BECKY BURR: Thank you. Sorry, Brenda. Along with a new copy of the supplementary rules in their present form, as well as a draft of the report to the CCWG on the state of our discussions here, as I notice, there are only three open issues, including some very complicated issues.

The first one is the effect on existing Independent Review Proceedings that are going on. We have talked about two alternatives, the first being what is traditionally standard procedure in these kinds of situations that IRPs commence prior to the adoptions of these updated Supplementary Procedures would continue to be governed by the Supplementary Procedures in effect at the time the IRPs were commenced.

As an alternative, we have the language that Avri has proposed that essentially says that the standard rules would apply. They would continue to be governed by the rules in effect at the time the IRPs were commenced, unless the panel determines that a party requesting application of the new rules had demonstrated that the application of the former procedures would materially and unjustly affect judgment on the case as presented by the requesting party and would not materially disadvantage any other party's substantive rights.

I take it, Avri – and I may ask you just to speak to it or to let me know if you agree or disagree – that the point of this is that, if, essentially, the outcome of the IRP terms on a matter that has been affected by these new rules, then a party would be able to bring that to the attention of the panel and argue that in the interest of justice that, essentially, they should be allowed to have the new rules apply.

Do I have that right?

AVRI DORIA: Yeah. The other part of it is that they don't have to rewrite. But it's basically: we've changed some of the things that are in scope, and if they had covered those issues in their appeal and, under old rules, those issues were out of scope but under new rules they were in scope, then they should permitted to make that appeal.

BECKY BURR: Okay. Do we have other views on this? David?

DAVID MCAULEY: Thank you, Becky. Good morning. This discussion I think is affected by the small attendance on this phone call. I understand, I believe, what Avri's position is, and I also would admit that Avri and I, I think, are either on opposite sides of the spectrum on this or close to being on opposite sides of the spectrum.

Part of my concern is, when we put language down that's abstract, saying, "If this, then that," I think it's fair to say that, for any pending IRP, a claimant will claim the new rules, and ICANN would probably oppose them because it seems to be me there will be a material issue in dispute.

Part of the concern I have is: where is the current IRP? Have hearings been held? Even though we're sort of not having hearings, were they held under the old procedure? How far along is it? Is the panel just ready now to issue a judgment? There's a lot of concerns, I think, that weigh in here.

Because we're such a small group – and I respect Avri's position – maybe what we should do is tee this up for the larger CCWG. I know there's a meeting next Tuesday. Maybe there's even time for two meetings to take place, but maybe we should say to the CCWG: "On this issue, there was a divergence of opinion that we can't seem to bridge. Here's what the issue is. How do you speak on this?"

In the background, maybe the lawyers could be drafting supplemental rules to meet each of the possible alternatives the CCWG might be coming up with so that we can stay within time within the month of September.

Anyway, I think it's a difficult issue. I just don't know how we're going to move it forward, other than something like that. But I'm certainly open to opinions, but we're an awfully small group tonight.

Thank you.

BECKY BURR: Thank you, David. Yes, we are an awfully small group. I don't think that we will be able to close many issues because really not represented as the group. But it's worth just having the discussion.

Avri?

AVRI DORIA: Thanks. Yeah, I think taking it to the full group may be the right thing. I just wanted to point out one thing: this is a parallel to the rule we got about people running under the to-be-changed rules, the new rules, when those rules may be changed. So essentially, the same

circumstances would apply since there's no idea what would change. In further changes to supplemental rules, we [can't] say upfront, "Oh, no, they'll just be minor."

So what I was really looking for [inaudible] to be existing that we would give to future [inaudible] under the new rules that might be affected by changes made to the rules why they were in progress. I see no difference in a matter of treating justly between those situations.

But I think you're right. If we are diametrically opposed, then certainly taking it beyond this group is a reasonable thing to do. But I do want to say that I do admit to all the same restriction of not [limiting] and not replaying. But there are some fundamental changes that are being made that may be matters of justice and not just procedure.

Thanks.

BECKY BURR: Thank you, Avri. Sam?

SAMANTHA EISNER: Thanks, Becky. This is Sam Eisner from ICANN Legal. I know, Avri, in the chat there are some people who are noting they're not clear on the point you just made.

If I understand the point that you just made, it was the fact that the rules are already being drafted [inaudible] for IRPs that are initiated after the transition and the [inaudible] into effect. There is already a provision that we're putting into rules that say, "If there are future changes to the rules, you can apply the rules that are in existence at the

time you file your claim, unless you demonstrate that it's not just that it happened [this way]." So there already is a provision for the rules to change for future claimants. So what's the difference between having some sort of retroactively-effective change that could happen now?

I do think that there is a substantive difference here – I know that we talked a bit about this on the list – because of the major change in the IRP process, where we envision future communities to have rules to be under the rubric of the new IRP. If we were to apply retroactively, it would actually take old claims that were filed under the old IRP and make them subject to the new IRP, which is a bit different.

But putting aside the positions that we might have on this in the different places that we are on in the call, I do note that last week, even McAuley into a comment – and I thought this was a really excellent point that he noted – there could be actually some legal concern with this type of retroactivity of Bylaws when it wasn't specifically identified and [inaudible]. I think that this might be something that – as he called out, he suggested that we leave them up to Rosemary, who hasn't been very involved within IRP work. But this is really a matter of California law on this, California's ability to make Bylaws.

So this is retroactive, and that I think is something that is worth agreeing to have the Legal Team take a look at it together because I think that these are the types of issues that would be material to any group, be it this group of the full CCWG, taking a position and making an ultimate decision on this type of issue. I think we have to brief out the impacts and the potential ramifications and where this will start and stop, but also the legal feasibility and that sort of thing.

I know from ICANN's perspective that, if that was something this group would be amenable to, we would be willing to start a conversation tomorrow with Sidley and Adler to chase this down a little bit more.

BECKY BURR: Okay. That probably makes sense. Obviously, we can't do anything that is going to put us cross-wise with California law. So I don't see any objection to the Legal Team beginning that conversation.

Okay. Why don't we move on to the next issue, which is the deadline to file? Unfortunately – oh, Avri?

AVRI DORIA: Sorry. On the last one – and I'm very happy with Rosemary go through it – would she be looking at both instances of the retroactivity and not just this one, but also the comparison between the two?

BECKY BURR: That totally makes sense. Okay. Sam, do you have a new hand or an old hand? Okay.

Unfortunately, Malcolm, who is not on the call, is the person who is most concerned about this deadline to file. The draft as presented provided a claimant 45 days to file after they became aware or reasonably should have been aware of the action or inaction that has given rise to the dispute.

Malcolm raised the point that the report language, which is somewhat informal, references awareness of the impact that the action or inaction

has on them. He further pointed out that, if you are challenging a law based on constitutional issues, you're not time-barred based on passage of the law but based on when you are affected by the imposition of the law on you.

So we have some three alternatives to discuss here. One is the language, which I think is, again, the standard presentation. The second is awareness of the material effect, and that goes back to the language about who has standing to bring an IRP; so when somebody becomes aware or reasonably should have been aware of the material effect of the action or inaction giving rise to the dispute.

The third alternative, which several people have supported, is: becomes aware of the material effect of the action or inaction giving rise to the dispute, provided that there is a time-certain limit after the date of the action or inaction.

David?

DAVID MCAULEY: Thank you, Becky. This issue – I think I'm going to sound like a broken record, I suppose – this might be another one for us to tee up to the full group because Malcolm puts his position well. I don't entirely agree with him. I've sort of moved off my natural conservative position of 45 days, etc., to alternative three. I could easily support that.

Malcolm, in his mail, made the point quite well about: what about in action by ICANN that is ultra vires? And if a party makes a claim 20 years after the action or inaction, why shouldn't that be hear and decided, etc.? He pointed to the fact that courts do this in nation states, and I

agree with them. Courts, however, in nation states, to me, are done by judges who have years, decades, or centuries, perhaps, of precedent to look to. They are subject to impeachment, typically. They are standing on an infrastructure that is deep and well-equipped to deal with these issues, whereas we're going to be dealing with an IRP panel which is, at the bottom, an arbitration panel that we're going to choose that will sit there for five years. In the past, I'm not so sure that they've [inaudible] entirely to the rules under which they operate. Maybe they have. I'm not saying that as an expert.

But I am saying that this is different. We're going to be unpacking, 20 years later, business decisions – I don't know if that's what you'd call them, but decisions that people rely on in running the domain name system. My concern is that the 24-month period seems to me to be sufficient for people to see that an act has become ultra vires. I just think that we need to have a reasonable compromise. Maybe this is an issue we should begin teeing up and taking to the full CCWG.

By the way, as a codicil to my earlier idea, we might even ask the co-Chairs [inaudible] to have the time sufficient to address these issues. Two is, the people who come to that meeting will have an interest in IRP, and it won't simply be one more issue discussed in a larger meeting.

Anyway, I'm concerned with the 20 years impacting these decisions and having an impact on how the DNS is run. So that's where I'm coming from. I think Malcom well states his position. I think there's reason in it, but I just don't agree and think that alternative three is a reasonable compromise.

Thank you.

BECKY BURR: Thank you, David. Okay. I think there's strong report for putting this to the CCWG. I do think that that makes sense, but I do think also that, when we are talking about this in the CCWG, we have to be clear in talking about concrete situations in which this might arise because it seems to me that the kinds of decisions that Malcolm is worrying about – that's something that someone feels that down the road actually acts as a regulation of content from the business decisions that ICANN makes, in which there are winners and losers as in who gets to run a top-level domain, and the need for certainty for investment purposes and the like. So I think we will move this into the broader discussion, but I would look for a way to articulate the two categories in which this would arise.

I think, Chris, what you're speaking to is my somewhat discomfort with alternatives two and three because of the business decisions. But I definitely understand Malcolm's point as well. Okay. So we'll move that on to the CCWG.

The final issue is cross-examination at hearings. The language in the draft was proposing that all hearings would be limited to argument only. Of course, if there were arguments only, it would essentially be lawyers making a legal case.

There are two or three alternatives that we discussed. One would be that we essentially say that the default is that they are limited to argument only, unless the IRP panel determined that the party seeking

cross-examination has demonstrated that extraordinary circumstances exist. This would essentially be that, in addition to demonstrating extraordinary circumstance for our face-to-face hearing, if you wanted to cross-examine witnesses, you would need to demonstrate that is necessary for fair resolution of the claim, necessary for the purpose of the IRP, and considerations of fairness and furtherance of the processes of the IRP outweigh the time and financial expense of witness cross-examination.

A third alternative that some people have proposed is that the IRP panel makes a determination in its discretion whether or not to permit cross-examination of witnesses.

Yet another alternative is that you apply the extraordinary circumstances test in face-to-face hearings only and apply some other test in telephonic or electronic hearings.

Again, this is another one in which I think we've heard a variety of views, although I at least don't have a strong sense of where the group comes out on this one. Sam, is your suggestion about stress testing or examples of – is that applicable to this or applicable to all of the open issues?

SAMANTHA EISNER: I was speaking really particularly on the time-for-filing item that we had just moved on from.

BECKY BURR: Oh, okay. I think that would really be useful; going back to that. So David supports alternative two. Avri supports alternative three. I think this is another one that we should go to the full group with again and try to make it as a concrete as possible. To me, this is really a balancing of a full airing of the issues and the interests of efficiency and streamlined process here.

So I think what we're concluding is that what we will do is draw discussion of these three open issues into the draft report and bring that to the full group. I think it's going to be very, very important for this group to make sure that the views of the group, with respect to the positions on the [circle] we represented in the draft – and I will take a first cut at dropping these issues into the draft report that I already circulated. It will be critical to have input on those drafts.

David?

DAVID MCAULEY: Hi, Becky. Thank you for volunteering to do that. With respect to this issue, it's the third issue, but I think it has two sub-parts. I'm just trying to confirm that. One is cross-examination, and the other is hearings of any nature. Is that a fair statement?

BECKY BURR: Well, I was under the impression that the group had a pretty strong consensus that, if the extraordinary circumstances test was met, the panel could decide to proceed with a [inaudible]. I believe that ICANN, while still concerned about that, was prepared to live with that outcome. Correct me if I'm wrong on that one.

DAVID MCAULEY: I take that, and I accept what you just said. Thank you.

BECKY BURR: Okay. Sam, if I've misspoken, obviously let me know. Okay. I think it would be extremely useful, Sam, if you and your team could initiate the discussion with Adler simply on the California law issue and any kind of concrete stress testing and concrete example of this, it would be great to have for discussion in the draft.

David?

DAVID MCAULEY: Thank you, Becky. I might ask Sam, when does that, to please copy Leon on that because the Legal Team, of which I'm part – I'm not sure who else is, but I think there's others on the call who are, too – is supposed to get back off the bench and back into the game. So I think, Sam, it would be good to let Leon know, just to stoke the fires to get the legal team active again, especially with respect to controlling the budget impact.

Thank you.

BECKY BURR: Yeah. Avri has raised a question about whether the Legal Team is limited to Work Stream 2 issues or Work Stream 1 issues. I think we should test with them. The cost-control issues obviously apply across

the board. But I agree with Sam that there's not particular harm in just making sure they're aware of the [inaudible].

Okay. Thanks to everyone who got up very early in the morning or very, very late at night. I think at least we have a direction to move forward on this. I will circulate a draft report.

David?

DAVID MCAULEY: Thanks, Becky. As we do that, as we wrap up, I think it might be a good idea to ask our group – let me ask you this. What other things do we need to do to be able to go to the full CCWG and say, "We have done our work. There may be details pending – "t"s to cross, "I"s to dot; that kind of thing"? But are there other things, Becky, that we need to be looking at in the month of September? I guess that's my question.

Thank you.

BECKY BURR: Yes. We definitely need to be getting the request for expressions of interest for a panel within the provider discussions, going, "These updated supplementary rules are really interim in the sense that, once the Standing Panel is seated, some issues will – for example, the references – that provider might or might not change." So these are really to get us to place where we can implement the Bylaws, but I think there is a fuller study of the rules collectively and putting together the processes for soliciting and selecting the Standing Panel, and I think that

needs to start right away. I know that you provided a draft for us on one of those things, so we can turn to that quickly.

Okay. Thank you very much, everyone. Look for my draft, which I will endeavor to get our very quickly.

UNIDENTIFIED FEMALE: Thank you. Bye.

[END OF TRANSCRIPTION]