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IRP IoT meeting.

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April 27, 2017.

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IRP IoT meeting.

(beeps).

>> Hello, it's David McAuley speaking. It's top of the hour. 3:00. Very small group. My fond hope is that we don't cancel today. I'm going to say why don't we give it two minutes, and maybe even three minutes for folks to gather. I'll come back on two minutes after and see where we are. Thank you for your patience. (Beep).

>> Hi, everyone. Sam is here.

>> DAVID McAULEY: Thanks, Sam. I'll be starting in a

minute. (pause).

Hi, everyone, it's now two minutes past the hour. I said maybe we would wait until three minutes past. I'd like to do that. So I will -- oops, never mind. It's three minutes past the hour. We have enough to press on, at least for a while. Let me explain what I mean by that.

I see Robin joined us, thank you. We are still a very small group. Excuse me. While that is disappointing I think we can go on and make some progress. We have scheduled thanks to Bernie for accommodating my request, we have scheduled this call for 90 minutes. I doubt that will happen with a group this size.

But I would like to press on, along the course of the agenda. We have enough of us of participants, Kate with Jones, Day, Kate Wallace doesn't really qualify for the quorum issue, and we spoke about that last week. We don't mean that any disrespectful way. But nonetheless I think we have enough to go forward.

Let's press on. I would like to ask if the recording be started. My apologies for forgetting that.

>> This meeting is now being recorded.

>> For purposes. Recording we have noted there is a small group gathered but we are going to press on with our agenda nonetheless. Let me ask if there is anybody attending by phone or audio who is not in the Adobe room,

if they would make themselves known at this time. Not hearing any, let me ask if there are any participants who are here now that have any changes to their statements of interest, if they would mention that now.

I don't hear any in that respect. Let's move on. Prior to getting to agenda item number 2, I wanted to note we are a small group. I'm grateful to those who have gathered. I doubt we will fill up the 90 minutes we have because of our size but let's press on and see what we can accomplish. Then I'll try and take stock on the list and encourage us to step up our efforts in attendance.

I would like to move to the agenda item number 2, this is a brief reminder, it is my hope that we will meet our May deadline. To do that, we have a lot to do in the coming month.

It's also worth noting again that we are a diverse international group, and it's my fond hope that we will be in this period and at all other times particularly mindful that we not be disrespectful or take positions that are critical of others or state our positions in a voice that would chill anyone that wishes to participate in the group.

I believe that we are and will remain a civil and generous group. That is my hope, it's a general reminder. I see Kavouss's hand is up. Before we move on I give the floor to Kavouss. You have the floor. If you are

speaking, we can't hear you.

>> [inaudible]

>> I can hear you now faintly.

>> Yes, thank you very much. I think we are just on the limit. So I don't see that we should have meeting for 90 minutes. [inaudible] 60 minutes, one hour, with the hope that we make sufficient [inaudible] for the next meeting to have more than five [inaudible]

(audio is very muffled).

I don't think that this should continue for 90 minutes. I suggest we limit to one hour.

>> DAVID McAULEY: Thank you for that. That is a wise observation. Frankly I think we will not be able to fill up 90 minutes. I think that we probably won't fill up 60 minutes. I think it's a good point. Thank you for that.

Now, let me move, excuse me, let me move on to agenda item number 3. This has to do with the subject we have had a lot of discussion about, a very important topic, and that is the timing issue. We have made great progress, we solved many things but there still is that nagging issue of repose that has not been solved. My hope and my attempt to set up this discussion is not that we revisit ground that we have already plowed but that we give Malcolm and Sam another opportunity to, not to make the points that necessarily that they made, but to sum up what they believe

the position should be, and in that respect, I have, I believe off list made two suggestions to our small group that has been discussing this.

One of the suggestions I may have shared with the group and that is could we let the issue of repose exist as Malcolm suggests, but put a cost element against claimants who bring what we would call late claims under the Sam approach, if they lose the claim to pay ICANN's legal cost. That is one thing. The other thing I asked separately more recently was, would it be a viable solution to consider actions of registrars and registries pursuant to policy, if they took an action pursuant to policy to consider that an ICANN action or inaction, strictly for the purposes of the timing, not for any other purpose in the ICANN community.

Those are suggestions I put out there. I don't know if they will dislodge things or help. I would like to turn to Sam and Malcolm to see if they have any further thoughts to add in five, six, 7 minutes, something like that, and along those lines I'll give the floor first to Sam. I see your hand, Kavouss. I'll talk about that in a minute. First to Sam, and if my memory serves me correctly, Sam, I thought that you said you may make a proposal on timing. I'll ask if that is the case, maybe I missed that, I don't think so, so I would ask if there is a proposal coming, before we talk, before I give you the floor, Sam, Kavouss, is that a

new or old hand? If you are speaking, we can't hear you. Kavouss, we still can't hear you. I'm going to give the floor to Sam to kick off this timing discussion. Sam, if you would.

>> SAMANTHA EISNER: Thanks, David, this is Sam Eisner from ICANN legal. One of the things we are working on isn't necessarily a proposal, but coming out of the meeting that you facilitated between Malcolm and myself and other members from ICANN legal, was a commitment from ICANN that we are working on to basically stress test out some of the examples that have been given particularly the examples within the links, public comment regarding the repose issue and the genesis for requesting that there not be any proposed because it's important to make sure we are discussing the same issues. One of the senses that I think we all reached on the call was that maybe we weren't talking about the same things, and so we are working on some kind of putting them out on a bit of a time line, and stress testing out some of the examples, because one of the things that Malcolm had asked for is what is the issue, even if we had a ten year, challenge ten years later, what is the issue with that?

We are trying to put some meat around a response to that question, and also give a little bit more common points for us to look at and discuss, to make sure that we are talking

about the same thing. To that end, if people on this call or if those from the constituencies that you work in and are representing on this group have other examples that you think are important to consider, either to support an reposed or to support not having repose, I think those would be helpful to have on the table.

I think it's important to understand the range of concerns around the issue of whether or not there is an outside limit on the timing to challenge an action or not through the IRP. This isn't about ultimately being able to get, if ICANN violated a law that you need compensation for, etcetera, that is a different issue. That is a court issue.

It's not, we want to make sure that we are really talking about the right issues as we are reaching a collective decision within the IoT to put out for the rules that is based in facts and example and common understanding.

We still need a little bit of time to work on this from our side. I would imagine within probably two weeks, we can have something back. It's something we have been working on, and we just need a little more time. If people do have other inputs, please let us know.

>> DAVID McAULEY: Okay.

>> SAMANTHA EISNER: If anyone else wants to stress test

too, that would be a helpful thing too. It doesn't just have to be ICANN doing that.

>> DAVID McAULEY: Sam, thanks. David here. I'm going to give the floor to Malcolm if he wants it in a minute. But let me react to what you said. What you say makes sense. I have a feeling that for us to solve the timing issue won't necessarily involve a great deal of time on our part, because the arguments have been made. They have been out there on the list and in the calls. Bringing it to closure is what we are talking about now.

I would encourage you, let me back up and say we have a May 29 deadline that I would like to meet. My encouragement to you would be, if there is any way you can shorten the two week period that you spoke about, please do. Please give every effort to that.

With respect to a question about stress testing, it seems to me that you might be able to put that request on the IoT list, and then people can share it separate from what you are going to be saying in this, when you finish your thoughts on this thing generally.

I would encourage to you take that early step and say if anybody has ideas on stress testing the idea of repose, lease let us know. We are in the process of thinking this through, I encourage you to do that -- please let us know. Anything to move this forward fairly quickly.

That being said, I'm going to give the floor to Malcolm if he wishes. He made a comment in chat. I'll go back to Kavouss to see if his hand is old or new. Malcolm, do you want to make a statement? Do you want the floor?

>> MALCOLM HUTTY: Yes, thank you, David.

I'll keep this brief. We have achieved a compromise on the timing issue, we set it on 128 days, the 120 days, from when the claimant knew or ought reasonably to have known they have been harmed. There is a time. There is no question that we are having no time limit, that is the time limit that we have agreed. The only issue on the table now is whether we should also set an outer limit that would strike out claims if the, even though the claimant did not know and could not reasonably have known that they have been harmed at the time that the clock starts running.

That is the only thing that we are considering. I think the answer to that must clearly be no both for reasons of policy and because the bylaws point so clearly in the direction of saying the claims should be heard. The purpose of the IRP is to ensure that ICANN is held to account and to ensure that people do bring disputes to be resolved, and not that they are left festering unresolved.

So I think the arguments been made very fully and I think we should just draw a line under this now and settle on the language that we have agreed, 128 days, for when the

claimant knew or ought reasonably to have known.

If Sam wishes another two weeks to stress test, well, I mean in a sense I feel you should always give more time just in case there is something that somebody could come up with but if they have the come up with it now at this stage, this amount of time, I find it easy to disbelieve there is a problem with this. Now is the time to draw the line and to do that.

>> DAVID McAULEY: Thank you, Malcolm. I appreciate your point. I'm not sure I agree. I think that we should ask Sam to, it was my word proposal, whatever it is, further thoughts, proposal, whatever it is, is to say come to the list with it, hopefully earlier than two weeks, two weeks is a very long time right now. I think that would serve us all.

My expectation would be then we can move this forward on the list. By the way, we have Malcolm's thoughts, Sam and Liz's thoughts, we have the Sidley memo, Jones, Day input, and recent comment by Greg Shatan. I encourage us to read these on the list and be ready to move to closure and for call for consensus. Malcolm, thank you, but my preference would be unless this whole group thinks otherwise, is to say to Sam, please deliver this further thought document or list or memo or whatever it is.

>> MALCOLM HUTTY: That's okay with me. That's okay with

me. I don't want to be trying to foreclose Sam from putting in a last ditch effort if she really wants to. What is important is that these things should be fully aired. I hope that when that comes in, we can draw a line on the list.

>> DAVID McAULEY: Good point. Thank you. Kavouss, is that a old hand or new hand? Would you like to speak? We can't hear you last time.

>> KAVOUSS ARASTEH: This is a new hand. I'm not in favor of a stress test. We are [inaudible] with that, we have been sufficiently [inaudible]

(audio is very muffled).

We don't want any more stress test. If I understood well Malcolm, we have more or less agreed on the lower time, we are just talking about the upper time. What is the time beyond which we could not accept anything. I think I agree that we should define all the timing or decide on that. But I'm not in favor of two weeks or three weeks or stress test. 120 days has been agreed, as a compromise, that is that. Now we have to decide the upper limit. Thank you.

>> DAVID McAULEY: Thank you, Kavouss. You make a good point about terminology. We should try and avoid the word stress test, or the word stress test. I think what Sam is getting at is asking if anyone has input on some notion

that they may be putting forward about the impact of this. That is not a unfair question. Let's see what happens. Malcolm has a good point. When this all gets to the list within the next week or two, we should be able to draw a line under it and decide this issue fairly quickly.

So I believe we are done with this issue for today. We can move on to agenda item number 4, which is furthering help for SOs and ACs in the pursuit of getting to establishing a standing panel.

In this respect, I forwarded an E-mail to this list that I had, that Sam and I had been passing back and forth or we had been discussing, Sam and Liz and I. I really present this as a matter of information, basically.

But as you recall, the supporting organizations and advisory committees have a role to play in vetting applicants for standing panel and nominating people to the standing panel. In my opinion, they may not yet be prepared to do this. It was, we sent them a letter a couple months ago. It was news to them that this was coming their way, I think. I advised a number of SOs and ACs in Copenhagen. Again I think it's news. It's in our interest to help them get organized. Sam and I discussed the idea of possibly doing a webinar.

What I'd like to do now is ask Sam if she has any further comments in that respect and ask this group if they

have anything they want to say about this, knowing that in the background, Sam and I are going to be moving forward with trying to generate ideas of what we might do to help the SOs and ACs in this role.

First off, Sam, if you want to make a comment I'll give the floor to you. Then I'll open it to the group.

>> SAMANTHA EISNER: Thanks, David. This is Sam again for the record. As noted in our communication on this, I indicated that I wanted to reach out and coordinate with our policy colleagues here, because they really work more closely with SOs and ACs than I do.

The sense I've gotten back is that clearly, we think we can still move forward with a webinar or, and other items to make sure the information is disseminated. But they are taking a first step which is to reach out to the SOs and ACs to confirm that they actually, to see whether or not it's something that has even been considered.

For example, there is a belief that, and this is a staff perception and it might not be the case, but this is one of the things they want to check, GNSO has recently done work to develop a standing selection group, and so from the GNSO side the staff will talk to them about whether or not that is in fact being considered as part of the way the GNSO would work on this and get a sense of how each group, whether or not they have thought about it, and if they

have, where is their work at now, so that we can then focus on getting the right collective work done about, are there places where the groups need to coordinate with each other, etcetera.

We have kicked off that conversation with our policy colleagues, again with the thought of moving on this fairly quickly, and we will see and we will continue reporting back to IoT here and working with David as we start seeing the content of a webinar come together.

>> DAVID McAULEY: Sam, thanks. David here. I'll make a comment and then I'll ask if anybody else has a further comment. That sounds good. I'm glad you reached out to the policy folks. I'm glad they are in touch.

My only comment or suggestion would be, as they reach out, as they discuss, is that they try and share information among SOs and ACs so it's not silo'd contacts. And thus if the CC SO could find out the GNSO is doing a standing, I forget the term, but it would be good that there is a shared information and shared experience here because they may be able to help each other, and brainstorm ideas, etcetera. That is what we are looking to help with, but if they get on with it themselves, god bless them, that would be great.

Is there anyone else on the call that would like to speak to this, like to make a suggestion or make a comment

about this process? Seeing none, I think that's an implicit sort of enjoinder to Sam and I to move -- yes, Bernie?

>> I did have my hand up.

>> Sorry, Bernie. My screen is a little truncated. I didn't see it. I'm going to ask you to go first and then I see Kavouss has a hand up. Bernie, go ahead.

>> Thank you. I don't know if I've missed it in the various correspondence on this topic, but do we sort of have an expected time line when we expect the SOs and ACs will have to review candidatures and make a selection? Because from what I've seen, I think we have sort of been saying this is coming your way, but we haven't really put an expected schedule around it. There is nothing that helps people understand that they have to get along with something like a schedule, and if I missed it, I'm sorry, but I haven't seen it in the correspondence.

>> DAVID McAULEY: Thanks, Bernie. Let me respond before I call on Kavouss with my understanding. My understanding is there is no end date to this. Bylaws say the SOs and ACs will nominate but there is no date by which language.

The whole process will be kicked off when ICANN releases an expression of interest document. My guess, Sam can correct me if I'm wrong, but my guess is ICANN will release a expression of interest document in the month of May.

That will kick off a process. I imagine ICANN will give people a certain period of time within which to state their interest in being a panelist. And knowing that people of this nature aren't going to throw their resume's into the hat on the idea that they may have to wait a year to find out, I expect that we will develop schedules around the end of the expression of interest, but I invite Sam to comment if she has any comments, and first I have to give the floor to Kavouss. Kavouss, you have the floor.

>> KAVOUSS ARASTEH: Yes, David, I'm very sorry, I apologize to Sam, I understand what you are talking about. I don't [inaudible] I do understand. They sometimes continue after subject, verb, object and so on, so forth, this is a structure of speaking, could you please repeat what Sam said, please? Thank you. I apologized to her before. Thank you.

>> DAVID McAULEY: Thanks, Kavouss. Are you asking me to summarize what Sam said?

>> KAVOUSS ARASTEH: Yes, please, I ask you to summarize what Sam said [inaudible]

(muffled audio).

Because it's [inaudible] she is a good speaker but [inaudible] thank you.

>> DAVID McAULEY: Okay. Well, let me say two things. One is, I don't take notes during a call. I usually go

back and look at the notes and the transcript to help myself. But I'll give a brief summary, then ask Sam if she wants to speak to it. Kavouss, my understanding that Sam was saying that ICANN certainly is willing to work with us, the IoT, basically through Sam on their part and me on our part. But with the whole groups being engaged through us, on taking steps to help SOs and ACs get their arms around this, and Sam and I had correspondence about this and as a consequence of that correspondence, Sam contacted ICANN's policy group, and those ICANN staff members are now in the process of contacting SOs and ACs to get a better understanding of where they are in understanding what their role is.

I'll leave it at that. And ask Sam if she wants to say anything else. And notes to the group, if you have a comment after Sam, please put your hand up, and you can weigh in on this. Sam?

>> SAMANTHA EISNER: Thanks. David, I think you summarized it well. Kavouss, what I was trying to convey is that we are, I'm working with my colleagues here at ICANN and particularly the appropriate colleagues who work directly with the SOs and ACs to make sure that we are not, from the ICANN side, stepping over the work that the community is already doing, in the event that they are already doing it, on coming up with selection processes.

However, we of course are really willing here to help, and willing to facilitate in any way that is needed. We want to do it in a way that is respectful of the SO and AC processes. That is really what I was trying to convey. We will keep working. In terms of the timing, I think David is correct, we will be issuing, we expect to issue the expression of interest within the month of May, prior experience with calls like this, we probably need to have at least a 45-day window to receive input. We can work with the community also on timing, if it's better for us to have some more certainty around the timing, we could do that too.

That is part of the conversation that we can have with the community groups. So we think that we are probably at least a good two to three months out from the community needing to come together to consider any part of the standing panel evaluation process or to actually do the work in it, not to consider how they are going to do it.

>> DAVID McAULEY: Thank you, Sam. Does anybody else want to comment on this aspect of the standing panel business? Bernie has his hand up. My screen is playing tricks on me. Bernie, would you go ahead?

>> Yes, thank you. I certainly appreciate the approach and I think it's the right approach. But also on understanding the timing realities, I think just sort of

trying to match up what David said, once people put their names in this hat, they are not signing up to wait for six months. If we understand the cycle of what happens in the SOs and ACs to get to a point where they can make some decisions about such things, even if they have had, if one or two SOs or ACs are ahead of the game, I don't think a lot of them are, just my personal understanding. And the reality that the month before a policy meeting like we are having in Johannesburg in late June, means that essentially the month before a policy meeting, so we are having late June meeting, so all of June is gone, because the SOs and ACs are basically, go into a cram mode, where they only focus on getting stuff ready for that meeting. Unless that is in the pipeline and part of the things they have to cough up for that face-to-face meeting in Joburg they are not going to have time to think about it in June. That basically means, and I'm trying to be helpful here, just the reality of timing of things is that we have got the month of May to work with the SOs and ACs to sort of understand where they can get, and that's talking about SOs and ACs trying to understand how they are going to do this internally.

It's not even about the fact that SOs and ACs have to come together between them to make a selection. Thank you. (pause).

>> DAVID McAULEY: Bernie, I was speaking to a muted microphone. My apologies. Kavouss, you have the floor.

>> KAVOUSS ARASTEH: Yes. [inaudible] do you have a deadline for SO and ACs not to appoint but just to declare that they have understood the process, because they will proceed with some time line saying that six days after the Johannesburg meeting [inaudible] have to declare that they have well understood the procedures and they are doing that, and need some time line, six days from Johannesburg they reply, did you decide on that or not yet?

>> DAVID McAULEY: Thanks, Kavouss. My hand is up because I'll speak as a participant here. The answer to your question is there is no time line set, I believe. It's something that would be desirable and it's something that we should work for. I think Bernie has made very good points.

This relates to a question that Sam had in the chat, shortly ago, about whether our team is done with the expression of interest document. I think the answer to that is yes although I hope that my comment on one of the calls that we should also ask prospective members why they want to serve as a member should be added as a question, but it leads me to also this discussion, Sam, to say I think that ICANN should move forward and develop the expression of interest but we may want to discuss it as a

group again before it's issued, because Bernie makes good points about the month of June and the timing is, we have to be careful on the timing because we can't invite people to apply for something that they may not be considered for, for several months.

My suggestion would be please develop the EOI and discuss further but let me ask you if you have any thoughts on that, Sam.

>> SAMANTHA EISNER: I guess from our perspective, we have the draft EOI developed and that is what we presented to the group. We will take on, if there are comments, additional comments that we haven't taken on, and we will do that. But I think from our standpoint, the EOI is basically ready to go, pending the IoT's agreement with it or making sure we don't have fundamental changes to make to that document. We are in a position we could put it out at any point. But we also had some really good comments raised here around the fact of we probably need to step back for a second, consider whether or not we as an organization are ready to put that out, even if the document is ready itself, because we probably want to get a bit more handle on the expected timing of when this process will conclude.

>> DAVID McAULEY: Thanks, Sam. That makes sense. It may be worth noting in the EOI to applicants that the

selection process involves the work of a number of organizations that may, it's not the normal hiring practice, but in any event, so I think that the bottom line of this discussion is the EOI is going to be developed, you will show us the copy when it's done, I guess, and before it's released you will talk with your policy folks and we will revisit the issue here on timing, to make sure we don't step on our foot and release something early that might sap the energy of some applicants as they sit and wait to be selected. Is that a fair summary, Sam, as you see it?

>> SAMANTHA EISNER: Yes. So I understood the request is to forecast for the IoT the final EOI once we take on all the comments that may have come through. I haven't been tracking this issue on the list. Liz will be back next week. This one is in her camp. We will get to a final version next week on the EOI because the draft has been developed, the document is pretty ready to go out pending major comments from the IOT. If you want to see a final version before it goes out, that is fine. Then we do have just that other logistic piece of does it make sense to put it out as soon as it's ready, versus should we take some time, talk to the SOs and ACs and get a better sense of time lines so that we can forecast out that time line for applicants to have a more predictable process.

>> DAVID McAULEY: Thanks. Thank you very much.

I think we can now move on to the joinder issue, fifth item on the agenda. With respect to the joinder issue, let me summarize I had put on list a prospective way to treat this. I'll briefly summarize the points I made. They were based on comments that I summarized in that same E-mail from a law firm that Kathy was part of and I believe it was a noncommercial stakeholder group and maybe the IPC. I can't recall everybody that had a hand in it.

But I suggested that all parties to a underlying proceeding get timely notice, and copies of pleadings, etcetera of IRP, that all parties have a right to intervenor mile amicus as they elect -- file. If they become a party they take on the obligations of the party. I suggest all parties have a right to be heard in any petition for interim relief, although whether con could intervene as [inaudible] up to the panel. All parties enjoy equivalent rights as a party. That interested parties could petition the panel to intervene, but that would be up to the panel basically. And that joining parties be given a reasonable period of time within which to react. But the time wouldn't be long based on the fact that they were involved in the lower panel undertaking.

Greg weighed in on that and said he could agree as long as we limit the definition of parties in accordance with

his E-mail. I thought that was reasonable. Then we have comments from Sam. If I could, I'm trying to summarize this, so we can move on. I think as Sam, the points I'll give you a chance to speak to, Sam, but as I read it you were basically saying, what have we do here, as we do it, let us not lose sight of the fact that IRP is meant to decide whether ICANN has violated articles or bylaws and this IRP panel has no business deciding disputes between parties that have nothing to do with ICANN's articles or bylaws -- whatever we do.

I thought this was a very good point.

You asked should the interested parties have to demonstrate harm based on alleged violation. It seems to me that if they were involved we could work on the concept of potential harm, but we have to keep the bylaws and articles in mind as we do all that. But you used the phrase, an appropriate tether to the subject of the IRP which is a important concept. I took your comments on board. I thought they were very well-made comments. What I'm going to suggest we do on joinder, since I've taken the lead on this as a participant, is that I try and stir together in one pot the comments I made, that Greg made and now that Sam has made and come to the list with a proposed solution.

But before I did that, I wanted to ask anybody on the

call if they would have a comment or if they want to speak to this, or encourage us to go in a different direction. The floor is open, if anybody would like to talk to the joinder issue right now.

I don't see any hands. What I will take that to mean. I do now. Kavouss, you have the floor. If you are speaking, we can't hear you, Kavouss.

>> KAVOUSS ARASTEH: Yes, what do you mean by potential harm, because it is, everybody raise a hand saying that I may have potential harm, it is easy that everybody raise a hand.

>> DAVID McAULEY: Good question. Thank you. This joinder issue is in the context, I'm using the example of where someone appeals the decision from an expert panel below, and says the decision of the expert panel below, if adopted by ICANN violates the articles or bylaws, whatever the magic words are.

The winner below would be the party that would be seeking to join. The winner below has not suffered any harm because they won their case. No one has breached any bylaw or article with respect to the winner. The issue of joinder would have to be broached in such a fashion that someone like that could join in a ongoing IRP because they have an interest in this IRP, and they were a, quote, litigant, close quote, below.

But they haven't suffered harm, the potential harm that I'm speaking about is that their win may be taken away from them without them having a voice in it. I'm going to look at, I haven't done anything on this yet, because I just saw Sam's comments either today or yesterday, whenever they were put in but they were good comments about don't lose sight of the IRP's purpose.

I'm going to try and boil this down, at least that is what I'm suggesting. I recognize you, Kavouss, you raised a good comment. Malcolm, I'm going to give you the floor. Your hand is up.

>> MALCOLM HUTTY: Yes, thank you, David. Are we talking, I was a little surprised when you said that the winner there, because that seems to assume a much, almost seems to be presupposing what the nature of the dispute was.

I thought when we were talking about joinder we were talking about more something in the nature a amicus brief. Did I misunderstand that?

>> DAVID McAULEY: I think is to.

>> MALCOLM HUTTY: A amicus would need to show harm because they are making sure the adjudicator is fully aware of the broader issues. But if you are talking about something broader, could you explain more fully that in a way that generalizes it as opposed to just [inaudible]

because it may not be that at all.

>> DAVID McAULEY: Yes. I think an amicus brief, in decent shape, what will happen, the panel will have discretion there. What I was talking about was appeals of expert panel decisions, such as community objection decisions, and it has to do with new gTLDs. Those are the only panels I can think of. But they are explicitly called out as being able to be appealed under the bylaws, appealed to IRP rather.

It was that I was speaking to. I think Greg was in his comments too. These are as I said community objections, or legal objections or string similarity kind of things. If there is an expert panel decision below, that there would be a loser and a winner and it would usually be the loser that would bring the IRP, changing the decision of the expert panel. And the winner below is what I was trying to, I was trying to refer to the party that won the expert panel decision below. That party has a interest in this IRP because they won below and here is the losers coming up to IRP saying, look, IRP, why don't you and I decide I should have won anyway. How does the winner below participate in the IRP was the question the joinder issue was trying to address. Does that help?

>> MALCOLM HUTTY: Yes, thank you. It does. I take it we are talking now just about joinder in the, only for

appeals from expert panels and not joinder in other cases, is that right?

>> DAVID McAULEY: I believe that's right. That is my understanding. Frankly, when we wind (overlapping speakers).

>> MALCOLM HUTTY: Has to be clear, make that clear.

>> DAVID McAULEY: When we wind up our treatment of these issues we will hand them to Sidley to draft a language. That would be apparent.

>> MALCOLM HUTTY: Thank you.

>> DAVID McAULEY: Okay, Malcolm. Thanks. Does anybody else want to speak to this? What I was going to say is, I'll take a stab at joinder again on the list and try and put it in a concise form that we can make a decision on, but what I mean is I'll stir together my comments, Greg's comments and Sam's comments, take account of them all and see if there is a way to meld them all together. I will do that.

The next issue I had was challenges to consensus policy. We haven't discussed this yet really. It's similar to the joinder issue. It was made, these comments were made by Kathy climban in the law firm Fletcher, I forget the full name. These were also made by the noncommercial stakeholder group, a similar comment. What they are saying is when a consensus policy is challenged by a party, or the

application of consensus policy is challenged by a party, at IRP, shouldn't the developer of the consensus policy have the ability to join that IRP as an interested party?

I sent four slides along. Basically presented these comments that these people made and I'll summarize briefly that the three specific changes that Kathy clyman's law firm was asking for, first provide notice to the ICANN supporting organization, stakeholder group, working group chairs, etcetera, that developed the community that is under challenge. 2, give a mandatory right to intervene to those who helped create the consensus policy. 3, limit what the IRP panel can do when overturning a consensus policy.

Now, my comment, this is just me speaking as a participant, a IRP panel doesn't necessarily overturn things. They make recommendations to ICANN.

2, I think that these comments and those three specific requests make some sense but it's very broad. Working group chairs, ICANN community, I think that we would have to come up with a more narrow statement of this and who is involved in this.

That is my initial reaction. But I'm opening it to the floor for comments. I see that Kavouss has his hand up.

>> KAVOUSS ARASTEH: Yes, David. What do you mean by consensus policy challenge, you mean if a consensus has

been reached by the panel to do something, and somebody doesn't like that, challenge that, and then the challenge is part of the decision-making, do you mean that? Why this consensus policy is challenged, consensus of whom, consensus on the decision made by the panel or consensus [inaudible] decision by the complainant or [inaudible] specifically explain what you mean by challenge consensus policy by whom, please.

>> DAVID McAULEY: It's my understanding, Kavouss, that the challenge would be by a claimant claiming that a supporting organizations, ccNSO or GN SOs developed policy and it's applied to them, well, I shouldn't speak for them. But that SOs policy violates in some form or fashion ICANN bylaws or articles of the incorporation. It's not another consensus, it's a policy developed by the SO involved, ccNSO or GNSO. These are fairly narrow in a sense. But it's narrow in that respect. It's not any policy.

>> KAVOUSS ARASTEH: Question which SO provides some policy [inaudible] will not be considered by the ICANN board, and then [inaudible] become policy or.

(muffled audio).

Already the ICANN [inaudible] issues be challenged.

>> DAVID McAULEY: It was my assumption, I have to say that as an assumption that it was an approved policy that was being spoken about. In other words, the application of

a consensus policy to an individual who turns around and becomes a claimant saying this policy violates bylaws or articles. That is my understanding, Kavouss. (overlapping speakers) go ahead, Kavouss.

>> KAVOUSS ARASTEH: Why it should be [inaudible] approve the ICANN [inaudible] anyone has a problem, why not bring the problem at that time [inaudible] potential problem for us. Until it comes to the panel, and then we decide to challenge that. I see that you are advocating that people challenging the policy will try to get into the decision-making issues [inaudible] make it easy for them to challenge a decision [inaudible]

>> DAVID McAULEY: I can understand the concern about that. Let me make two comments. Then I need to turn over to Malcolm. The comments I would say in that respect are, one, that is the way the bylaws read right now. We are not talking about claimant's ability to make a challenge here. We are talking about a ability to join, to become a interested party in that claim, the SO that developed it specifically.

The other thing I was going to say, it's possible that the claimant in this case may be a registrant wasn't involved in the community or wasn't around when the policy was developed. I can easily envision a claimant making a claim against policy. I don't think that is beyond the

scope of conceivable.

I'm going to give the floor to Malcolm now whose hand is up.

>> MALCOLM HUTTY: Thank you, David. I can foresee practical problems here both for the SO intervening and indeed given the, what is practical for the SO to do in the time frame that they would need to be able to respond as a party. I imagine that might well delay a case, rather slow down the case quite significantly in a way that neither ICANN nor the claimant would particularly find helpful to achieving a swift and efficient resolution.

That said, I can see that the case why a SO might wish its views to be taken into account. I wonder if the better way of dealing with this issue is not to make them a party with all the obligations that would go in that, the procedural obligations, potential risk of cost being awarded against them and so forth but again to treat them as amicus and will be entitled to [inaudible] duty to consider a amicus brief from the SO whose policy it was, rather than actually to be a party with all the full obligations of the party.

>> DAVID McAULEY: Thank you, Malcolm. That is a good sensible suggestion. And it's brief. I urge you to put that on the list so we don't lose sight of it. I think that is a good idea. If there is a view to bring an SO in

as a party, they have SOs and ACs have a quick turnaround time in community actions, I don't think there is any reason they shouldn't have a quick turn around time here. Sam made a good point in her comments on join der that delay is a issue. Whatever we do we want to make sure doesn't defeat the purpose of the IRP being quick, etcetera. You made a good point. She made a good point in a different context. I don't think we will lose sight of that but I encourage you to put it on the list if you don't mind.

>> MALCOLM HUTTY: I'm always delighted to have the same perspective as Sam.

>> DAVID McAULEY: I didn't plan to say anything else right now about challenges to consensus policy, other than to invite comments like Malcolm just made, if anyone would like to make them on the phone, please do, or put them on the list in the next couple of days, because I intend to wrap this one up on list, maybe early in the week next week.

The next thing on the agenda is what I call segmenting certain issues. This relates to an E-mail that I put on list on March 29. It was trying to deal with a number of comments that we received that were I think more easy to address perhaps than something like timing. I listed them and I'm happy to go through them now. I'll do it briefly.

But I would also ask you to look at the E-mail, I sent it March 29, and it would be in our archives if you have lost that E-mail. The title is segmenting certain IRP comments. I think what I summarized is fairly easily handled, perhaps with one exception on a thing that the IPC said. Anyway, I spoke to the comment about continuous IRP improvement, ALAC comment, and mentioned that the bylaws do provide for periodic review of IRP. I think that is a good thing.

I don't necessarily know that we have to do anything with respect to that comment, other than to acknowledge it and say the bylaws provide for something along these lines. I'm going to skip IPC and go to dot music. Dot music asked that we eliminate board confirmation of the standing panelists. Nominated by SOs and ACs.

The problem with that comment is that confirmation, not to be unreasonably withheld is in the bylaws. It's possible that people will come up with changes to bylaws I think that are appropriate, I think my personal opinion is they can suggest those in the appropriate fora. Our job as I see it and I'm open to other views obviously, is that we are to try and implement the bylaws as we are asked to in the bylaws, and so this is beyond our ability. We can't do that, we can't eliminate the board's ability to confirm standing panelists. I suggest we reject that comment. Dot

registry makes a comment that seeks that any review of IRP decision can only be made in court. That is all fine but not something we can do. We have bylaws that we have to work with. I would suggest that we reject this. We are not going to overturn the fact that SOs and ACs vet applicants, SOs and ACs nominate panelists. And that ICANN confirms those nominations without being able to unreasonably withhold confirmation.

I would suggest we reject that.

The international trademark association comment seeks to enlarge the bylaws concept of standing and allow those to be claimants who haven't suffered harm but are at risk of I am in any event harm. That would be a change in the bylaws -- imminent harm. We have talked about that concept in the joinder issue but that would come under the rubric of joinder and we have to decide whether that is possible. But in bringing an IRP claim to begin with, I can't see it. My recommendation would be that we can't enlarge the bylaws and we reject that.

Mr. Auerbach made a comment that the concept of materially affected as a standing requirement is too stringent. The party, had ability to bring a IRP claim should broadened to include people using IP addresses or domain names, basically everybody. I think again this is an expansion of the bylaws and we should say no. That

would be my recommendation.

In here the IPC made a number of comments that I think we can easily agree to regarding the invoice date for when costs are due and when cost, in order to be considered the claimant, and other things. But they made some substantive proposals, one of which is that when there is an appeal of a IRP decision to the complete standing panel, that the three member panel that decide the case below not be included. Let's say we have a standing panel of 7 members, and you go to IRP and lose and you want to appeal the IRP decision to the full standing panel. That means you would appeal to four, those four that didn't sit on your case. I have personally, I'm speaking personally, fundamental problems with that kind of thing. It seems to me the judges that heard the case or panelists that heard the case had every right, not a right but should for all reasons be able to sit on an appeal.

This may be separate from an easily decided one and I might have to deal with this separately and come to the list separately but I want to mention it's there. Having said that, about segmented stuff, I'll go to Kavouss whose hand is up. Kavouss, you have the floor. If you are speaking, Kavouss, we can't hear you.

>> KAVOUSS ARASTEH: I don't believe that the term, materially affected is the term because we discussed at

length and some people proposed if I am not mistaken, I stand to be corrected, propose a term materially, could not be affected, affected by what, materially affected. I don't think that we can consider that as a term, thank you.

>> DAVID McAULEY: Thank you, Kavouss. I think we are probably of one mind on this. But I'll try to wrap this up on list as well. But it was out there and we have had time to look at it. I think we may be in a position where with one more mail I can say, let's see if this is a consensus approach.

I'm going to take one second to read Sam's chat comment here, requiring the IRP provider's invoice dates might not be something that the IoT could implement without agreement from the IRP provider. Good point. We need to double check that.

Any further comments on this issue? Malcolm, I see your hand is up.

>> MALCOLM HUTTY: Thank you, David. I agree with all your rejections for those matters that you said were outside our powers, because said in the bylaws and what was being requested would be to expand the bylaws which we cannot do.

I'd agree with your reasonable on each and therefore the disposition you propose on each.

However, on one in particular, the question of imminent

harm, the IRP has in the past actually given an interim injunction type decision as I understand it. So as a matter of policy, I'm very sympathetic to this, but we clearly can't go beyond the bylaws. I'm wondering whether it is possible or appropriate for us to say something about the meaning as affected that would include essentially that plans were changed or they were unable to do something because of the factor what was coming, we don't want to get in a position where no harm has happened until it's irreversible and therefore it's moot. That is bad policy. We can't go beyond the bylaws but I'm wondering if there is anything that we can do to give a degree of comfort to this issue, especially given that the IRP has in the past considered it important to act in some cases.

I think possibly we might want to consider that a little further. I don't know what the answer is. There may not be an answer that is available to us. But I'd like to separate that one out slightly from the others as being something that we might give a little bit more thought to.

>> DAVID McAULEY: Okay, Malcolm, thank you. I'll give that some thought and look at separating that out. I'm making a note of that. As a participant, let me react to it. One is, people always have courts for injunctions, if there is a risk of imminent harm. Two is, I think that --

>> MALCOLM HUTTY: They give up their right to go to

court. Many parties before ICANN has given up the right to go to court.

>> DAVID McAULEY: Good point. Many haven't. Maybe we can segment those out. But the other point I was going to make is to me the idea of materially effective would be something, would be a body of law that the panel, I guess I would look to the panel to develop this rather than us. I don't know. We have to recognize, we are a very small team right now. I don't know. I'm reacting to it.

Let's segment it out and give it some thought. Malcolm, let me --

>> MALCOLM HUTTY: That may be the right approach. I just wanted to say that, that one seems to me slightly more difficult than the others. But I suspect you may be right. It may be simply leave that to be dealt with by a body of precedent. I don't know.

>> DAVID McAULEY: Let me encourage you not to let it go without putting a brief comment on the list, that we need to give it further thought so it's not dropped is what I'm getting at. That could invite people to comment. I'll try and do it myself. But be alert to that, and it not get dropped.

Without other comments, I'll move to the final agenda item which is the remaining work plan. In that, I think I forwarded it to the list, I'm sure I did, the template,

what I'm suggesting is a template for moving issues on list, and I think that as I mentioned at the top of the call we have a May 29 deadline which requires us to have things done a week, at least a week before that to hand over to staff. That is aggressive.

Now so I'll be working on a number of comments to moving forward. If anyone else can find the time to move a comment, please let us know on list, so we don't duplicate work. This might be a good template to use, the repository of comments is there, and it's a fairly easy template. Summarize what the comment is, give the source, the link to the comment. What does the current draft of the rules say in respects of what the comment deals with. There is a reminder that I put in that our job is just resolution of dispute due process, etcetera, standard reminder.

Then what do you suggest? I think it's a reasonable thing. I'm hoping that we will make great progress, maybe we can cancel a call or two. That would be my encouragement. That is all I want to say about that but I'm happy to invite comments from anybody else along the lines of the work plan.

I don't see any. I did not put on the agenda any other business. So I think we are stuck here for the rest of eternity. Only joking. But if anyone has anything else they want to say, I will give them the floor. Kavouss,

your hand is up. Why don't you take the floor.

>> KAVOUSS ARASTEH: Yes, next meeting, next Thursday, 5:00.

>> DAVID McAULEY: I need to check, Bernie, do you happen to know or Brenda?

>> It's up now.

>> DAVID McAULEY: Thank you. While Bernie is doing that, if anyone else has a comments, please put up your hand. Otherwise when Bernie speaks we can wrap up the call.

>> May 2, 13 :00.

>> Sorry.

>> This is not fiction group, sorry. (chuckles) (overlapping speakers).

>> Has it, Bernie.

>> Occupational hazard. Sorry, Thursday, 11 May, 1300.

>> DAVID McAULEY: 11 May, 1300.

>> Incorrect again. Sorry. I've got it now. We have a slot reserved Thursday 4 May, 1900.

>> DAVID McAULEY: Okay. Let's gather then (overlapping speakers) great. My hope is that we will, can do so much on list that we will have very brief calls. But I want to thank everybody for hanging in there today, in a small group format, and I think it was a good call. I appreciate the comments that were made. Looking forward to moving

forward.

I am happy to say that's it. The call is over. I want to thank everybody again. And see you next week and on list.

(end of meeting at 3:10 p.m. CST)

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