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IRP-IOT SUBGROUP

Tuesday, November 14, 2017 – 19:00-20:00

>> DAVID MCAULEY: Thank you. I would like to say—and welcome everybody to the call. I expect maybe a few more will join in as they realize the call is an hour earlier than typically. Hopefully that'll be the case for many that is. Not for everyone- but for many. And I'd like to press on and at least create a record of this call for the others to look. Typically Aubrey and Greg have joined us a moment or two late so we'll see. But now that we've done that I want to ask those on the call—if anyone has a statement, any change to their statement of interest and at the same time I would like to ask people that may be on the phone who are not in Adobe to please speak up and identify themselves. Is there anyone that is on the phone that's not in Adobe? I'm not hearing any. We can press on. Does anybody have a change in their statement of interest? And the statement of interest was an interesting discussion that's public forum at ICANN60 so it is important then we need to remember to pay attention to it so if there's any change please know that we know. Having none, we can move forward. Before we get to the issues I would like to welcome, as an observer, Cherine Chalaby, who has been on the ICANN board for sometime now and who at the conclusion of ICANN60 took on the role as chair of the board. And I would like to congratulate Cherine again and Cherine- today we have a small group. We typically have a small group and in a few minutes I'll just do a brief summarized history but in the meantime I want to give you a chance to say something if you wish to. Certainly, you don't have to. But if you would like to make a comment please feel free.

>> CHERINE CHALABY: Thank you, David. And thank you everyone. David, thank you for letting me observe this call. Completing the work of new system, establishing – I

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consider this to be a major accomplishment of our transbability process. So hence my heightened interest particularly in three areas. One is the supplemental rules. I understand that the IRT is working through issues that were raised at the public comment on supplemental rules. And there's perhaps another space for another round of public comment. And, so, I'm very curious about the issues but also about the time frame of getting those issues on board would be useful to know for getting for it. The second area would be the standing pillow and particularly the process and time scale for doing so and selecting the members for this panel is important. And particularity from my limited experience the choice of a lead person on the panel is very critical. So, I would like to observe also, that process and the time scale and finally the CEP process. My understanding also the IOT took over the CEP issue from the CCSW to work. And post [indiscernible] I don't know where we are on the time scales for that. So those are the three issues. That I would like to observe. The supplemental rules, the sounding panel, and the CEP. Thank you, David.

>> DAVID MCAULEY: Cherine, thank you very much. And I would like to comment on that and again say welcome. We're very glad you are here. And then I will open it to the floor if anyone else would like to comment in the meantime. And you are absolutely correct, the supplemental, the IOT, the team itself, is a small team. It was capped at 25 members by the CCWG on accountability workstream one and we now have 26 members. We took on Anna Loop as an additional member when we took on the CEP process. And it's a small group but it's an active group at times. It's a mix of legal skills and other skills and we've been working on supplemental rules. The initial leader of the IOT was Becky Burr and she's still a member of the team. Becky stepped away from the leadership of the team when she stepped onto the ICANN board last year. Last November I guess it was. And then I took over as lead of the team. And just as Becky was leaving

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we had the first draft of the supplemental rules that are basically supplements to the International Center for Dispute Resolution rules to take advantage of ICANN and the supplemental rules to primacy if there's a conflict between the supplemental and ICDR rules. They are put out for public comments. The public had comment closed in February of this year. We started working on the rules, and the staff report came out in May, and we spent a lot of time discussing them.

We are we have moved some through to conclusion, and we are basically very near the end. We've discussed the rules at great length including the timing, retroactivity, all those kinds of things. We are very near the end. So that part of it is very good.

So the supplemental rules, I hope, will be done and presented to the board in the January/February time frame. I'm hoping we get all of the heavy lifting work done by the end of this year (indiscernible), on this and on another call in addition to this one.

Secondly, we expect the standing panel Liz Le is on the call, and she will be talking later about where the preparation is. But the standing panel is something that will be created for this IRP under the bylaws, and it will involve an expression of interest, a document that has been prepared seeking people to apply for the standing panel. But we the ICANN legal and ICANN policy are waiting on people to help, supporting advisory committees to nominate for the standing panel. Under the bylaws, it's the role of the ACs and SAOs to nominate. It's the role of SAs and SEs and ICANN to put them in two qualifications, qualified and unqualified. Once you have a pile of qualifications, it's the SAO's job to nominate to that panel, and ICANN policy is working to get organized doing that. We in the AOT have offered our assistance in that respect because we're developing some facility with the IRP bylaw. That's moving on. And I think Liz can speak to that a little bit later.

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And then with respect to the cooperative engagement process, that was a separate subgroup of Workstream 2, and at that time Jill Burke there was a change in the CCWC Accountability Co Chairs asked us if we would take that work on, and we've agreed to do that. And that will probably follow the issuance of the rules.

Our first order of business, I believe, as we see it right now is to get the rules done and then step on to some further work. And I'll speak about that in a little bit. But thank you very much for your interest. That's exciting for us, and that's roughly where we stand right now.

Today's meeting is to discuss and hopefully wrap up issues of joinder of parties to an IRP, work on how parties can do discovery and gather evidence, and also work on translation services, all with a view towards recognizing IRP as an arbitration is meant to be quick, to the point, fair, not prolonged and not necessarily expensive, at least when compared to litigation. And so I hope that we will have some fruitful discussion on that, and I have invited discussion on the list waiting up to this call. So that's roughly where we are, and I will invite others in the group if they wish to make a comment to please, you know, indicate by their hand now. Charene, you're certainly welcome to comment, in light of what I've said, as well.

Hearing hearing nothing right now, let's move on. Liz, let me ask you if I could move you up on the agenda from Number 6 to to right now before we get into the joinder of discussion, inasmuch as the issue about preparations for getting to the standing panel have been have been mentioned.

Are you able to do that now?

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>> LIZ: Hi, there. This is Liz. I'm happy to do that. So just to follow up on your recap, as you know, we circulated the we drafted the call for expression of interest. We'll also served related to the group for comment the process flow that we mapped out in terms of the four step process that is establishing the standing panel that the bylaws calls for, and we have identified in there certain points where we needed additional input from the community, and we've received some input from the IOT group, and we've also identified that we should get input and need input from the SNLAC leaders.

Weaving working with ICANN policy team in terms of figuring out, what is the best way to go about that. And I think the goal is leading to do a webinar, as we've discussed with this group here to do.

We are one of the things that we have been working with policy team is to recalculate to AOC leaders to identify for them what issues and probably what we planned to see get some kind of get their input in suggesting a planning call. I don't I think that might be the first step that they find to be appropriate, and then following that, a webinar, or if they feel that the webinar and the planning call can be done at the one step, that would be the next thing that we identify.

So from our standpoint, we are hoping to get that out to the SNLAC leaders this week, and depending on when they feel and identify is the time they are available to do so, we're hoping that we would be able to get this planning call up and going within the next couple weeks.

>> DAVID: Liz, thank you. So and thank you for that. In a moment, I will turn to Aubrey and Becky who joined the call, both members of this group, and see if they have any comment. Let me respond just briefly, Liz, and thanks for the update.

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You've heard me speak about this before. I think the webinar is a good idea, the sooner the better. We would be happy to participate. We can find folks. I would be happy to participate and having read the bylaw now, I don't know how many times, I'm certainly gaining some knowledge of it.

The other thing I think we need to do is identify in conjunction with leaders from the SLACs is whether they need time for face to face, because the planning for Puerto Rico is done I don't know and maybe for Panama, I guess, will come up soon. It's amazing the lead time that's needed. While I hoped we could wrap all this up before then, if we need to preserve some time at one of these meetings, it would be nice to identify that fairly early. I'm looking forward to what you want to send out and looking forward to getting this moving.

Having said all that, Aubrey and Charene is a welcome observer today. I have given a recap of what we've done and where we are, and if you have any comments, you're certainly welcome to make them now.

>> AUBREY: Hi, this is Aubrey. I'm not sure I can be heard. Can I be heard?

>> DAVID: You're heard, but very, very faintly.

>> AUBREY: Sorry, this is the first time I'm looking this connectivity. I have no comments to add at this point. Thanks.

>> DAVID: Okay. Thank you. Becky, do you have anything that you want to say at this point?

>> BECKY: Not at this point. Thank you, David.

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>> DAVID: Okay. Thank you. So, Liz, unless you have anything in light of what I said, then we can move on to the next agenda item.

>> LIZ: Nothing from me.

>> DAVID: Okay. Thanks. So let's move on to joinder. And as I mentioned in E mails, I have had a little bit of a time challenge. So I didn't send out anything more extensive than the E mails that I sent out following the last meeting to try and move these issues to closure.

We've discussed joinder quite a bit. And what I would like to do is just read the language as to where we are now. It will take two or three minutes, but I think it's good for the record to go ahead and read this now. And this is where we presently are on joinder. And if anybody wishes to say anything different, I have urged them to do some on lists. You can do it on the call, too, but to give specific language as an alternative. Here on joinder, only those entities who participated in the underlying (Indiscernible) of the full notice of IRP and request for IRP, including copies of all related file documents, contemporaneously with claimants serving those documents on ICANN.

2. That subject to the following sentence, all such parties shall have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted party status if; one, that person or entity demonstrates that it meets the standing requirement to be a claimant under IRP Section 4.3 B of the ICANN bylaws, or 2, that person or entity demonstrates it has a material interest at stake directly related to the injury or harm by the claimant to have been directly or causally related to the alleged violation at issue in the dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR, except as otherwise indicated here.

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Subject to the preceding provisions in the this paragraph, the manner in which this limited intervention rights shall be excised shall be up to the procedures officer, who may allow such intervention through granting such IRP party status or by allowing such parties to file amicus briefs as determined in his or her discretion.

An intervening party shall be subject to applicable costs, fees, expenses and deposits, provisions of the IRP as determined by the ICDR. An amicus may be subject to the applicable costs, fees, expenses and deposit provisions of the IRP as deemed reasonable by the procedure's officer.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the procedures officer.

4. In handling all matters of intervention and without limitation to other obligations under the bylaws, the procedures officer shall adhere to the provisions of bylaw Section 4.3(s) to the extent possible while maintaining fundamental fairness.

That concludes the reading of the suggested language.

Just as background, I believe this addresses some of the concern you had last time. And the notion of fundamental fairness is something that is stated in the bylaws where it says that the rules of procedure are intended to ensure fundamental fairness and due process and shall at a minimum address certain elements. So that's where we are.

And the floor is now open for people to speak to this. Otherwise, we will consider this having reached second reading conclusion.

Liz, you have a comment? You have the floor.

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>> LIZ: Thanks, David. One question that ICANN org has has with respect to the second provision second clause in Paragraph 2 where at the end of that it states that it's claimed by the claimant to have been directly and causally connected to the alleged violation at issue in the dispute.

We're not clear what you intended for that clause to mean.

>> DAVID: Thanks, Liz. I'm looking for it. Where is it again?

>> LIZ: So Paragraph 2.

>> DAVID: Okay. It's in Number 2?

>> LIZ: Right.

>> DAVID: So let me just read that out loud. That person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that's claimed by the claimant to have been directly and causally connected to the alleged violation at issue in the dispute.

I actually think this may have come from somebody else. But it seems to me that what's involved here is that this has to be directly tied to the dispute. It can't be tangential. There may be better language to state that, and if you have a concern with that language, I would urge you to maybe give me something else. But it's basically, you know, this has to be directly stemming or directly tied to the dispute in question.

>> LIZ: Okay. I understand that. I think what we would propose to change that to is that that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the claimant that has resulted from the alleged violation.

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>> DAVID: Okay. So if that's what you want, then we I don't think I wouldn't sense any objection to that on my part. If there's anyone else, they will have to raise their hand and make a statement about it, but I think that would be fine. And I would ask you to send that to me in the E mail and send it to the list; yeah.

>> LIZ: Absolutely. Happy to do so.

>> DAVID: Okay. Any other questions about joinder or any concern with what Liz just proposed?

Since that involves a bit of a change, what we will do is, I'll get the language from Liz. We will incorporate the language, and before we give this a second reading, we'll have to leave it on the list for several days to give people who are not in the call a chance to respond.

So absent any requests to speak, we'll move on to the issue of discovery. Of course, I have lost my place. We'll move on. Liz, your hand is still up. Is that old or new?

>> LIZ: Sorry, that's old. I'll take it down.

>> DAVID: Okay. So we are at the next agenda item, which has to do with discovery. And at the conclusion of the last meeting, Liz and I had gone through some suggested variances with respect to the paragraph entitled "Written Statements." And so I would like to read now where that is based on Liz's changes and do the same go through the same procedure. If anyone has a concern, then please note it when I finish reading, and otherwise, we'll move this one to a successful conclusion of second reading.

So the paragraph on written statements reads as follows: The initial written submissions of the parties shall not exceed 25 pages each in argument, double spaced

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and in 12 point font. All necessary and available evidence in support of the claimant's claims or claim should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing and there shall be one right of reply to that expert evidence. The IRP panel may request additional written submissions from the party seeking review, the board, the supporting organizations or from other parties. In addition, the IRP panel may request for additional risks the IRP panel may grant a request for additional written submissions from the party seeking review, the board, or from other persons or entities that meet the standing requirement to be a claimant under the IRP at Section 4.3 B of the ICANN bylaws and as defined within the supplemental procedures upon the showing of a compelling basis for such request.

In the event the IRP panel grants a request for additional written submissions, any additional such written submission shall not exceed 15 pages. That concludes the reading.

So I open the floor to comments, concerns, otherwise, we will move this one to second reading.

Thank you, Brenda, for putting that up. It looks better in color than my reading did for it.

So, Bernie, your hand is up. Do you have the floor?

>> BERNIE: Thank you. I wrote it in the chat, but it's everyone could speak their name before they start speaking, we're not capturing that right now. It's not our usual captioning team, and it's going to make it difficult to use the captioning record if we don't do that. So, please, everyone, if you can state your name before you start speaking. Thank you.

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>> DAVID: Thank you, Bernie. So we can we can move on then to the next issue, which is about the next supplementary procedure that we were addressing is translation and interpretation. And in this E mail that I sent out, it was a summary of the discussions that we had rather than putting something into words, and so the gist of this is that they were going to ask Sidley, and we have budget with Sidley to polish off the rules when we're done with them to basically capture what we have in this E mail. And the principal elements of the E mail are that the claimant would get translation interpretation services based on need, not on preference.

We did have some public comments that asked that these services be provided if they were simply requested by the claimant. And we agreed and, of course, we have to, really, the bylaws say it's a matter of need. I can't I can't remember the specific paragraph, but the bylaws say these services are available if needed. And so we stick with this element, this concept of need, not preference. And we go so far as to say, and that includes if someone is bilingual and has a couple of language skills. If one of those language skills is English, then there would be no need for translation. If one of those language skills is one of the ICANN six languages of Arabic, Chinese, French, Russian or Spanish and the other language is something a little bit more esoteric, the translation can be done in one of the ICANN provided languages. This is principally, then, Caboose, you brought up an issue with respect to other documents that are requested to be translated, other documents than the Complaint or the response to the Complaint. And there we're basically putting those

costs/materiality balancing issues in the hands of the panel.

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And so I would like to open the floor to anyone to say if they have any concern with what with what we're doing on language and translation, and I want to offer any other suggestion.

The one thing I forgot to mention is that if a claimant is more than an individual let's say it's a corporation where there are directors and officers then the language skill would be met by a director or an officer; in other words, as long as the claimant has some facility in English or one of the ICANN six languages, then that's going to be determinative.

So I open the floor if anyone has a comment. And if anyone doesn't, we will move this to closure for for the reading, and we're driving to an early conclusion for this call.

The other thing I wanted to handle today was getting towards how to wrap up the supplemental rules that we've already had the update on AOC and SO preparation for nominations to the standing panel. So we've moved to agenda item number 7. And as you heard me in the discussion with Charene at the outset say, it is my hope the supplemental rules will be done, through and to the hands of the board in the January time frame. In order for that to happen, we need to get through them, I hope, by the end of this calendar year.

Brenda, can I ask that you put up the sign up sheet on the screen if you can? And so what that means is, even though the sign up sheet on these rules appears somewhat blank it may be hard to read there the four issues below the second yellow line in the left hand column are things we will do after the supplemental rules. The items above that are the supplemental rules. Despite the fact it appears a little bit blank, we're actually making great progress, and I think we can finish these rules by the end of the year. And to do that, I think, would take one more teleconference, at least, and a lot of work on the list. And I'm happy to tee things up on the list the way we have been moving along. And

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many of the rules, basically we have had substantive discussions along the way, so I think we're near the end.

So I would encourage all of us, and I would encourage the people on the list, be sure and throw in comments towards the end of the year so that we can wrap these up. I imagine we give it off to Sidley, it will take them a couple of weeks, and I need to get in touch with Holly to make sure she knows this is coming.

All of that being said, we would then turn our attention to the different items. Charene was asking about the CFP at the beginning of the call. We would turn to the cooperative engagement process and come up with any rules we think are germane for that, and we would also turn to things that the bylaws asked us to do, such as to consider whether there are additional requirements needed for conflict of interest rules for panelists, the bylaws at 4.3(q) set out conflict of interest standard, but give us the role of saying, you know: Take a look and see if more are needed.

We also have to come up with rules for appeal and with rules for claims by customers of the IANA services contract. Those things, we think are secondary right now to getting these rules done, because they follow sequentially in time anyway. So that's the plan, folks. And you'll see some more from me on the list to tee these up and move them along, and we will have to set a meeting between here and the end of the year. We don't have anything scheduled. Bernie is reminding me, we should try and schedule some tentatively, at least, right now. So I may put Bernie on the spot in a minute and ask him if he could suggest maybe something in the first week of December that would be good for us. We're usually Thursday afternoon, 19:00 UTC.

Bernie, can I turn it over to you and ask you to comment in this whole area?

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>> BERNIE: Sure, David. We're as it happens, December is wide open. So you get your pick, Thursday, December 7th, 19:00 is your choice, that is open, and more than willing to book it now. I also have Thursday, December 7th.

>> DAVID: Okay.

>> BERNIE: And I also have the last day in November is 30th. I also have that if you prefer.

>> DAVID: So I personally think maybe we should schedule a meeting for Thursday, December 7th. But is there anyone on the call that has other thoughts about this? I think if it goes past the 7th, it's a little bit too late. And if it's on the 30th, I might be able to get things out through the list. Does anybody have any objection to setting things for Thursday, December 7th at 19:00? Let's do that, Bernie.

>> BERNIE: All right. Given things get very quiet towards the end of December, should we try and book something for January right now, at least one meeting, maybe on Thursday or Thursday the 18th?

>> DAVID: What was the first Thursday you mentioned?

>> BERNIE: We have well, they are all open. So we have January 11th, January 18th and January 25th.

>> DAVID: Okay. What's the one let's set one for January 10th. Better to have and not need than to need and not have.

>> BERNIE: Thank you very much. The invitations will be sent out.

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>> DAVID: Okay. Any other business? If anyone has any comments, I would welcome them now.

Seeing and hearing none, I will thank everybody for participating. It's a tough time to get on the phone calls around the holidays. Hopefully, December 7th, we'll be able to get our group together. And look for some E mails from me on the list. We'll move these rules to conclusion. We have had great discussions about them, happy about getting near of the end of this process so we can move on to other things.

Aubrey, you have a hand up, so go ahead and take the floor.

>> AUBREY: Thank you. I can be heard slightly better now. This is Aubrey speaking.

>> DAVID: It's better.

>> AUBREY: The one thing I haven't finished, the one thing we didn't get on the agenda today is the subject of the ongoing monitoring. So I just didn't want to let the call slip away without having fessed up for not having gotten much further on it and developed the document further. I did have a lot of discussions about people at the ICANN meeting about whether to continue sort of on the separate view that we have been having, or to sort of accept the notion that you had accepted that a small change to the bylaw, basically saying that the ATRT shall review the as opposed to may review the procedures would be an adequate response. And I guess the desire to not have a complicated solution has been pushing me that way. The only problem I still have with that and wanted to put on the table, and the one that's been sort of working in the back of my mind is, that leaves out the whole notion of including the panelists in that review.

Now, one could assume that the ATRT would indeed review them. But the there would be nothing explicit saying that they would have to be included.

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So going back, the simple solution is just a simple bylaws change that changes may review to shall review in the appropriate bylaw. And I don't have the document with me. I'm traveling with less machinery and don't have my laptop with me and the full copy in front of me. But basically, that could be the one change that was needed. Because we did want to make sure that there would be a review. And any other solution that I had been working towards gets more complicated, and I'm not sure it's worth the complication. I didn't want this one meeting to end without having put that back on the table.

Thanks.

>> DAVID: Thank you, Aubrey. As you said, you and I have been discussing this within the meetings. Within our teleconference, it's you and I that have been sort of batting this around. And I am of the view and just to mention for Charene, the current bylaw does, as Aubrey suggested, the ATRT reviews for IRP, but the lead in language is that it may be reviewed. And one of the public comments, I believe it was from ALAC, to our rules was that there should be periodic reviews of IRP. And we all I believe we all agree with that. And I came to the view that, like Aubrey stated, it could be under ATRT if it says shall. But I also was one that believed we should include as least the lead arbitrator or lead panelist, if that's the term, in their review. And so we will work more on that one. I agree with you, we will work more on that one. If it is something that involves a bylaw change, it would be a recommendation to the board, but a bylaw change along this lines would be required. It shouldn't be unleashed without an opportunity for the community to review its performance every five years or so. So more to do.

Aubrey, on that one, that issue, while it came up in public comments to the draft rules, it really doesn't affect the rules. So we can finish the rules before we finish ongoing monitoring, because that's sort of separate.

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Now, your hand is still up. Is that an old hand or new hand? Old hand. Is there anyone else that has a comment regarding what we've discussed or anything else on the list? If not, I want to thank Charene very much for attending. It's certainly a very welcome attendance. We're glad you were here, and you're welcome back any time. And I'm going to close the meeting.

Seeing no hands, I want to thank everybody for participating, and enjoy the rest of your day. We were able to wrap up early, and thank you. We can stop the recording.

(Meeting adjourned.)