

# Notice to the Parties

1. Juror #2 and I have similar thoughts. As I am currently working on the justification of my opinion — with regard to the rules to be applied, I am not ruling on the facts yet — I think the other jurors could profit from excerpts from this draft.
2. The relevant section goes as follows:

(24) In determining whether there has been a violation I first determined whether the challenger has to prove a violation or whether the submitter has to prove compliance. As a general rule the party that makes a claim has to prove that all requirements for that claim are met. With Badge requests, however, it is not clear whether the dispute is about the submitter having a claim to get the badge or the challenger having a claim to have it removed.

(25) I don't think that there is just one answer to who is the "claimant" here. Instead, every alleged violation can put the burden of proof on a different party. When I determined who bears the burden of proof I therefore asked: "What distribution of the burden to proof certain facts would be fair?"

(26) One factor that is crucial for determining this burden of proof is subjectivity. Some listing criteria like "utility", as I will point out later, are rather subjective. In this case, the court should per default consider the requirement to be existent and just reject a submission if the challenger can clearly show that there is no circumstance in which the product meets the requirement. The reason is that I don't see why seven randomly selected people should make a decision on whether a product (let's stick to the relevant issue) provides utility on behalf of potentially thousands of users - some of whom might have a good reason to see utility.

(27) Another factor is availability. Sometimes there is evidence required that one of the parties cannot provide, but it can convincingly show that another party has the required prove. The situation described will often

be a challenger creating reasonable doubt regarding the submitter's compliance. When in addition to that the challenger can show that the submitter is likely to have relevant evidence, in my opinion, it would be fair to ask the submitter to prove full compliance.