DAVID MCAULEY: Thank you very much. Welcome, everybody, to the March the 2nd call for the Implementation Oversight Team for the Independent Review Process. We are a small group hoping that nonetheless some more of us will gather during this call. And even though we're small, I would like to press on and have a call and have it on the record so we can ensure that those who can't join us today could listen to the record and find out what happened.

I want to begin by asking if there is anyone on audio who is not present on the Adobe room so that we can have an accurate roll call.

Hearing none, I will then ask, does anybody that's on the call have any updates, changes, etc. to their Statements of Interest?

Again, hearing none, let's dive into the agenda. But let me make one parenthetical comment. We have on the call today Reg Levy of the Registry Stakeholder Group and Minds and Machines. I am taking part as a participant in a Chairing Skills Pilot Program that ICANN is running, and Reg has kindly volunteered to act as a coach. And so her job during this call is to simply watch basically and she and I will have a discussion sometime following the call in that effort toward chairing skills development. So that is, as you all know, this is a closed group but that's Reg's role in this call, and I'm very grateful to her for it. And so now let's press on.

The second item on the agenda following the administration bit is considering our comments. As you all have heard me say in the past, our job is becoming largely operational/advisory with respect to actions like

standing up the Standing Panel, getting Expressions of Interest out – that's ICANN's job but we will help – helping SOs and ACs cull through people who will apply to become members of the Standing Panel, looking at the administrative support for IRP, all of those things. But the rules are our decisional role, and these are really important for us. We've had many good and many involved comments, and so we have a bit of a mountain to climb in a relatively short time.

I'm going to ask Bernie if he could speak to the schedule that we should pursue for finishing comments and for doing some upcoming calls in the month of March. I will then mention a little bit about ICANN58.

Bernie, could you also talk about the tool that you're developing for us to use? And then I will again talk about volunteers for picking up specific issues, and we need to try and get through this quickly so Bernie, could I ask you to comment?

BERNARD TURCOTTE: Thank you, David. First of all, we are March 2nd and the report on the public consultation has been extended to March 29th. This is the length of our consultation already got extended. We pushed out the report. But we do have to produce a report as per the rules for public consultations. The problem is, we've got ICANN58 in Copenhagen next week in the middle of this, and it's going to take up a bit of time. So there are no meetings scheduled during the Copenhagen meeting obviously, but we have a meeting on Thursday, the 23rd of March and then on the 30th of March, one week later which is a day later. So we only have – after this one – two meetings to provide the input to staff

so we can write this up and post it so that everyone who did take the time to publish comments knows that they were looked at and what we're planning to do with them.

In that context of what we're planning to do with them, you did get the original spreadsheet that sort of was staff's take on where the comments landed. There are different ways to look at that, but it is just to get the team started. Additionally, we've created some forms in Google Docs for each of those categories of comments, which is trying to help people take on one of the comments for the less significant ones and go through them and provide recommendations for this group to look at so that we can approve those and then get them into the report for the comment.

That's about it for me unless there are questions. Thank you.

DAVID MCAULEY: Thanks, Bernie. And thank you for the tools you've already given us, especially the spreadsheet, the compilation of comments. Those are very valuable, and so I would commend them again for use by members of the team.

Bernie, I do have a question for you. We do have calls, as you mentioned, later in March. In the month of March after ICANN58, are there any other available time slots? And I ask knowing that the time slots themselves are hard to come by with competition among a number of groups for these time slots. Can you speak a little bit to that?

BERNARD TURCOTTE: Yes sir. Basically we've got until March 19th booked off as that is a Sunday. ICANN58 closes officially on March 16th which is the Thursday, giving a few days for people to get back home and get through the weekend.

Starting on March 20th, that's the week we've got the 23rd schedule at 19:00 on the Thursday, and then the 30th later on. There are still quite a few slots open amazingly. This is exceptional but I think a lot of groups are waiting to see what's going to happen at the Plenary before they start booking slots. So I've got a number of good slots for the weeks of the 20th and the 27th that are still open if we want to schedule additional calls.

DAVID MCAULEY: Thank you, Bernie. So let's speak a little bit about ICANN58 for a moment. I am going to do my best to get some space. I might be able to get some Verisign space or something else, and hopefully park there for a couple of hours and I will send an invite to those folks on this team who may be in Copenhagen for the meeting to come by and chat with me and talk about the consideration of the rules in any event. And when I do that – hopefully I'll be able to do that – I will come out to the list with a notice of date, time, place, that kind of thing.

And then finally on this #2 of the agenda – and I need to try and slow down. I apologize, Kavouss – it is important that people step up and volunteer to take on an issue presented in the comments. And in this respect, I would commend again the good spreadsheet that Bernie put out and we can re-mail it if needed, where the issues are listed by issue

and then sub-headings under that include comments by various commenters. Some issues just have one commenter. Other issues have many as we'll see. And so we need help. There's a tall mountain to climb. So I'll ask people please to consider stepping up and volunteering. And then based on what Bernie said about the meeting schedule and the schedule that we need to try and meet, obviously we need to try and make progress on the list.

So before we get into the actual substantive discussions, let me try and answer Avri's question in the chat, and simply saying I am going to make myself available – it could either be private or a group meeting – just in case anyone needs any help on considering which issues to pick or anything like that. It's not meant to be a formal moving the ball forward for the group. Sort of an administrative kind of discussion. It sounds to me like that would be appropriate, but if there's any concerns you can let us know on the list.

Having wrapped up #2, I would like to begin the substantive discussions. As we all know, the time within which a claim has to be filed generated a lot of discussion. Becky and Malcolm and I then presented a question to Sidley, our outside Counsel, and Sidley came back and confirmed that there is a problem with the timing, a problem that Malcolm noted. And so Malcolm has kindly volunteered to take the lead on this discussion, and if it's okay with you, Malcolm, I'm now going to turn the floor over to you.

MALCOLM HUTTY: Thank you, David. I circulated an analysis that I did of the public comments received on the mailing list yesterday, and I think that it is worth starting by going through that really because people took time to make public comments and I think it's entirely appropriate that we should do them the respect of spending some time to focus on what it is that they've told us.

With your support, Mr. Chairman, I would propose to walk through this analysis. It may not be perfect. Certainly the headings that I've used are my own and are not the words of the individual commenters. But what I've tried to do is boil down the essence of the arguments and recommendations being made by the commenters into categories. When we put this out for public comment it was just, "Please send us any comments," with nothing really very specific in terms of questions and I've tried to turn this into multiple choice results by picking out the options out of the comments that have been raised themselves by the respondents.

DAVID MCAULEY: Malcolm, can I interrupt just for a moment?

MALCOLM HUTTY: Yes. Go ahead.

DAVID MCAULEY: Kavouss has his hand raised, so my question to you, Malcolm, would be would you like to manage the queue while you're speaking or would you like me to do that?

MALCOLM HUTTY: That's a very good question. Let's take Kavouss's point first because I think I saw him on the mailing list first and I think he had a question about whether we should even be going through these public comments like this. So why don't we take Kavouss now, and then afterwards if we do then carry on to go through this paper, perhaps you would manage the queue while I speak to it.

DAVID MCAULEY: Thank you, Malcolm. And in managing the queue, once I get it I will try to bring up any hands that are raised at a good moment. So thank you and Kavouss, go ahead.

KAVOUSS ARASTEH: Yes. Thank you, Malcolm. And thanks, everybody. My question is that when we start to review the responses at the beginning of the time we received, in the middle of the period, or at the end of the deadline we have started to review the reply received. Because [it] is said earlier, that will give rise to some misunderstanding of the situation. My question is this, and the second question is that all of these things that was put to public comment was agreed in the CCWG with a number of participants starting from 28 up to 45. Now, if we receive a comment of five persons, then that was not correct and proposing differently does this five response override the decision of 45 or not? Because I truly agree with the public comments. I have full respect for the public comments. But those people attending CCWG are also member of the public.

So we cannot be subordinated by very few [or] in number of the replies received. This is a shortcoming in the entire ICANN public comment. We have to have something quite clear. But not because of a very, little amount or less number of the people opposing to what was agreed by the greater number. We abandon what we have agreed and yield to the minority giving the comment and that is a problem. Because I look at some of these statistics and I have problems – 45 people agreed for something and eight people disagreed with that. What we do? We override the 45 people decision by this eight people without listening to the debate?

Why with just 45 [inaudible] for instance or why with just 12 months? There were many, many, many, discussions and all of a sudden somebody from the [inaudible] come, "No, I don't want 45. I [inaudible]." This is correct? This is a good way to proceed? Just answer [Inaudible]. Thank you.

MALCOLM HUTTY: David, do you want to answer or shall I?

DAVID MCAULEY: I will make a brief statement and then If you would please speak to the specifics, Malcolm. And let me apologize to Kavouss a little bit. I have a not so great connection but I did read Kavouss's mail and I do believe I heard most of the comment.

Let me just note that with respect to timing, our Counsel have indicated that we do have a timing issue that we need to address. And then I

would say that what we're involved in here is addressing comments that the public made. And I think that we need to go through the comments. I think that's exactly what you are doing, what you were in the process of doing, Malcolm, with respect to the timing of the claims. And I think that once we have these discussions on the phone, we will in all likelihood end up coming back out to the list and saying, "As a result of these discussions, here is where we" – that is, the leader of this particular issue – "believe that the IRP IOT team should fall." So I have a feeling that we'll wrap this up on the list and so I would encourage you, Kavouss, to join the list and restate what your concern is but I do think it's an important exercise to go through these comments and that Malcolm is on the right track.

That's my comment. Malcolm, back to you.

MALCOLM HUTTY: Thank you, David. I would also add that my understanding of the procedure varies from Kavouss's. Kavouss just said that the CCWG as a whole had agreed these Rules of Procedure. Now I'm not sure that that's whether his understanding or mine is the accurate one, but my understanding was that that had not happened, that the CCWG had simply agreed to put these draft Rules of Procedure out for public comment but had not settled on approving these Rules of Procedure yet and that it was actually absolutely envisaged that this review of the public comment would happen and that our recommendation would be required to the CCWG before it would decide how to proceed if at all.

So having said that, I do think that we should go through the comments that have been received and I've tried to provide some structure to this. I've tried to separate these out into the different issues that were covered because there were multiple issues that were said. Some of them are arguments that are being raised in support of a particular position. There were some clear recommendations in some of them. But it is worth picking through.

What we can see, I think, one reason why I think this is particularly worth doing is that when you compare the people who have made particular points, it is not always the same people making the same points or the same groups of people agreeing on the same points. But actually you have a kaleidoscope. While you have a degree of commonality on some issues, the arguments that are being put by persons #1 and #2 on one issue will not be #1 and #2 saying the same thing on the next issue. It'll be #1 and #3 or #1 and #5 on the next issues. That I think in itself shows that people gave real thought and independent thought to this issue before submitting the comments they did.

So working through them – the first question: "Support for the proposal that there should be a 45-day deadline." How much support did we see in the public comments? In here I would draw attention to ALAC. ALAC stated that, "They specifically recognized the effort put in drafting an updated set of procedures that address the delicate balance between due process and expedited resolution times that will help provide both certainty and [solarity] to applicants in the IRP processes."

I would read that comment as being a general statement that ALAC is content with our proposal as a whole. It is not a specific support for the 45 days in particular, but I think it's content with it. That comment stands out because it is the closest I could find in any of the comments submitted to anyone expressing support for the 45-day deadline.

There was also support from Mr. Richard Hill for the principle of a fixed time bar. I think this is something that Greg has referred to as the "Principle of Repose" – not a term I was previously familiar with – but the idea that after 12 months after the action, there must be a hard cut-off. Richard Hill wrote in with a support in principle for that. He was the only person that did.

Moving on –

DAVID MCAULEY: Before you move to the next one, Kavouss has his hand raised.

MALCOLM HUTTY: Kavouss, come in please.

KAVOUSS ARASTEH: Yes. No problem. My first question was not answered and I'm not convinced of what Malcolm said but I don't want to raise it now. I will [inaudible] heavily to.

My question is that, suppose that CCWG agreed with each [stage] less than 45 days. You put in a public comment and we have five replies

saying that 400 days but not 45 days. What we do? Do we agree with that? [Inaudible] public comments?

MALCOLM HUTTY: Well, Kavouss, as the process as I understand it, the very fact of having public comments sends a clear signal that we are supposed to consider that and take into account what is said. If what you are concerned about is the notion of counting heads or simply just saying, "There was only one that said this and it was seven that said the opposite," I don't think that should be decisive. But for myself, I think we should take it into account. But whether we should give greater emphasis to the arguments that have been put by the people that made the points rather than simply counting noses, and that is why I put out this analysis here to attempt to assist us in giving greater attention to what people have said rather than just simply doing a tally. So in that sense, I'm suggesting the same as you, Kavouss.

DAVID MCAULEY: Malcolm, I also want to mention one reply to Kavouss, and that is the IRP IOT is a creation of Bylaw Section 4-4.3 specifically – and so in that respect, our work is going to be managed by that Bylaw. And so we're not reporting back to the CCWG in that sense. Basically the Board is going to approve the rules or not after public consultation. So it's not quite like in Article 27 of the Bylaws. We're not quite like Work Stream 2. And I think that's important to keep in mind. Anyway, enough said.

Back to you, Malcolm. Thank you.

MALCOLM HUTTY: Thank you, David.

KAVOUSS ARASTEH: I didn't ask for counting the heads. I said that if the time is 45 days and the reply are 450 days, is that [inaudible] present to the Board? This is a practical approach? Because 450 days have a lot of difficulty. There was some logic why we selected 45 or 50 but not 180. It's far from that.

MALCOLM HUTTY: Kavouss, that is something that we will have to consider, how we proceed on the basis of this. But I have actually suggested that the first step in that is to understand what it is that the public comment has said and so if you would kindly bear with me while we conduct this analysis, then we will have to decide as a group how to proceed.

KAVOUSS ARASTEH: [Inaudible] if you allow me to finish my sentence then [come in]. Nevertheless, [inaudible] my intervention. No problem. Go ahead, please.

MALCOLM HUTTY: Okay. Of those that said 45 days is too short, there were eight of them and the kinds of numbers that were put out then, there were put out, three of them – AFNIC, Auerback, and NCSG – had said 108 days. That's six months. Two of them – INTA, a Trade Association, and Richard Hill

had said 90 days. The Registry Stakeholder Group I think that was, said, "Eliminate it altogether." And ISPCP, .music, and LINX just said, "It's too short."

Additionally – and this goes to the reasoning – three respondents specifically picked out the claim that 45 days would be – I used the word "biased" – that's my word rather than theirs, but it would certainly affect different types of participants differently and therefore would be unfair to some, in the views of those commenters. NCSG specifically said, I remember, that non-contracted parties would have a harder time of complying with 45 days than contracted parties would.

Then we move on to the question of this issue of "repose." "Should we have a fixed limit of 12 months or some other period that does not relate to the knowledge of the impact but relates only to the time after the action that is being complained about and happened?" And you'll remember that this is specifically the thing that Sidley has warned is problematic in terms of conflicting with the requirements of the Bylaws.

There was seven respondents that said specifically and in very clear terms that they thought that this was wrong in principle. They were Sullivan, Rosenzweig, the CCG from Delhi, NCSG, .music, the Business Constituency, and LINX. There was a lot of additional reasoning offered in support of the contention that this is wrong in principle. I've tried to pull those out so that we can understand that better, and the main arguments being raised were firstly that it would undermine the effectiveness of the IRP at ensuring them mission limits restriction upon ICANN . Those points made by Rosenzweig, NCSG, and LINX, and LINX gave an extended example of how that might happen.

Another one was – and slightly related there – the argument that, "There should be no deadline if ICANN violates its core principles," and Auerbach raised that point as well as LINX.

Then there was the argument that if something conflicts with the Bylaws, every valid complaint should be heard. That was one raised by Rosenzweig, CCG Delhi, and LINX.

Then possibly the largest point that was made – most popular point raised – was the idea that this fixed limit would not align with the actual reality of how long ICANN policy processes take, that they take years to come to fruition and therefore it might not be possible to bring such a challenge to them within 12 months because the process itself takes much longer than that. That argument was [raised] by Rosenzweig, by the Non-Commercial Stakeholders Group, by [ISPCP], by the Business Constituency, by CCG Delhi, by INTA, by .music, and by LINX.

There were suggestions offered as to how to resolve that. Richard Hill appeared and NCSG clearly stated that they would recommend differentiating between policy type issues and administrative issues. So if ICANN makes merely an administrative issue, then having a fixed deadline would be acceptable but on a policy question where there could be a challenge that this was fundamentally against the core values of ICANN or outside its mission, then they wouldn't want to see any kind of limit to that at all. That was argued for by NCSG and I think it was argued for by Hill, although another statement in a separate submission by Hill appeared to contradict that.

And then there was also a distinction not between policy and administrative decisions but between policy and facially invalid decisions, and that distinction was offered by the Business Constituency and was also offered by CCG Delhi.

The NCSG also argued that the 12 months, again, would differentially affect different types of IRP claimants and that this would unfairly impact non-contracted parties who would be less able to access it than contracted parties.

Those were the main arguments as to why the repose should be removed altogether as being wrong in principle. There were others that said that 12 months is too short, that either in the alternative wished it removed altogether but if it's not removed altogether, wants it to be longer, or didn't say that they wished it removed altogether but did say that it was too short. Auerbach, Rosenzweig, INTA, the Registry Stakeholder Group, and the Business constituency, all said that. So there you see INTA that recommended a two-year period did not disagree, was not listed amongst those that disagreed with in principle, whereas the Business constituency did disagree with it in principle but offered an new alternative if that's not acceptable [or] it should be three years in their view.

Those were the main points of major principle. There were then some supplementary points that were made on more points of detail.

DAVID MCAULEY: May I interrupt a second?

MALCOLM HUTTY: Certainly.

DAVID MCAULEY: Here's my question to you – I think you've gone through the gravamen of the concern with respect to the time periods. My request would be that maybe in a follow-up on the list we could take the ancillary issues up with the group, but the reason I'm concerned is just the time of the call and so I thought we ought to try and get to questions if that's okay with you. And if it is okay, Kavouss has his hand raised.

MALCOLM HUTTY: Okay. In terms of how we would move forward, there was actually one thing that comes up in the ancillary that I would suggest is the first threshold question that we would need to address before deciding how to deal with the gravamen and the main issue, and that's whether or not [inaudible].

DAVID MCAULEY: That sounds fine. Before you bring that up, let's ask Kavouss to take the floor with his question.

MALCOLM HUTTY: Kavouss.

KAVOUSS ARASTEH: Yes. With respect to what time later on we agree at the level of this group and [inaudible], I want to say I have never heard any process without any time limit. [Inaudible] process, you have to prepare your tax [inaudible] you have to pay your taxes, regulations, so on so forth. So those people think that remove the time they are not logical persons. We need to have time. What time would be a good one? This is something we could discuss but we could eliminate as a possibility that removing all the time limits.

That doesn't work. This is something that at least we have to agree before going to the process. Otherwise, we come to the issue that somebody wants no time limit and the lower part, no time limit and upper part, that be a total disappointment. So we need to have a time.

What would be the correct time? After the comment received, full comment received, that is something we should discuss, but we could eliminate the exclusions of no time at all. Thank you.

MALCOLM HUTTY: Okay. That's slightly pre-empting the threshold question that I was going to raise that two of the constituencies had put in – the Business Constituency and the ISPCP – had both recommended that actually we have a moratorium on this. Not that we necessarily never have a time limit on this, but that from a process point of view that we go ahead with updated supplementary procedures for the time being without any new time limit added, and then review the impact and study the impact and study the issue over a longer period rather than doing it at this time.

The BC does argue that there is no time threshold at the moment and therefore this is a novelty and there is therefore no urgency about introducing it. Actually, I'm not entirely sure that they are correct that there is no threshold at the moment but there we are. But that was what they argued. If we were to go with that, I wondered how we would do so. And it struck me that there were multiple options.

One, which Kavouss would clearly dismiss immediately from what he has just said, would be to simply say, "There shall be no time period," and that would be our recommendation. It struck me that there was another way of implementing this that we could consider, which is to remove any explicit and numerical time bar but instead to say that it will be within the discretion of the IRP to strike out any claim for being too late if, in their opinion, it was so late that a fair hearing could not be achieved and that the IRP's purpose could not be successfully delivered. That would be a second option.

The third and final option I would suggest is that we say, "No, we would not do a moratorium," and that instead we would have to construct a revised time bar that is consistent with the Bylaws as a minimum requirement and that we can defend as being the appropriate threshold in reply to the issues that have been raised by the public comments. That may mean conforming to the public comments' opinions or if we disagree with them, that we can say why we have done so in a way that is convincing – because it's not going to be us that decide whether or not these procedures go ahead. It will be firstly the CCWG and then ultimately the Board – and anything that we say will have to have a convincing explanation as to why we have done it.

So the third option I think would be about constructing that. But I would suggest, David, that the first threshold question we need to decide is whether the group agrees with the Business Constituency that actually this should be put off until a much later date for more detailed study or takes the view that Kavouss does that that needs to be taken off the table immediately and that we go ahead with constructing something that is Bylaws compatible.

DAVID MCAULEY: Thank you, Malcolm. There are two hands – Becky first and then I raised my hand because I want to speak as a participant rather than the lead.

Becky, the floor is yours.

BECKY BURR: Thanks. I have a question here because I want to make sure we understand what we're talking about. When you're talking about that there should be no time period, are we talking about repose or a period of time within which you must file?

I think that Kavouss, in my experience, is correct that there is always some outer limit that starts at the time you either know or should know how something is going to affect you. You have a period of three years, two years, whatever the statute of limitations is. So I just want to make sure I understand what we're talking about. Are we talking about the period of time to file after you know or should have known how you're going to be affected or are we talking about the outer repose – "You must file within 12 months of the event" – or something?

MALCOLM HUTTY: Thank you, Becky. Remember this is not my proposal. This is responding to the inputs raised and I was picking out something that I thought was a threshold issue first. And it's the Business Constituency – and I will read to you their paragraph on this. And they boldened it to make sure we didn't miss it. And they say:

"In the light of these concerns, the Business Constituency recommends that the IRP IOT impose a moratorium on imposing any time limits related to bringing forth an IRP until further studies can be conducted by the ICANN community to assess the potential impacts of such time limits."

That's why I say this is a threshold issue. So I don't think that's just about the repose. I think that recommendation is that we should have a moratorium on anything and a study period and further study of the impact. Whether or not we accept that recommendation is a separate matter, but I think that they are speaking there not only to repose but to the whole thing. And really we need to decide whether or not we accept that. If we accept that, then we can stop. If we don't accept that, then fine. We can put that aside and say, "Right. Well we've disposed of that."

DAVID MCAULEY: Thanks, Malcolm. I'm next and I'm speaking as a participant here, and I have a comment and a question. The comment is, I would personally be opposed to the idea that the Business Constituency is making here. And I think we are engaged in this timing issue and a really difficult balancing

act of trying to make sure that a claimant has a fair chance to bring a claim and that ICANN is protected from constant exposure to old, stale, claims, whatever it might be. I'm not sure I'm using the right terminology. But I think that a time limit which typically ensues in courts and arbitration is a fair thing and we ought to try and nail this down.

My question to you is – and I know there's a lot of comments and there's a lot of words and all, but can we cut through this Gordian knot perhaps by just saying whatever time period we're speaking of – it could be 45 days, it could be one year – whatever we settle on, whatever that number is, that if somebody brings a claim within that time of the time that ICANN took the action or the time from that action causing harm to the claimant, wouldn't we solve this problem perhaps maybe if need be in conjunction with your suggestion that the Panel would have discretion to allow an out of time claim if fundamental fairness required it? Wouldn't that cut through all of this? That was my question. Thank you.

MALCOLM HUTTY: I need to understand more clearly your proposal, David. Are you saying the later of those two periods, the earlier of those two periods? What exactly are you proposing?

DAVID MCAULEY: Both of them. In other words, a rule that would say a claimant must bring a claim within X number of days of ICANN taking the action, or that same number of days within which the claimant should have

known of the harm that was caused to him – whichever of those dates is later.

MALCOLM HUTTY: Whichever of those dates is later. Okay.

DAVID MCAULEY: Yes. And then maybe having a paragraph saying the Panel could in extraordinary circumstances dispense with the time limitation if justice or fundamental fairness required it. That's basically what I'm suggesting. Would that cut through this?

MALCOLM HUTTY: It would cut through a very large proportion of it. By saying, "whichever is the later," you would satisfy the opposition on the grounds that the 12 months' repose is wrong in principle if the period after knowledge comes later than that then it would still be valid. So that would satisfy all of that and would deal with a very large bulk of it. It wouldn't deal with everything. We'd still have to deal with the issue of picking exactly how many days – is it 45 days, 180 days, whatever. You would also have to consider whether even that 12 month figure was the right number. There is in particular the NCSG keeps coming back to the same point that the number, as well as being wrong in principle in their view, is biased in that it is harder for a non-contracted party to adhere to than a contracted party. And we'd have to decide whether we accept that comment. And if we do, then pick an alternative number or maybe we don't accept it in which case we [deal with] it.

So there would still be that that would need to be considered. But if we did what you said, we would certainly have cut out a big and thorny part of it which is this issue of repose which has got most of the opposition and which is opposed by Sidley.

DAVID MCAULEY: Thank you, Malcolm Next hand up is Kavouss. Malcom, after Kavouss's question, could you summarize it please? I'm having a very hard time. I think it's my connection. I'm getting much of what Kavouss says but not necessarily all.

Kavouss, you have the floor.

KAVOUSS ARASTEH: David, I am not in favor of your proposal as supported by Malcolm. What you are saying we would have a starting point deadline and then if somebody bring a claim and that deadline was [hard] to him or her, then the Panel will decide to extend that. That is not correct. I am opposing to that process. What I can do – at least suggest that – I take the approach proposed by Business Constituency but in the reverse direction. We go ahead with whatever time limit that we establish – whether 45 or 60, even lower, 12 months or 18 months in the higher – put it into the trial test of three years. If something comes and show that there is deficiency, we review that after some time.

But you have to start on something. You could not start on moratorium for years and then come [apart] some things that may cause problems for the people that would have difficulty [cases] to come to the Panel

within the three years. So I don't think that neither your proposal nor the BC proposal is acceptable. This is totally negating what we have done during the [months] of the first Work Stream. So we have to have some time limit. Whatever time limit we could agree based on initial proposal and comment received. But no public comment or moratorium public comment or what you say, provisional deadline and then correct it by the Panel according to the claim of the people is not working. It's impractical. I cannot agree with that. Thank you.

DAVID MCAULEY: Thank you very much, Kavouss. I could hear that. So back to you now.

MALCOLM HUTTY: You could hear that. Okay. The only thing I would add to that is that the last part of Kavouss's recommendation that whatever we do should be subject to a review after a defined period to see whether it's working or not was also one of the ancillary points that was made. It was made by ALAC.

I think the group as a whole have to take a view here. David's proposal would be welcomed by the great bulk of those that replied to the public comments insofar as it would be welcomed by them. It would certainly simplify how we go forward. The difficulty that I see with going forward with what we have at the moment as Kavouss suggests, apart from the fact that we clearly have substantial and well-reasoned opposition to it from a number of parties, is the opposition from Sidley. Sidley warn us that this is inconsistent with the Bylaws. So I think we could expect that if we do go ahead with this, It will not be accepted at a later stage in the

process, whether the CCWG doesn't accept it in the face of the legal advice to the contrary or maybe the Board would say that they couldn't accept it given that it's been advised as being incompatible with the Bylaws.

I think we would have to do something to that, and so I respectfully disagree with Kavouss's recommendation on that. But I note that there's – and I don't think this should be just me, David, and Kavouss – I would be very keen to hear others.

I see that Becky is speaking in the chat: "I would be willing to dispense with an absolute repose but very uncomfortable without the statute of limitations commencing from a, 'knows,' or, 'should have known,' standard. Six months from the time you know or should have known that you have/will be harmed plus David's 'fundamental fairness' caveat." Becky seems to be therefore clarifying and really supporting David's proposed way forward.

When I say that I think that this would deal with most of the comments in the chat, I'm trying to act neutrally as Chair in that, but certainly it's clear that my comments were included in that and I would be comfortable with that as a way forward as well. I think that would provide a good way forward for myself.

Who else is on the call that hasn't given a view yet? Can we have some more views from anyone that hasn't –

DAVID MCAULEY: Malcolm, I will keep my eye out for hands up in response to your request, but another way I think we can wrap this – because I would like to tee up the next issue – another way to wrap this is, we inevitably will have to work on the list. And so my request to you will be that you come out on list and summarize the discussion whenever you can and summarize the discussion and invite people to comment on the list, including ICANN Legal and Jones Day- I know we have reps from both on the call – so please feel free to weigh in, and ask people to comment on the list and then we'll go from there. And I think that we will inevitably have to work on the list as well. So does that sound like a fair way to wrap this up?

MALCOLM HUTTY: That sounds great.

DAVID MCAULEY: And Malcolm, personally I'm happy to work with you on trying to come up with a format so that we might come up with a format that speaks to instigating discussion and allowing folks to know that we're moving towards resolution here. So I'll be in touch with you the next day or so to try to figure out how we might be able to do that.

MALCOLM HUTTY: Yes. And I just briefly note, Becky, your comment on the chat has been noted for the minutes and it also is reflected by one of the public comments as well about how it relates to [CEP] I'm trying to pick out…

Yes, it was the Registry Stakeholder Group that made that point as well. So that's duly noted.

DAVID MCAULEY: Thank you very much, Malcolm.

I would like to move on to the next substantive discussion which deals with parties and joinder and consolidation, those kinds of matters. I have volunteered to take that up, take the leads on that particular issue and I believe that everybody on the list has seen some materials that I sent forward earlier this week.

Bernie just reminded us that we're running out of time on this call so I would like to tee this issue up and then what I intend to do is come out on the list just like I asked Malcolm to, to re-tee up this discussion and ask for input and try and move this forward.

I used the comments by Fletcher to act as a catalyst for what I was going to say, and I'll get to that in just a minute, but there are two hands up. So first Kavouss, you have the floor. I'm asking commenters now to please be brief. Thank you. Kavouss?

KAVOUSS ARASTEH: Thank you. If you adjust the time I have no problem. But if you have new approach, that should go again to public comment. [If you are talking] new approach [inaudible] it should go to the public comment because [inaudible] the time. [Inaudible] or combine two process. I know my [inaudible] it would work successfully until [inaudible] matter. But I am not in favor of doing something totally brand new. Thank you.

DAVID MCAULEY: Thank you, Kavouss. Liz, you have the floor.

LIZ LE: hi David. Yes, I missed the comment, the proposal that you made. Is it possible for you to put that in writing in the chat on the proposal about timing?

DAVID MCAULEY: I'm not sure I follow, Liz. Could you state that one more time?

LIZ LE: I stepped away and I think you made a proposal about timing on the issue of time bar, and I'm wondering if you can put that in writing in the chat?

DAVID MCAULEY: Yes. I probably won't be able to put it in chat during this call, but the suggestion I just made to Malcolm in the discussion I will try and recapture or actually Malcolm will probably do it in his summary. But if it's inadequate, I will make sure it gets on the list.

MALCOLM HUTTY: Right now, though, Becky's made something in the chat that I think summarizes what David's point is, so I think if you read what Becky Burr [2], the comments from 13:42 onwards I think that is what David

suggested. So you can see it now and we will confirm that on the mailing list.

DAVID MCAULEY: Thank you, Malcolm. Liz, I take it… Will that address what you want?

LIZ LE: Yes. Thank you.

DAVID MCAULEY: Thank you very much.

Getting back to the joinder issue, let me just speak to it. We really don't need to put it on the screen right now. I'm using Fletcher as a catalyst – they're certainly not the only part that talked about joinder and parties – for instance, the Non-Commercial Stakeholders Group made a similar comment. But Fletcher basically pointed to the fact that the Applicant Guidebook from the 2012 round of new gTLDs basically did not provide an appeal to people who lost before an expert panel. Those were the panels that heard legal rights objections, string confusion objections, and community objections. But now the Bylaw explicitly says that expert panel decisions can be brought to IRP.

And so Fletcher is making the point that we in the rules need to be clearer and explicit about parties who won before the expert panel, therefore they're not likely to bring a claim. Parties that lost are likely to bring a claim. And in doing that, Fletcher's question is – what about the parties that won? How are they going to be heard?

And so while we're in this particular call reaching the top of the hour I can't get into detail. I will in the list. That's really the issue, and I think they raised an important issue. Before I say more, Liz, you have your hand again so let me ask you to take the floor.

LIZ LE: I'm sorry. That's an old hand.

DAVID MCAULEY: I'm sorry.

So Fletcher suggested three safeguards: 1) that we should have a rule that provides actual notice to all the original parties before the expert panel, 2) that we should provide a mandatory right to intervene to all the parties – they can decline it but they would have a right to do it, and 3) require the IRP panel to hear from everybody that was involved below before they give any interim relief.

Frankly, I think these are sensible provisions. They gave us draft language. I've gone through it. Some of it doesn't match up quite to the Bylaws, and so my intent is to take this issue along with challenges to consensus policy – which I sort of joined because Fletcher joined them – and I'm going to come to the list, much like Malcolm is going to do. Malcolm's coming to the list in the next week or so will be a summary of our discussion. Mine will have to be more because we haven't had a chance to discuss this yet. But it will recognize that we are in a time crunch and we have to have a hybrid way of operating, taking some issues up on the phone and taking other issues up on the list. And so I'm

looking forward to doing that but now that we have a minute left let me wrap that and ask if anybody has any other business to bring up on this call. I don't see any hands… Kavouss, you have a hand up. You have the floor.

KAVOUSS ARASTEH: David, at this last moment, you propose a revolutionary action saying that those who have lost the case bring it back to the IRP. This would result in sort of instability in the entire process. [Inaudible] someone wins, someone lost. I'm finished. And now from 2012 in 2017 you [want] that the people they lost bring back the case. What to do with that? Why we have to do that? Why there is such a retroactive application? I'm not in favor of all of these new things that you propose. There is no logic behind that. Maybe you have mobilized two people to agree with you, but I'm one that is opposing to that. It is not legitimate that if somebody lost bring, back the case. This is instability in the whole process. Somebody win and somebody may go ahead with the project and now all of a sudden you bring it back to the IRP and then that would reverse the decision so what happened to that investment? What happened to that process? This is totally de-stability of the whole process. Please kindly be careful what you're proposing. Thank you.

DAVID MCAULEY: Thank you, Kavouss. We have to wrap but just a brief response. The Bylaw Section 4.3N requires that the Rules of Procedure ensure fundamental fairness and due process. And then it says, "Shall at a minimum address the following elements." One of those is issues

relating to joinder intervention. I actually think we're within the scope of what we need to do but I take your point and will mention it in my summary and trying to move this issue forward.

We are out of time and I want to respect everybody's time. So I will say thank you to everybody. Thanks especially to Malcolm for leading us on the timing issue, and thank you to all for participating. Please look for action items on the list and please engage on the list. And I hope everyone has a good day and thank you all for participating.

That's the end of this call. Thanks very much.

[END OF TRANSCRIPTION]