# IRP Draft Supplementary Rules: Rule 5 (strawman replacement)

## Principle of cost minimisation

The PURPOSES OF THE IRP require it, inter alia, to “Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes”.

The IRP PANEL shall consider therefore accessibility, fairness, and efficiency (both as to time and cost) in all aspects of its conduct of the IRP. As part of this, the IRP Panel shall be responsible for ensuring that the dispute is resolved expeditiously and at the lowest reasonable cost consistent with the PURPOSES.

## Electronic means

The IRP PANEL shall conduct its proceedings by electronic means to the greatest extent feasible.

Within these rules, the phrases

* “on paper” shall include anything reduced to writing in electronic form
* “in person” shall include oral statements and unwritten interactions made remotely, by telephone, videoconference, or other electronic means

## Proceedings on paper

The IRP PANEL should conduct its proceedings with the presumption that the dispute shall be disposed of on paper, by written argument alone, without witness statements or testimony.

## Witness statements in writing

A party seeking to present a witness statement must seek the IRP Panel’s prior consent. The IRP Panel shall decide whether to give such consent on the basis of whether doing so is likely to advance the PURPOSES OF THE IRP, having regard to the principle of cost minimisation.

Except where the IRP Panel has ordered an in-person examination of a witness, witness statements shall be made in writing and shall be delivered together with written arguments.

## Proceedings in person, including by videoconference

The IRP panel shall have the power to conduct (a) hearings on argument and (b) hearings of witness testimony, in-person (including by videoconference). This power shall only be exercised as an exception to the general norm, and subject to the following conditions:

1. The IRP Panel may only order a hearing in-person if it believes that to do so is necessary to achieve the PURPOSES OF THE IRP. When considering whether an in-person hearing is necessary, the IRP panel shall have regard to the Principle of cost minimisation set out above.
2. In accordance with the principle of cost minimisation, the IRP Panel shall ordinarily consider whether to order an in-person hearing on argument separately from whether to order an in-person hearing of witness testimony. Similarly, the IRP Panel shall ordinarily consider whether to order an in-person hearing on one witness’ testimony separately from whether to order an in-person hearing for the testimony of another witness.
3. The IRP Panel shall order an in-person hearing on the motion of one principal party if the other principal party consents.
4. The IRP Panel may order an in-person hearing on its own motion if both principal parties consent.
5. The IRP panel may only order an in-person hearing on the motion of the Claimant if It is necessary to do so in order to achieve the PURPOSES OF THE IRP. having regard to:
	1. The value of the direct interest the Claimant has in the outcome, relative to the costs of holding an in-person hearing;
	2. Whether the issue in dispute has a broad interest to the ICANN community beyond the Claimant’s direct interest;
	3. Whether holding an in-person hearing is likely to have a material effect on the outcome of the case (and in this, the onus shall be on the Claimant to show that it is likely); and
	4. The principle of cost minimisation
6. The IRP panel may only order an in-person hearing on the motion of the ICANN if it is necessary to do so in order to achieve the PURPOSES OF THE IRP, having regard to:
	1. Whether the issue in dispute has a broad interest to the ICANN community beyond the ICANN’s direct interest; and
	2. Whether holding an in-person hearing is likely to have a material effect on the outcome of the case (and in this, the onus shall be on the ICANN to show that it is likely).
	3. The harm that is done to the accessibility of IRP cases generally by rising costs;
	4. Whether any increased cost arising directly or indirectly from the hearing would cause financial hardship to the Claimant; and
	5. The principle of cost minimisation. [Editor: Are there any other key interests ICANN has not covered by this?].
7. The IRP Panel shall consider reasons ICANN gives not to grant the application for an in-person hearing by the Claimant, and vice versa. Other (intervening) parties need not be heard on this issue.
8. The IRP panel shall not consider a motion of another party to hold an in-person hearing without the consent of both ICANN and the Claimant. When considering such a motion, the IRP Panel shall have regard to both the matters to which it would have regard on an application on the Claimant’s motion, and an application on ICANN’s motion, and the onus shall be on the applicant to show that a hearing is likely to have a material effect on the outcome of the case.

**Subject to the following, if the IRP panel order an in-person hearing, this shall be conducted by videoconference.**

1. In accordance with the principle of cost minimisation, the IRP Panel may order short hearings in which there is not likely to be much interaction between speakers to be conducted by telephone.
2. It shall be a duty of ICANN to provide suitable videoconferencing capability for the panellists and all parties, at ICANN’s own expense, save that it shall be the responsibility of each participant to provide for their own use a PC running either Microsoft Windows or Apple OS, on which they can install software as directed by ICANN, together with a headset microphone and attached videocamera, and a suitable Internet connection.
3. Only in exceptional circumstances may the IRP panel order an in-person hearing to be held with the participants physically travelling to the same geographic location, rather than by electronic means. Before ordering such a hearing, the IRP panel must satisfy itself:
	1. That the PURPOSES OF THE IRP and a fair and just outcome *cannot* be achieved without such an order; and
	2. That *no* available electronic means would suffice for this purpose (which includes, any electronic means that could reasonably be procured at lower cost than the costs and expenses that would be incurred in a hearing).

Having decided to make such an order, the IRP Panel shall consult with the Parties before appointing a time and place, and shall make such appointment in accordance with the Principle of cost minimisation.

## Witness statements in person, including by videoconference

Where the IRP Panel has ordered an in-person examination of a witness:

1. The party presenting the witness shall provide a written witness statement to the IRP Panel and to all other parties, no later than [15] days before the hearing.
2. The party presenting the witness shall not be permitted through direct examination to open new issues not covered in the witness’ written statement. This restriction shall not apply to examination by the Claimant of witnesses who are ICANN’s employees or members of ICANN’s Board.
3. In accordance with the principle of cost minimisation, the IRP Panel shall be responsible for limiting witness direct testimony so as to avoid unnecessary duplication of material already understood from the witness’ written statement.
4. ICANN (if the Claimant is presenting the witness) or the Claimant (if ICANN is presenting the witness) shall be offered equal time for cross-examination.
5. The IRP Panel shall be responsible for limiting witness testimony to relevant matters and preventing abuse of the process through such testimony.

## ICANN Staff Witnesses and other connected witnesses

Where the IRP Panel has ordered an in-person examination of witness who is (a) employed by ICANN or (b) a member of the ICANN Board, ICANN shall be under a duty to make that person available.

Where the IRP Panel has ordered an in-person examination of a witness who is for any other reason only able to participate as a witness subject to ICANN’s consent, ICANN shall give that consent if it is able to do so; if ICANN is not able to grant such consent, it shall explain why not.

None of the foregoing implies a right for the Claimant to compel testimony.

## Timetabling

Within [PERIOD OF TIME], the IRP Panel shall set out in writing a proposed timetable for the conduct of its proceedings. This shall include:

1. Deadlines for filing arguments by the Claimant and ICANN.
2. Deadlines for applications to intervene as a party, or as an amicus curiae.
3. Deadlines for applications for permission to present a witness
4. Deadlines for applications for permission to present a rebuttal witness (relative to the date of submission of witness testimony).
5. Deadlines for filing rebuttal witness testimony.
6. Deadlines for applications for to hold a hearing in-person, and for replies to such applications.
7. The date, time and duration of any in-person hearings it has ordered.
8. Deadlines for comments on the proposed timetable.
9. Date for delivery of final decision by the IRP Panel.

The IRP Panel shall confirm the proposed timetable (subject to any changes) having considered the comments of the parties.

The IRP Panel shall have the power to amend its timetable after it has confirmed it, at any time. When considering whether to do so, it shall have regard to the principle of cost minimisation. If the IRP Panel varies the timetable, it shall provide all parties and amicus curie a written copy of the amended timetable.