that his concern is exactly what Mike Rodenbaugh is identifying in the chat, which is that you can have a fight, dispute, disagreement, or contention over when somebody reasonably should have been aware of the action or inaction.

Greg?

GREG SHATAN: Hi. I commented on this on the list. Just to go back to it, "or reasonably should be aware" us lawyers call constructive notice because the underlying idea is that they did not in fact become aware but they should have been. So you're talking about something that went by but they're going to be stopped anyway, even though they didn't know that their rights were ticking away. It was not what was expected in the final report.

I think we should stick with "becomes aware," which is actual notice, and not go into constructive notice, especially in this community, where things can be complicated, people can be volunteers, and people can be going around the world for 14 days to go to a 7-day meeting. I think it's unrealistic, so I would get rid of the red text.

BECKY BURR: Thank you, Greg. As I recall, though, there actually was some discussion and I think some expression of concern that not everybody who was affected following ICANN minute-to-minute – so one of the things that we might want to do – Bernie, can you tell me if it's possible to go back through the transcripts to see whether this issue was actually discussed?

BERNARD TURCOTTE: Tall order, but we can try to do that, yes. It depends what your timing is. If it's tomorrow, then I would say that's pretty close to impossible. If you give us until the next meeting, which is expected to be in a week, we could certainly give it a try.

BECKY BURR: Okay. There's a little bit chat that's in here. The requirement would be that somebody making and not filing an IRP would be required to set out when they became aware of the action or inaction, and presumably ICANN would have the ability to demonstrate that they should have become aware reasonably.

Jeff is pointing out that "become aware" itself is a little ambiguous. I think that I agree with Jeff. The fact that ICANN has posted minutes wouldn't be necessarily awareness. That would be constructive awareness.

Can I just get a sense from the group here as to what we want to do, particularly keeping in mind that our job at this point is to try to make sure that we don't do anything that's inconsistent with the final reports?

Greg, is your hand old or new?

GREG SHATAN: It's kind of new. I was just looking at Jeff LeVee's statement in the chat. If the Board posts minutes but somebody doesn't read the minutes, they're clearly not aware of them. On the other hand, if the Board posts minutes and we have a reasonable expectation that people read the minutes, then they reasonably would have been aware of those minutes, even if they never read them, and their 45-day clock would start ticking from then, whether they knew it or not.

So I think there's nothing ambiguous of confusing about actual awareness. At the fringes, you can get into issues of trying to prove actual awareness. I don't think the burden of proof is on the claimant to show when they were aware. I think they just need to make a statement that they became aware of it on X date.

If we really want to get into nasty back and forths, somebody could say, "No, you actually where aware of it or a prior date because you have an e-mail from you," or, "We saw you sitting at this meeting and it was

clearly stated, so your actual awareness date is even earlier than you think it is." But you're still basing it on when something entered somebody's headspace in fact, not on when they reasonably could have had it happen.

So I don't think there's a lot of excitement here. Thanks.

BECKY BURR: Thank you. Samantha?

SAMANTHA EISNER: Hi. This is Sam Eisner from ICANN. I think that there has to be some sort of bright line put on this, whether it's the 45 days or the "reasonably should have been aware." Whatever that ultimately winds up to be, when we look at accountability, we also get to a point that there can be some level of finality to decisions.

It also doesn't benefit anyone to have decisions of the ICANN Board or staff actions or anything be subject to challenge two years down the road because someone just decided to get interested in something and researched and issue and decides that they were adversely affected by that issue and therefore they're going to come in and do it.

If we look at this, maybe someone will want to come in two years down the road when they realize the New gTLD Program has come into effect and start challenging it because it's just on the radar of their business purpose.

So there has to be some timeframe that makes sense, and it can't just be up to when someone decided to pay attention to an issue or

someone was told to pay attention to an issue or someone finally became aware that ICANN existed and started looking at it, because that doesn't increase ICANN's accountability to the rest of the community that needs to have some level of certainty.

So as we walk down this path, I think that we have to keep in mind that it's really important to have some bright line. I'm not saying what the bright line should be, but there has to be some bright line on this so that we can't always get into endless loops of decisions that were taken a while ago.

BECKY BURR: Okay. Thank you. David?

DAVID MCAULEY: Thank you, Becky. Answering your question of where we are, I just want to say I think I'm somewhere between Sam and Greg. I think Sam brings a good point. There has to be some sense of timing involved that imposes some discipline in the process in the interest of fairness to everybody.

But I also think that Greg has a good point about constructive notice. I also think – I may have this wrong – when I read Malcom's comments last week, that he actually was thinking the point that it's a change in status. If a person has a change in status one, two, or three years down the road, that could actually give rise to a claim. It struck me as odd, but I'm open to considering it.

One of the things we might keep in mind as we try to wrestle through this – parenthetically, I'd just like to say I'm sorry Holly is not on the call, because it would be nice to have our legal drafters present. But one of the things we ought to consider –

BECKY BURR: Can I just say I just heard from Holly and Ed that they were not included in the invite? I think that somehow they're not on the list, so I sent out the information, and hopefully they will join us. We will endeavor to correct that.

DAVID MCAULEY: Thank you. But I was going to say is that one thing that's in the back pocket that we consider when we come up with some wording – and this is more to Malcolm's point – is to actually go to the full CCWG and say, "In the final report in Work Stream 1, did we mean X, Y, or Z?" We can ask a question for clarification. If we're struggling, we might be able to get some direction that way.

Thank you.

BECKY BURR: Thank you, David. Greg?

GREG SHATAN: I think it's good that David pointed us back to the final report because I think that was – it's certainly clear that actual awareness was what was intended in the final report. I appreciate the concern about finality, and

there's obviously attention here. I don't think 45 days is any way appropriate in terms of a constructive notice deadline or, really in a sense, kind of a statute of limitations, although in some cases statutes of limitations don't even start to run until the date of actual awareness.

I don't want to get too deep in the weeds here, but I think the practical point is that a date of finality, after which no claim could be brought regardless of the circumstances, assuming that it wasn't completely hidden, would make sense. But it's got to be way longer than 45 days. I'm not entirely sure even that two years is too long.

Going back to Malcolm's point, there may be changes in circumstances and issues that come up that really are worthy of challenge. We don't know. Trying to find a middle ground, I would say that something far in excess of 45 days as a kind of finality date would make sense, but not 45 days based on constructive awareness. We did say 45 days after actual or X number of days to be determined by this group. 45 days in terms of actual awareness seems reasonable to me, but, again, with a constructive notice, maybe a year, just to throw a number out there for the sake of a number.

Thanks.

BECKY BURR: Okay. So I am getting the sense that, while there is support from some of the people in the notion that there has to be a date by which things are final and not challengeable and everybody can rely on it, that there should be a statute of limitations in every event, a drop-dead date, but the language in the final report was for actual awareness. We will

endeavor to go back and see whether that was a particular discussion point, and we should bring this issue back to the full CCWG to talk about what a drop-dead date should be there. Does that make sense to everybody?

Okay. David?

DAVID MCAULEY: Thanks, Becky. I think that make sense to me; what you said. If we do go back to the full CCWG, I think we should come back with a brief summary of the positions that we've been batting around [from] Malcolm's e-mail from last week and some of the alternatives to put in context. I guess maybe that was a –

BECKY BURR: Yeah.

DAVID MCAULEY: Okay. Thank you.

BECKY BURR: Yeah. I think that's definitely right. Just so you know, there's a full CCWG meeting, if I'm remembering correctly, on the 30th or 31st of August. I would like to have that August 30th. We would prepare a general report and then, on any issues that we want greater input on, we would provide a bit more detail there. I will endeavor to circulate that to the group beforehand to make sure that we accurately captured the discussion points here.

Okay. Going on to the next item, we have spent a lot of time talking about what kind of burden of persuasion, whether it was clear and convincing or whatever, would be needed to convince the panel that an in-person hearing was necessary for a fair resolution of claim was necessary to further the purposes of the IRP, and the interests of the fair resolution outweighed the time and delay and costs associated with it.

I think I was at least quite persuaded by the discussion in the chat that clearly demonstrates that most of the people on the call were actually going to be confusing and that we should either have a clear standard or no standard. Most of the people on this call are lawyers, so you guys will all be familiar with it, so I did this for purposes of the non-lawyers in the group. I'll just run through it quickly.

Generally, the burden of persuasion sets what kind of standard of proof a party needs to make. So it would be the amount of evidence that a party needs to provide in order for the panel to reach a particular determination.

In U.S. civil cases – this may be a standard elsewhere, I don't know – there are three kinds of choices with escalating requirements: either a preponderance of the evidence, clear and convincing evidence, or substantial evidence. Substantial evidence usually applies in cases that are not particularly relevant.

Just to compare the two, the preponderance of the evidence is what applies is most cases, and it would require the panel to permit an in-person hearing if the requesting party demonstrated that it is more likely than not that an in-person hearing is necessary for a just

resolution of the issue, that it's necessary to further the purposes of the IRP, and the interests of justice outweigh the costs and delay in any particular case. So it's more likely than not that it meets the three criteria that we've established.

The clear and convincing evidence standard is an elevated standard but not the highest standard. It would require the panel to permit an in-person hearing if the requesting party demonstrates that it's substantially more likely than not that it would meet the specified criteria necessary for a fair resolution, necessary to further the purposes of the IRP, and where the costs and delay outweigh the other interests.

I think Mike Rodenbaugh is agreeing that we shouldn't use clear, if we're not going to use convincing – I just want to go back to this standard. I think our choices are either to say, going back to this next language, the panel determines that a person seeking the in-person hearing has either demonstrated that an in-person hearing is necessary for a fair resolution of the claim or has demonstrated with clear and convincing language.

I will just say I don't really think that the clear and convincing standard is that high of a burden. However, I think there is concern that was articulated that it would pull in U.S. case law.

So the question is, do we want to specify a standard, or do we want to leave it up to the panel to determine whether the demonstration has been made, keeping in mind that we have said that the person has to demonstrate in whatever fashion we specified that an in-person hearing is necessary for a fair resolution of the claim, that an in-person hearing is necessary to further the purposes of the IRP, and that considerations

of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense?

In-person. We are not talking about telephonic hearings. The supplemental will provide for telephonic hearings. What we are trying to do is set a fairly high bar but not a bar that defeats our purposes for a fair resolution.

Greg?

GREG SHATAN: I think we need to recognize that we already have a standard in here, which is the standard of extraordinary circumstances. So the circumstances themselves have to be extraordinary. Now we're talking about the level of proof that these extraordinary circumstances exist. The clear and convincing standard or any standard we've put in here is not about whether these are extraordinary or not, but it's about whether the fact of these circumstances is being proven.

That may seem like hair-splitting, but I think we don't necessarily need a heightened to prove extraordinary circumstances. The burden that the circumstances be seen as extraordinary is sufficient.

I don't know that we need to have any standard in there because, once we have a standard, then we're either tying it to U.S. standard or not. Or we could make something up: more likely than not, significantly more likely than not. But I think we need to distinguish between whether we're proving the likelihood of these circumstances or the extraordinariness. I think it's the discretion of the panel to decide whether the circumstances being presented to them are extraordinary.

The level of proof goes to whether these circumstances exist or not, not to whether they're extraordinary or not. Thanks.

BECKY BURR: Okay. David?

DAVID MCAULEY: Thank you, Becky. I think I will say that I think Greg convinced me. Where we came from on this was that Sam had made a good point last call or the call before that we have to find a –

BECKY BURR: Oh. Okay. David?

DAVID MCAULEY: Yes?

BECKY BURR: You cut out, so please start again.

DAVID MCAULEY: I believe that Greg just convinced me, and I'm sorry if I cut out. I think it's important to note that there is a presumption at work here and that these three conditions are tools to get by the presumption in extraordinary circumstances.

I think that Sam's request for some protection for this hearing, or if we put this in the context of cross-examination or whatever it might be, has

to be unusual. This should not be the normal case, and we don't want panels becoming trial courts. They are supposed to be arbitral panels.

Just listening to Greg, I think he made a good point. That's all I want to say. I think he's convinced me to leave the presumption and leave the extraordinary circumstances and the three conditions.

Thank you.

BECKY BURR: Okay. So I am hearing from those who are weighing in on this different things. One is that clear and convincing seems too high, and it could pull in U.S. case law, which might not make sense, that we have a high burden anyway because the definition of extraordinary circumstances is sufficiently high, and that we could leave it to the deference of the panelists.

On the other hand, I think I would be surprised if ICANN staff didn't make the point that not having a standard creates the possibility for more motions, practice, and more debate about whether or not something has been appropriately demonstrated.

Robin is saying on the other hand that maybe we should pick a standard because not having one means that we'll end up with conflicting standards.

I don't know where I think – Greg?

GREG SHATAN: Thanks. I've been trying to do some extremely rapid research on standards for approving extraordinary circumstances. One place it seems to come up is in custody hearings and the like. The language that I found in a couple of different spaces for that is merely that it has to be demonstrated to the satisfaction of the court that extraordinary circumstances exist.

So that's getting away from any kind of evidentiary standard. Evidentiary standards are basically proving that something did or didn't happen. I think we may actually be in the wrong place and we're discussing evidentiary standards. "To the satisfaction of the panel" might be a way to at least say that. In essence, it goes without saying because either they're going to say, "Yeah. We see it. These are extraordinary circumstances. Let's all have a hearing in X place – Geneva." I would say, "No, we're not satisfied. These are not extraordinary circumstances."

BECKY BURR: Just to be clear, what I'm hearing as the weight of argument here is that we go with the language that is like the language that is up in the Adobe room, though this applies to the standard for cross-examination, which we're not going to talk about next. So it would be basically: "Any in-person hearing shall be allowed only in extraordinary circumstances. Whereupon motion by a party, the IRP determines…" – we also had some other languages; let me go back to the other one – "Whereupon motion by the panel…" Oh dear. Hold one on second. I just want to make sure I'm looking at the proper language.

I apologize for not… So it would say, “Whereupon motion by a party, the IRP panel determines that the party seeking an in-person hearing has clearly demonstrated that an in-person hearing is necessary,” etc.

So I think the language that we’re talking about is: do we just go with “The IRP panel determines that the party seeking an in-person hearing has demonstrated that it’s necessary for fair resolution,” etc.? It’s conflicted in the chat here.

Does Amy or Sam or anybody want to – I know ICANN is concerned that in-person hearings create delay and significant expense and has concerns about whether we set the bar high enough. Do any of you guys want to speak to that? I don’t want to move on without – okay.

Conditions 1 and 2, Mike: the difference is that fair resolution and the purposes of the IRP are defined as – let me just pull it up here so we can look at it – to hear and resolve disputes for the reason specified by the ICANN Bylaws. So, 1 goes to fair and just resolution. 2 goes to resolution, and 3 is the balancing test.

Greg, we can add “to the satisfaction of the panel,” but I’m not sure that we need to do that if we just say “the panel determines that party has demonstrated…”

Okay. I’m not hearing a lot of resistance on this, so I think the desire is to take clearly out – and as between just “determines” or “determines to the satisfaction of the panel,” does anybody want to have a view on that? Robin, you can speak to – okay. “I don’t know of any strong feeling.” Okay. So we’ll let the lawyers talk about that.

Okay. The next issue is cross-examination. The current rules do not permit cross-examination of witnesses at an in-person hearing. We had dueling drafts' language. The ICANN staff would like to leave it where it is, with a prohibition on cross-examination. Other people have expressed the concern that, if it meets the extraordinary circumstances test, then it ought to be permitted.

Clearly, if we decided to along with cross-examination of witnesses, it seems to me that the standard should be the same as the standard that we've just decided on, but it's an open question. Obviously, what we are struggling with is a good accountability process but also an accessible and affordable and efficient accountability process.

David?

DAVID MCAULEY: Becky, hi. I tend to believe that – and I've changed on my views on this – cross-examination of a witness should be permissible in extraordinary circumstances, so long as we can come up with the language that we're wrestling with on what is extraordinary, etc.

With this language and the alternatives for consideration on the screen, my only suggestion would be that, on Line 1, where it says, "cross-examination of live witnesses," to rather say, "cross-examination of a live witness" – singular – just to underscore the point that the issue should be decided on a witness-by-witness basis, not by an IRP basis.

Thank you.

BECKY BURR: Okay. Thank you. Mike is pointing out that the current language prohibits cross-examination, even in electronic or telephonic hearings.

Greg?

GREG SHATAN: I tend to agree with what I'm seeing in the chat. Not that we're talking about a constitutional law question, but the right to confront the witnesses, which is essentially the right to cross-examine, is a fundamental right in many types of cases – in most cases. The idea is that you're going to get to the point of a live case. I guess the question is whether we're saying that establishing a live hearing – is this a separate – first you've proven the need for an in-person hearing, and then you have to prove a second time? That, once you are all in a room, you have a chance to ask people questions?

It seems to me that, one you've gotten to the live hearing, cross-examined should be presumed. Not even presumed. It should just be a matter of fact. I don't even see why there's any burden separate from the burden of having a live hearing in the first place.

Maybe one of the reasons you'd prove that a live hearing is necessary is because you need to do cross and not just rely on interrogatories or witness statements or the like. But to have a second gating factor to prove that "Now that I've gotten you in the room" is a pretty extraordinary circumstance. I need to have double extraordinariness to ask questions? I don't get it.

Thanks.

BECKY BURR: Okay. We have two different approaches by people who believe that cross-examination should be permitted. One is that, in fact, the party making this push should have to demonstrate that the in-person hearing meets the criteria, and then the cross-examination is necessary.

Sam is making the point that there could be situations where the argument is complex, so presumably an in-person hearing is necessary, but the credibility of witnesses is not an issue, which would support a live hearing without the need for witnesses.

Live hearing means in-person, Avri. The rules do provide for telephonic hearings, not subject to the extraordinary standards. So there can always be the telephonic hearings.

You guys still there? I guess my question is: Mike Rodenbaugh raised the question and is saying in chat that, even for telephonic hearing, the current rules would say that cross-examination must still be necessary for the purposes.

Amy and Sam, can you tell me whether that's correct? I'm having trouble finding it.

Greg?

GREG SHATAN: Thanks for Mike for that point. I've taken [inaudible] so I haven't found what the current standards – but of course, the new IRP is quite a different animal from the old IRP, and I think that the necessary standards is probably too high for that on the phone. The whole idea

that you can't actually talk to people across the table is just – maybe it's my imagination.

So the standard I would propose that they proposed in chat would be that cross is allowed unless it would be vexatious or frivolous or totally without merit or something along those lines. I don't want people just noticing 30 live crosses just to make people suffer.

That does happen. I was just talking to somebody who had that happen in a case. Useless [prop]. But if it's above that level, as long as it's useful, it seems to me that it should be allowed. It's pretty much a standard part of most types of adversarial hearings. [inaudible] we're all one big happy family, not adversarial, if you know what I mean.

BECKY BURR: Okay. Please mute your telephones if you're not speaking. Mike?

MIKE RODENBAUGH: Hey, Becky. Thanks. Right now, the draft says that even a phone or video hearing has to be deemed necessary, which I think is wrong. I think this should be as a matter of course, as pretty much they have been in almost every IRP proceeding to date. So I'd like to discuss that.

And then the issue we're discussing right now is whether there should be cross-examination, and it seems to me that that standard, whether or not to have cross, should not matter for what kind of hearing it is. Regardless of whether it's video, phone, or an in-person hearing, cross-examination should be allowed because that's just a fundamental part of a hearing. That's why you have a hearing.

If there are witnesses, they must be cross-examined.

BECKY BURR: Thank you, Mike. I think that – could somebody mute their phone? Because I'm getting a big echo here.

Okay. The current standard is that all hearings are – well, let's take this in two orders. "The IRP panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP panel may conduct live telephonic or video conferences." So Mike is correct that there is a presumption that you proceed by electronic means, but if the IRP panel decides it's necessary for whatever reasons – because whenever there's no extraordinary standard that's [out] here, they can conduct live, telephonic, or video conferences.

Then we have proposed the extraordinary circumstances standard for an in-person hearing. The further question is the language which limits all hearings to argument only, whether it's telephonic or in-person hearing. That's what we're discussing now.

I hear you, Mike. You want to put the "necessary in general for electronic hearings" back on the table, but let's try to resolve this one first.

Greg?

GREG SHATAN: Old hand. Sorry.

BECKY BURR: Oh, old hand? Okay. So I'm definitely hearing that, at least with in-person hearings, to the extent that a panel determines that the extraordinary circumstances warranting an in-person hearing are present, some people are saying that should be enough and that cross-examination of witnesses should be permitted. Other people are saying no and that, in addition, the panel should make a specific determination that cross-examination of witnesses or the putting on of witnesses for purposes other than making the argument itself should be required.

I need some help here because it's hard for me follow the chat and the discussion, both of those things. David?

DAVID MCAULEY: Thanks, Becky. I've been trying to listen and follow the chat, too. It is very hard. I simply would say I think our purpose here is not to build a trial. I don't think we're trying to build a trial process here. What may be a good idea is to, in the extraordinary case where a hearing is needed, have the witness statements passed back and forth. If someone wants to cross-examine, they can go to the panel and say, "We would like to cross-examine three out of the following ten witnesses that have been listed." The other party can challenge it and the panel can make a decision.

It just seems to me it shouldn't be willy-nilly, but every witness in the case gets to be cross-examined.

Thank you.

BECKY BURR: Thank you, David. So I stand by my characterization of people being on somewhat different perspectives on this.

Okay. What I think I'm going to propose is that we take this back and try to get some concrete alternative language in front of people to look at and debate in a concrete way to do this.

Mike, I just want to get to the next issue on the agenda. I am not ignoring the fact that you object to the language about the determination of necessity for telephonic hearings.

The next issue is scope. We're going to break this discussion into two sections. The first one is that, right now, IRPs that have been commenced right now, that exist right now, would continue under the existing supplementary rules.

But we know that the rules that we are updating – the updated supplementary rules – may well change. In that circumstance, we're saying that, if the updated supplementary procedures are established, the amendments would not apply to pending IRPs unless a party successfully demonstrates that application of the former supplementary procedures would be unjust and impractical to a requesting party, an application of the amendment would not materially disadvantage any party's substantive right, and the request to apply amended updated supplementary procedures will be resolved by the IRP panel in the exercise of this discretion.

Now, because the standard of review for these updated supplementary rules is actually specified in the Bylaws, that standard of review is not

going to change it unless there is a very material change to the Bylaws and like.

So in this case, what we're talking about is allowing people to take advantage of differences in procedural rules, for example, if we decided to tweak the page length or something like that.

The sense that I got from the group last week is that the scope page – I don't know which scope page you want, David. The sense that I got last week was people were tending to the notion that, if somebody demonstrated that it would be unjust and impractical not to apply any modifications and it wouldn't materially disadvantage the other party's rights, they should be permitted to do it.

I think ICANN still remains concerned this could complicate the process without real benefits and proposes deletion. I have to say, since we are not talking about the substantive standard of review, really, in this one, I could go either way and think that ICANN's concern about complications without real benefits be meaningful, but I also don't have a problem with the language that's up there.

David, this one actually goes back to the substantive standard, so it's not really the same thing that we're talking about.

Okay. We are getting close to the top of the hour. Okay. So I think people are feeling like, with respect to the non-material rules, there's not a lot of benefits.

Avri?

AVRI DORIA: Thanks. On this one, on the scope, I don't quite understand why we assume that there could not be substantive change. You talk about tweaking of the rules after these new rules are established. But that's not something that we can really know at this point. So I don't quite understand the presumption that this would only apply to procedural and not to substantive changes that may be made after the new rules go into effect. Or maybe I'm misunderstanding.

Thanks.

BECKY BURR: Avri, just let me explain a little bit. What I'm saying is that the standard of review in here is the de novo examination of the dispute as to whether it was violation of Bylaws, etc. That is determined in the Bylaws right now. That language exists in the Bylaws, and we cannot change the standard of review from the Bylaws without changing the Bylaws themselves. So that's why I'm saying it really goes to the procedural – the page limits, the time for filing. It could go to the questions of the hearing or not a hearing. But all of those things are, to me at least, things that are more procedural.

AVRI DORIA: If I can ask further – I know I didn't wait to be called on and we're almost out of time – for example, various processes that are going on now may indeed change things in the Bylaws in the WS 2 and such. Then the rules that come out, any updates that came out, on this UPS after that could well have a substantive bearing.

So I guess I'm confused, but that happens often.

BECKY BURR: Yeah. Let me try to explain this slightly differently. The standard of review here, just in the case of Bylaws, is a de novo examination of whether or not the Board violated the Bylaws, or ICANN violated Bylaws. If the Bylaws change, then the question of whether ICANN violated the Bylaws would be a question of what the Bylaws were at any point in time. So the panel would have to determine what the Bylaws were and whether ICANN violated them.

So I guess that does mean that, if somebody files an IRP on a bunch of grounds and the suddenly the Bylaws' provision on human rights changed, the standard that the panel would need to look at would be the Bylaws that existed at the time of the filing, although I think it could still bring stuff in.

We're now at the top of the hour. This is too important a discussion to rush, so we do have time slotted for next week. What I hope we can do is limit our work here to the things that are outstanding and then really dig into this issue.

I think that fundamentally what we're trying to do is be equitable but not create a situation where people get to completely re-litigate issues because there's a modification in the procedures. I think that's a really substantive issue in terms of, if we know that there are going to be tweaks to the rules – because our next job is to be to go through the rules in a more comprehensive format – what amount of opportunities for re-litigating on the basis of procedural issues do you want to permit. So I think that's what are going to need to sink our teeth into on the next call.

I will go back and send around some proposed alternatives on the language that we talked about earlier.

Bernie, I think that we did pick a time for next week. If we didn't, we should do that right away.

Okay. With that, since we are at time, let's call it a day. Thanks to everybody. Same place, same time next week. Bye-bye.

UNIDENTIFIED MALE: Bye all.

[END OF TRANSCRIPTION]