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## ICANN Transcription

### GNSO New gTLD Subsequent Procedures PDP Working Group

**Monday, 07 December 2020 at 20:00 UTC**

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TERRI AGNEW:

Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures Working Group Call taking place on Monday, the 7<sup>th</sup> of December at 20:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you're only on the telephone portion, could you please identify yourselves now.

Hearing no one, I would like to remind all to please state your name before speaking for transcription purposes, and to please keep you phones and microphones on mute when not speaking to avoid any background noise.

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As a reminder, those who take part in ICANN multistakeholder processes are to comply with the Expected Standards of Behavior. With this, I'll turn it back over to Jeff Neuman. Please begin.

JEFF NEUMAN:

Thanks, Terri. Welcome, everyone. We're getting towards the end, so that's great. Only a couple more topics left—well, I guess, in relation to as many as we had.

Before we start, though, let me just see if we have any updates to any Statements of Interest. If you do, raise your hand or put something in the chat or both. Okay. Not seeing anything.

All right. So, today's topics, we have four of them. I think the last one, Closed Generics, probably will take us the longest. So, I would like to see if we can get through the first three. There weren't a huge amount of comments on the first three topics, so unless there are any questions ...

Let me just say that the most recent revised draft of the final report redlines were sent, I guess, a couple hours ago from Emily. So, please do look at that. That shows you ... It's got a log of the changes that are made along with the redlines. So, please do make sure you look at that. Comments for that one are due before the call on Thursday. So that's important.

And then we'll continue to come out with drafts. Each draft that will come out will be a redline compared to the previous version. So, please do try to keep up with the drafts. Okay.

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Let's jump into the Terms and Conditions. Just a reminder, these are the applicant Terms and Conditions that were contained in Module 5 of the Applicant Guidebook. They were the terms that an applicant had to agree to through a clickwrap agreement when it submitted its application into the system.

So, for the most part, there were not a huge amount of comments, but most of the commenters agreed. They supported the output as written. But there were some comments that were made. The first two from gTLD Registries and from InfoNetworks, we just note those concerns. You can read those if you would like, but they're not asking us to make any kinds of changes—just notes on them.

And then if we go to the New Information. So, the registries filed a comment. And I think similar to the Galway Strategy Group—which is Jim on this call— basically wants to make sure that there are references anywhere in the report that may add other terms and conditions just so that we have it all in one place, or at least references all in one place so that we can make sure that when an IRT picks this up, that they will be able to draft the Terms and Conditions or make the necessary changes.

So, there are a number of topics that can have an impact on the applicant Terms and Conditions. And the registries do a good job, and I think, also, Jim does a good job in listing those out.

So, our action item really is to go through the report—and when I say “our,” leadership and staff just to make sure that all the references to the Terms and Conditions or any updates to the Terms and Conditions are in Topic 18.

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If someone could post the link to the document for Anne. Okay.

As far as the New Information, there were a couple comments that either asked us to reconsider the covenant not to sue or to enforce it, I guess, or make sure that it's in there in more detail. But we just note those, really.

There was one comment on auctions from Christa Taylor that we moved to the Auctions section. So, we'll skip that for now.

Information from the Board and, I think, ICANN Org as well has similar ones. So, as you can imagine, the Board and Org are not as comfortable with ...

Let me just go back a step. In our recommendations we say, "Unless required by specific laws, ICANN Board members' fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisioning Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws for not allowing an application to proceed."

The ICANN Board is concerned that this somehow limits the Board's authority to act, and they really want some more information as to what problems the group identified for us to make that recommendation. And I think in the Leadership Comments, you'll see a note there for A which says, "Well, look. The purpose of pretty much our entire work these last four years has been to ensure predictability."

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And so, if you have a reservation of rights in favor of ICANN that basically reserves your right to do or not do what's in the Applicant Guidebook as you see fit, that pretty much obliterates all of the changes and improvements that we have tried to make, and also would obliterate the predictability.

So, I think the leadership sort of turns it around on the Board to say, "Look. If there are certain reasons for rejecting an application that you don't think you would have with this language in it, then let us know." But to the contrary, I think we want to establish a predictable process.

Let me just pause there for a minute. See if there are any comments.

Okay. I've got an "Amen." Thanks, Paul.

All right. In Part B, the Board notes Recommendation 18.3 which states, "In subsequent rounds, the Terms of Use must only contain a covenant not to sue if, and only if"—I'll paraphrase—if and only if there is basically an appeals process. That was our conditional language.

The Board is concerned that this may create an argument for dissatisfied applicants that go through the appeals mechanism that aren't satisfied with the appeals mechanism. Maybe they think it was not a ... What are the words that we use? Where are the exact words here? I'm trying to look for it.

Well, we basically say, "If the appeals/challenge mechanisms are the ones that are set forth under Topic 32 ..." And so, the Board is

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concerned that if they don't like it, they might object under the policy recommendation.

So, I think here, at the end of the day, what we really wanted to make sure was that the appeals process that we envisioned was put into effect. It was not really to say that it has to be the greatest appeals process.

It's really just to say, "Look. If you adopt this, then we're happy with the way the Terms and Conditions had the covenant not to sue. But if you're not going to adopt an appeals mechanism, then we don't think that covenant not to sue is fair."

And so, I suppose if ICANN Legal wants to make it clear in the Terms and Conditions what the intent was, then I think they can do that. I'm sure Legal can figure out a way to not give the avenue to argue that there's some sort of argument that they're dissatisfied with the appeals and therefore there's a policy violation. I think that could easily be overcome by a smart legal team.

Becky asked the question, "Does this language parallel GAC language?"

Which language, Becky? Are you back on A?

BECKY BURR:

Sorry. I was back on A. It just occurs to me—and I am speaking for myself and not the Board now—that if you have language that says, "The Board must do x, y, and z in terms of the explanation and the reasoning ..." that if the GAC language—and I know this

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was a topic of discussion about what guidance the GAC has to give the Board. If there is a gap between that, then we can get into a situation where the Board has received contentious advice from the GAC creating whatever you end up with. And I don't know where the team is finally ending up in terms of the strong presumption.

But all I'm suggesting is that the obligation to articulate the reason for what you're doing ... There's a reason, with all due respect, to make sure that the obligation on the GAC to provide reasons supports the Board's requirement to provide reasons.

JEFF NEUMAN:

Yeah. Thanks, Becky. I think this is the obligation for ICANN Org. So, I would think that if the GAC provided GAC consensus advice and it was in accordance with the Bylaws, and ICANN Org decided to implement it, then ICANN Org would cite with specificity the reason. And in the guidebook, it does say that the GAC could provide consensus advice. I think it still can be ...

And maybe others have a different view, so please do weigh in, but I don't think they're inconsistent. But I think it's a good point. We should double check.

Anyone else with thoughts on A or B? Okay. Quiet group.

All right. Let's then jump to the ... I think Registrant Protections is next.

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Oh, I'm sorry. You're right. I missed one. Thanks. Before we jump to Registrant Protections, ICANN Org did have some comments on the refund.

So, going back to our recommendations on the Applicant Terms and Conditions, we say, "Applicants must be allowed some type of refund if they decide to withdraw an application because substantive changes are made to the Applicant Guidebook or program processes and such changes have, or are reasonably likely to have, a material impact on applicants."

And so, ICANN is asking us the question, does this just mean that the refund is the same refund schedule that ICANN would be using depending on when the application is withdrawn?

So, in other words, if you recall, ICANN had a refund schedule that was based on when the application was withdrawn. If it was before Reveal Day, it was a certain percentage. If it was after Reveal Day but before an initial evaluation is complete, then there was another percentage amount, and so on.

I think the intent here was not to create a new refund schedule, but I want to double check to see if the group agrees.

Donna, go ahead.

DONNA AUSTIN:

Thanks, Jeff. Donna Austin from GoDaddy Registry. One of the concerns I have with this is, if the program changes after the Applicant Guidebook that really makes an applicant no longer eligible or unable to continue, then I think that's a very different



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situation than staying to a schedule of after evaluation or before evaluation because this is something that is out of the applicant's control to a large extent.

So, my thinking on this is if it is a material change and it impacts the applicant in a negative way, then my thinking was leaning towards a full refund. So, I'm not comfortable with the current schedule because I think this is a considerable impact on the applicant that was unforeseen.

So, my thinking was if it does happen, then it should be a full refund. Thanks.

JEFF NEUMAN:

Okay. Thanks, Donna. I see some agreement from Marc and Susan. Question would be, though, is there some threshold of materiality in the change in order to be able to get the full refund?

Well, let me take an actual example: a topic we're going to talk about later, Closed Generics. But let's pretend we're back in 2012 where applicants applied to be Closed Generics, and at the end of the day, they had to either open it up or wait until the next round, essentially.

There were a number of applicants that withdrew their application as a result of that. Not all. Some of them opened it up. So, using that kind of example, is there a threshold on when a full refund should be given?

I'll go to Alan and then, of course, Donna and anyone else that wants to get in the queue.

ALAN GREENBERG: Thank you. I'm very sympathetic to what Donna is saying, but I wonder about the mechanics and logistics of it. There's the issue you just raised, Jeff, of how [substantive does it have to], and how do you measure, and how do you decide when that threshold is being met? And how do you differential between someone who just decided that day that they're going to withdraw anyway and is using this as the excuse?

It just seems to be something that's close to unmanageable unless you start putting rationales in and it has to go to a panel to decide whether it's a sufficient rationale or not. So, I'm sympathetic with the concept, but I don't know how to implement it in a fair and reasonable way.

JEFFREY NEUMAN: Yeah. Thanks, Alan. Sorry, I'm just looking at the list. Does anybody want to weigh in? I see some comments in the chat, so let me go to that.

Donna, go ahead.

DONNA AUSTIN: Thanks, Jeff. I respect what Alan's saying, but I really think that if it is a material change, and even if there is some serendipity and somebody decides to withdraw their application at the same time that a material change is made, well how are you going to distinguish that?

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So, maybe we need to have some benchmark of what material change is, but I think the policy should be that if a material change is made to the Applicant Guidebook that makes an applicant no longer eligible or some other criteria, then a full refund should be made available.

JEFF NEUMAN: Thanks. So, I'm just reading the chat. Marc says he can't raise his hand, but he would like to comment. Okay. Go ahead, Marc.

MARC TRACHTENBERG: I agree with Donna. I think if you're going to change the rules in the middle, then those who invested significant amounts of financial and other resources into applying should be able to withdraw because that's not what they were applying for. Using the example of Closed Generics, that's a great example. If you were planning on operating as a Closed Generic and your entire business model was based on that and then halfway through, ICANN pulls the rug out from underneath you, you should be able to withdraw and get a full refund.

I understand that people don't like the ambiguity of just saying "material." And I have been saying it for a long time, I prefer specificity. But this group has been very comfortable with ambiguity and judgment calls and many other things like being able to demonstrate the intent to use the string.

So here, where it's a material issue of fairness, while I would like to have more specificity than just "material," I think it's too late in the game to create a whole other structure. And we don't need

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another structure anyway. I think “material” is fine, and if people want to take advantage of that, they can argue that at that time.

JEFF NEUMAN:

Yeah. I think that sounds right. I think the way this is written, if we basically keep it the way it is but also specify that it is up to a full refund and the IRT, if they want to put some bounds around it whether it’s time-based (it has to be exercised within x number of days after the change is announced or something like that), then that’s perfectly fine to do things like that. But the full refund is what we did talk about during this.

So, I think we’ll take that back and clarify that it’s not the normal refund schedule.

Anne, go ahead.

ANNE AIKMAN-SCALESE: Thank you, Jeff. I’m assuming that you were done with that conversation. I wanted to go back with something that Becky had raise because I looked again at the language that is cited in the Board's comments and it’s put in quotes with respect to stating specifically the reasons for denying an application.

Now the reason I’m bringing this up is I just ... I don’t want to cause problems for approval of this policy. I noted that in our recommendation, we included that they can cite fiduciary duty. But in the second sentence we say if an application is rejected, they have got to cite specifically to the reason “in accordance with the Applicant Guidebook, or if applicable, the law or the Bylaw.” And

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we didn't repeat the exercise of fiduciary duty there as what they specifically need to recite.

I'm just looking for the consistency that I think the Board would be checking for there.

JEFF NEUMAN: Okay. Thanks, Anne. So, we'll just take a note to revise that to make sure that there is that consistency between the first part of the sentence and the second. [I think that makes sense.]

ANNE AIKMAN-SCALESE: Thank you.

JEFF NEUMAN: All right. Now we can jump to the Registrant Protections. Sorry about almost skipping that.

And by Registrant Protections here, we're mostly talking about the COI (Continuing Operations Instrument) and the Emergency Back-End Registry Operator. I know there are a lot of other things you could potentially think of a "Registrant Protections," but in our topic this is really the main thing that we cover.

Lots of diverse agreement. Some that didn't comment. I think that there were some comments from Geo groups that want to be added to be able to request an exemption. We have discussed that and we note that, but I don't think we need to revisit.

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The ALAC has some items in there that we are going to add to the Metrics section, which actually we will also be talking about in a little bit.

And then if we look at the Board, there are a couple comments here. If you recall, we say that the .brand TLDs, essentially Spec 13 TLDs, should receive an exemption from the Continuing Operations Instrument because they're brands and because they don't have registrants in the traditional sense.

You're only really looking out for ... If an EBERO were to come into existence, it's only really protecting the brand itself, which the brand is in a better position to actually rectify the issue than an EBERO or ICANN for that matter.

The Board, though, wants to make sure—and I think we have—that there are no hypothetical cases in which an EBERO might be appropriate for a Spec 13 TLD. And I guess this relates to the notion that there could be trademark licensees as registrants.

And I know we did talk about this, and I think at the end of the day, we thought, "Well, this is just still the brand problem and not a problem for registrants," which is really what the EBERO is there to protect.

I'll go to Alan and then to Kathy. Alan, go ahead.

ALAN GREENBERG: Thank you. I agree with our position. There are certainly implications. If the TLD disappears, users are going to be impacted. All sorts of other things will happen. But ultimately, if we

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said, “You have to go to EBERO and the TLD will exist,” the brand still has full control over all the content, and they can pull it all down.

So, we really have no ability to make sure that it continues just because we say the registry is going to continue functioning. So, it’s really a meaningless thing. They have control of all the content, either by themselves or through licensees. And they move the brakes, it’s gone. Thank you.

JEFF NEUMAN:

Thanks, Alan. I think that’s consistent. Kathy, go ahead.

KATHY KLEIMAN:

Thanks, Jeff. Hi, everybody. So, two things. One is, I think we should change the name of this. As you noted in the opening, it’s not really registrant protections. It’s more like operational protections for the registry database. So, I would like to suggest that we do it because every time we get here, I’m like, “Registrant Protections,” and it’s something very different than what we traditionally call it. So, that suggestion—Operational Protections for the Registry Database.

And, here, I think the Board is actually raising a point that you may have sites that people [need], that people are using that have technical problems that may need some backups. So, I’m not sure how our stepping back and saying that all the traditional things we do to protect the registry’s database and support it—I don’t think that all goes away. That content could be of great use to end users, to governments, to others.

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And the registry may not know what's going on. There may be problems beyond their control. And I don't think we should be throwing up our hands. They may want help, and I don't think we should support a policy that says just because it's a brand, we don't step in to help. I think we have rules.

And we should. I think we should step in to help unless there are other circumstances. But not just because it's a brand. Thanks.

JEFF NEUMAN: Thanks, Kathy. Paul and then Marc.

PAUL MCGRADY: Thanks. I'm going to respectfully disagree with my very good friend Kathy. I don't think ICANN should at all be in the business of preserving hosting records and content and asserting some sort of de facto copyright license or de facto ownership to that content for itself or for governments, or anybody else that Kathy suggested here.

If the goal is to keep brands from applying for .brands—and some people on the call ... And I'm not saying Kathy does because if Kathy had such a goal, she would have been forthright about it. But if somebody were to try to find a way to make sure brands don't apply, setting this up such that if a brand chooses to shut down their TLD because it's no longer part of their marketing strategy and that brand going to an EBERO to keep licensees in business who would no longer actually have a license if the brand is shutting down that particular expression of its mark is



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completely frightening and sounds like a loss of brand control. I don't think that's what the goal of the EBERO process is.

And so, if we're going to talk about Continuing Operational Instruments and EBEROs in the context of .brands, I do think we need to pull it back to what was in the 2012 Guidebook because that had to do with technical failures, not having to do with continuing to make content available to licensees and ICANN and governments. Thank you.

JEFF NEUMAN: Thanks, Paul. Let me go to Marc. Marc, go first.

MARC TRACHTENBERG: Paul made the points that I was going to make, but again, we're talking about ICANN making sure that content is still there. I thought the whole point that everyone keeps making is that ICANN is not in the business of regulating or preserving content. So, for me that just doesn't really make sense here.

I just reiterate that points that Paul makes. The whole point of the .brand TLD is that it's a promotional TLD for the brand to use in connection with its trademark for itself and its licensees.

And so, if that brand does not any longer want to operate that TLD, how could you have a third party step in and take over control of that brand? A third party that has no connection to the trademark and no license and no right to use it? That's just, for me, incredibly problematic and, again, would act as a significant disincentive for brands to apply for a TLD.

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JEFF NEUMAN: Thanks, Marc. Elaine and I were sort of putting the same kind of thing into the chat. The content doesn't just disappear because a registry goes down. The content is still on the hosting server. It's just that you can't get there through a particular domain name, but you can still access it through an IP address if you knew how to find it.

MARC TRACHTENBERG: Jeff, I understand that, but that was the point raised. The point that Kathy made was the EBERO should maybe step in for that purpose. And so, I agree with you from a technical perspective. The content doesn't go away. But the content is still connected to those domain names and now those domain names don't go away. Well, the content still is accessible through those domain names.

But regardless, content or not, it's problematic for, now, this third party that is not a trademark licensee or the trademark owner to now have control of the registry database which issues domain names based on that trademark.

JEFF NEUMAN: Yep. We're in agreement. Kathy, go ahead.

KATHY KLEIMAN: Okay, so responding to my good friend Paul McGrady. Are we converging, though, that there might be a technical need that a

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brand might have not for maintaining a TLD that they don't want—because there are procedures for turning them back in—but for maintaining a TLD that they do want that seems to be having technical difficulties beyond what they can handle?

That's, I think, what ICANN Org is raising. And I can't imagine that there's no situation where that could happen. So, don't think of this as trying to do away with .brands, but trying to help .brands under circumstances they might need it. And can we put some language in here rather than ...?

It just seems like we're kind of throwing them out to the wolves if we say brands really can never seek EBERO protection. Thanks.

JEFF NEUMAN: Thanks, Kathy. Susan and Paul, and then I think everyone has kind of made their points. But go ahead, Susan and Paul.

SUSAN PAYNE: I don't think we're saying that brands can't have a technical backup if they want one. They're perfectly capable of ...

I mean, I think they could probably signup for the EBERO process if they chose to. They could also have their own separate arrangement with a backup registry operator if they felt they wanted to have one, and thereby choosing the registry operator as the backup that they wanted to have.

What we're saying is, they're not under an obligation to be in the ICANN-mandated system which, to be clear, also ensures that if

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the registry does go to the EBERO, it goes to whichever EBERO gets determined by ICANN; and probably the next one that has come to the top of the list rather than, perhaps, the one that they want their registry to transition to.

So, nothing is preventing them having backup systems. It's just saying it's up to them to take a view on the risk and whether they either want to or need to.

JEFF NEUMAN: Yep. Thanks, Susan. And Kathy has agreed now. Paul, do you want to go, or do you want to just move on?

PAUL MCGRADY: One last thought. If we really are worried, and I don't think that we are, about consumers not being able to access content that used to be up at a .brand, it seems to us that this is a very small problem compared to the exact same issue at the second level. And ICANN has never once said anything about that. They're not running around making sure that Walmart.com has a backup to ensure the consumers can access it.

Now, we're firmly into Mission: Scope Creep here if we start to think up ways for ICANN to run around making sure that commercial content put out there by brand owners still expresses itself on the web. Now we're really off the beaten path. Thanks.

JEFF NEUMAN: Okay. Last word from Maxim.

MAXIM ALZOBA:

Just for clarity, EBERO-state means TLD contract is not valid anymore. It's a total loss of control. It's not reversible. It's the death of a TLD. There is no backup. If you failed to state why you need EBERO, you lost everything. There will be no help. You have to ensure your systems do not fall into this state where [you're ultimately] prosecuted, and your contract is terminated.

So, please don't think that it's a kind of help. It's like a team burying the TLD in the graveyard and keeping it [zombie] for interested parties to see the last state of a TLD.

Also the situation where brands ... Basically, EBEROs can be put in quite serious legal danger. For example, when court orders some brand to stop using TLD, to shut it down, and suddenly they do it, suddenly some EBERO takes it and runs it. It's going to be very wrong, and it will put the whole structure into quite a dangerous situation. Thanks.

JEFF NEUMAN:

Thanks, Maxim. Yeah. It's one of the reasons why there's an evaluation of the continuity plan during the applicant review. Obviously, EBERO is the last, last option.

Okay. I think the only other items from here is that there was some concern from ICANN Org. We have a recommendation to say that if there's a COI that's going to be required, it shouldn't be part of the financial evaluation, but really just should be required at the time executing the registry agreement.

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ICANN says, “Well, there’s often lead time needed to execute the COI,” and they want us to account for this. And I think that’s fine. I think you certainly could put in the guidebook that the applicant should start this process as early as possible or expect delays.

But I think, from everyone that went through the COI process as part of the application, it was very hard to explain to banks what the COI was and that it was for something that you may not get for several years. So, I think [we] understand and we note the concern.

All right. Let’s go to the next one, which I think is Metrics if I’m not mistaken. This one, not a huge amount to discuss here. There are a bunch of items that have been proposed or we have discussed throughout reviewing all of these comments that have come in, and so you’ll see all of these.

So, you’ll see number 1. ALAC has a comment in there that we note. But then you’ll see that the registries have suggested some items that could be included in the Metrics. I think we discussed this at a different time and thought it was good to just include, so we suggest including these.

The ALAC has also some metrics which we have discussed in other contexts already. If you scroll down. Sorry, can you scroll down to number 2?

So, number 2 we have discussed in number of different contexts except the end of there, which is in bold. This is a little bit different, in a sense, where it says, “The ALAC would like to see goals set

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and measured related to Consumer Trust including: frequency of direct use commercial activity or consensual data sharing.”

These, from our perspective, from the leadership, just seem beyond our scope in terms of, yes, it was recommendations from the CCT Review Team, but that was to ICANN. And so, if ICANN accepts it, that’s great. They’ll do it. But I don’t think they need recommendations on us from this.

We already talked with Contractual Compliance, and if you look at the latest draft, you’ll see some change in there in Contractual Compliance.

And then if you go to number 3 for the ALAC. Here are some suggested metrics for Applicant Support Program. Actually, I’m going to skip the paragraph there that says, “the term ‘Community,’” and just really look at the bottom there, the last paragraph.

So, it says, “And, in terms of metrics for the ASP, these should include: (because that’s the relevant part of the ALAC comment on this) ...”

We have already incorporated these into the metrics, so unless anyone has got a problem with it, let us know. But it has already been incorporated in there because I think we discussed this when we discussed the Applicant Support Program.

Kathy, your hand is up but I think that’s an old hand. Okay.

If you look down, there are some comments. ALAC #4 was copied from the Registrant Protections that we just talked about. So, the

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ALAC is asking for “the five critical registry functions and respective threshold levels ICANN Org has used to determine the triggering vs non-triggering of an EBERO event:” and then they list the five out there.

I think we actually got these stats, but I think what the ALAC is saying is, ongoing, they would like to see these details provided. And I think it makes sense to provide those.

And then the registries had some comments that we copied from the Applicant Support section, which we have already discussed all of these. So, I don’t think we need to discuss again. They’re already in the Applicant Support.

Article 19 has a comment saying that “all data collected, used, stored, and disposed should be in line with international standards for data protection and with respect to the right to privacy.”

So, I think here the suggestion is to include a just general—I put “disclaimer” and maybe that’s not the right word—but essentially a general statement saying that “All data collection will be collected, used, stored, and disposed in line with applicable law,” or something like that. Just a general kind of statement.

ICANN Org has a comment on our use of the term “meaningful” because we say that there should be meaningful metrics, and they want to know if this just means the CCT Review Team. And I think our response there ... So, we just note that.

And then they have a statement on 7.3 which says, “ICANN org confirms that the PDP Working Group recommends that



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subsequent procedures phases include metrics, service level agreements (SLA), and monthly reporting.”

They understand that “the phases listed in the Recommendation are examples, not a requirement to be used, as the names of phases may change in subsequent rounds.” So, we note that.

All right. Any questions, comments before we get to the fun of Closed Generics? No? Okay.

Let’s go on to Closed Generics. Okay.

This is obviously our most difficult one. We talked a little bit about this with Becky and Avri when they were on the call. If you look at the comments, you will see that very few agree with what was written, meaning that we were not able to come to a conclusion. And I think the only thing that there are comments agreeing on is not liking the fact that we don’t come to a conclusion and that it’s our job to come to some sort of conclusion.

But that’s probably where the agreement ends. If I were to just sum this up, I would say there is very little agreement on each of the extremes. So, there is not a huge amount of agreement on completely banning Closed Generics, nor are there a number of comments that support the unfettered use of Closed Generics. There may be a couple comments, but in generally I would characterize very few being support for the two extremes.

Most of the comments were some sort of variation of the “some limitations,” and a number of comments talked about serving a public interest goal.

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In thinking back to the conversation with Avri and Becky, they, I think, made it clear that the Board has no pre-conceived notions as to whether what had happened the last time sets any sort of precedent on what will happen going forward. So, there is no, in essence, default, if you will. At least in the Board's mind, they would like to see us develop policy with respect to Closed Generics.

The other thing I would like to add is, if we decide to allow Closed Generics for any reason other than what the GAC puts in their advice—to serve a legitimate public interest goal—then, of course, ICANN will have to deal with that GAC advice. Or it still has that GAC advice pending before it.

So, Marc is correct, too, that they were not looking for something that was overly complex. I think the other things we can reasonably assume is that ICANN doesn't want to be in the business of judging content, and so that was clear in their report. So, if there is any sort of public interest test, I don't think ICANN would like to be involved in that public interest test, to say the least.

We really need to understand whether there is some position—whether it's just, "Let's set a general parameter and agreement with GAC advice, let's say, that it must serve a legitimate public interest goal"; or whether we want to put some additional parameters around that. And that could be in accordance with the short document I submitted, or the document submitted by George Sadowsky, Kathy, Greg, and others. But we do need to bring this a conclusion.

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There are a couple comments from Paul and Marc. So, I think that this is what we need to work on. Right? I think that legitimate “public interest goal” is not something that is easily definable, but I don’t think that means that we are going to get agreement within this group that there should be unfettered Closed Generics out there. So, we need to move a little bit from the edges here.

So, I’ll go to Alan, Kathy, and Paul.

ALAN GREENBERG:

Thank you. Look, we have talked about this interminably. I don’t think there is a chance at all of getting agreement on any of the three proposals that were submitted—that is completely unfettered, or the Sadowsky/Greenberg one, or yours, Jeff. I really don’t see us coming to closure on this.

The chances of the GAC withdrawing their comment from last time, I think, is also close to nil. The GAC is well known, when you ask them questions, saying, “See our advice from N meetings ago.” And I can not see that changing this time.

The Board representatives have made it pretty clear that they don’t want to build policy. And if we don’t come up with a policy, they’re likely to send it back to the GNSO. And if it doesn’t come to this group, it will come to another similar group.

The only possible policy I can see at this point is banning Closed Generics because there’s no possible way that we’re going to come to something that’s acceptable to all the parties in this group. I know banning it was also not particularly acceptable, but at least it’s clean and it ties it up with a bow. Thank you.

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JEFF NEUMAN: Thanks, Alan. Paul and then Donna.

PAUL MCGRADY: Thanks. I tend to agree with Alan in one part, which is that I don't think we're going to reach agreement. There is no agreement around the Sadowsky proposal which really wasn't a proposal about Closed Generics. It was about a super-community application for non-profits.

There wasn't widespread support for Jeff's efforts—sorry, Jeff—which was very regulation-heavy. If I remember, you had to form boards and things like that.

And while I fully support the Pritz-Trachtenberg effort, there are still some here who believe that ICANN should be in the speech-regulation business and impose some sort of a public interest (which nobody is willing to define) obligation on top of this. And complicating it, there are people, I believe, on the call who may even go so far as to say that healthy, good competition in commerce is against the public interest in some way.

And so, we really have talked this thing to death. I think it's perfectly to say, "Hey. We talked it. We couldn't figure it out. The default is 2012, whatever that is." The two Board reps made it pretty clear that whatever they did last time (the Board did on this), there's no guarantee they will do it again one way or the other.

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The 2012 Guidebook doesn't preclude these, and if the Board is unhappy with that, send it back. Sometimes that happens. Or, they may just say, "Okay. Nobody banned them. Good enough."

But I have no problem leaving that to the Board when the time comes rather than trying to force some kind of false consensus on this now. We just don't have time. And most importantly, we've already talked about it. Thanks.

JEFF NEUMAN: Thanks, Paul. Donna, go ahead.

DONNA AUSTIN: Thanks, Jeff. I just wanted to address something Alan said. And this is the challenge of GAC advice and the assumption that if GAC advice comes in that's, again, against Closed Generics, then the Board will have to do something about it.

Well, one of the things the Board can do is reject that GAC advice on the basis that a PDP has put ... We have 52 participants on this call, have discussed this at length, come up with a number of proposals, and couldn't reach agreement. And so, therefore, on the back of that, I think that the Board could readily reject GAC advice because now there has been community discussion about it. And here we are without a unified position.

So, I just wanted to re-enforce that we shouldn't think that we should be beholden to GAC advice because the Board does have the option to reject that. Thanks.

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JEFF NEUMAN: Thanks, Donna. I see a couple other hands. If we could just scroll down a little bit to the questions and the comments.

So, I want to ask—because I’ve read this a couple times and it’s interesting—Paul and Marc in the comments. And maybe I’ll throw this to Susan and others.

So, the one thing, we had a non-recommendation, and the IPC and the BC were pretty strong about saying it was not acceptable to have an outcome of “no agreement.”

If I could ask Paul and Susan or others on the call to get in the queue and just help me understand what would be acceptable just so I can understand. At the council level, obviously, this will go and this will be part of it, and I want to make sure that we have addressed the IPC and the BC comments here.

So, while you’re thinking about that, let’s go to Kathy and Alan. And then I see Paul and Marc.

KATHY KLEIMAN: Great. Thanks, Jeff. And sorry, all, about the comments. It didn’t format the way I thought when I put it into the comments. But let’s review the GAC advice. It was an appendix, and it was the Beijing Communiqué. And it said a little more than we’re talking about.

So, just for reference, it was titled Exclusive Access and it said, “For strings representing generic terms, exclusive registry access should serve a public interest goal. In the current round, the GAC

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has identified the following non-exhaustive list of strings that it considers to be generic terms, where the applicant is currently proposing to provide exclusive registry access ...”

And I’ll note that there were early warnings on all of these as well.

“.antivirus, .app, .autoinsurance, .baby, .beauty, .blog, .book, .broker.” And I’ll spare you the rest, but they’re in the chat. So, it goes on and on.

And so, nothing indicates in our comments that the GAC has withdrawn this advice. In fact, I think we’re seeing that they currently support it. And so, one of one of our issues has always been that certainty going forward, that we don’t want a whole bunch of early warnings for applicants. We want certainty.

So, I’m going to support Alan in saying I don’t think we have agreement here, and accordingly, we can’t go forward with any agreement on supporting Closed Generics going forward. Thanks.

JEFF NEUMAN:

Thanks, Kathy. And I don’t think we need to discuss whether the GAC advice is effective or not. They have restated their advice in every comment that they have made to us. So, let’s assume, for our discussion, that the GAC advice still remains valid because, again, they’ve been reiterating it every single time.

Alan, go ahead.

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ALAN GREENBERG: Thank you very much. I think it's pretty clear that we do not have agreement to have completely unrestricted Closed Generics. There are some proponents of that here, but I think there is a strong indication that that is not going to win the day.

We understand the difficulty of finding any way to define "in the global public interest." Remember, the word "global" is there, and it is key. It's not just in "a public interest," but in the "*global* public interest."

I just don't see anything else that can meet those criteria. If we cannot define what the global public interest is and make it predictable, then how can we cop out and say, "Well, we're just not going to say it, and maybe someone else will figure it out for us"? Because that's what it comes out to.

I don't see any way of addressing all of the criteria other than saying, "At this point we do not see a way to do it, therefore you can't do it." Thank you.

JEFF NEUMAN: Thanks, Alan. Let me go to Paul.

PAUL MCGRADY: Thanks. I'll respond to two things. First, to Alan's comment which I wasn't intending to respond to. But basically, what Alan is suggesting is that the entire methodology of the working group with two calls left be flipped on its head where we say if we can't reach agreement, then we are going to impose a change to the



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status quo 2012 Guidebook. And the entire work of the working group has been the opposite of that.

And so, yeah. There's no agreement that we should ban Closed Generics without there being agreement on that, which there isn't.

Jeff, as to your point. I don't speak for the IPC, but I am a member of the IPC. And, yes, when you read the first sentence of the IPC's comment without reading the rest of it where they put forward a framework that they think might work, it may be sort of clever to say, "Aha! Even the IPC wants us to get to a decision here."

But I don't think the IPC—and, again, I'm not speaking for them. I don't think that capitulating to the maximalists who want to ban Closed Generics for reasons that really have never been fully articulated is ... I don't think the IPC wants agreement at any price.

So, I do suggest that in response to your question, that the entire IPC comment be read. And therein lies the way forward. But unfortunately, with two calls left, if we didn't get to what the public interest might be in four years' time, I don't know how we're going to get there in two calls. But I am the eternal optimist. Thank you.

JEFF NEUMAN:

Thanks, Paul. So, let me take that for a second and then throw this out because what we could do is go with some options and then indicate the level of support for those options. Right? That's one thing we could do in this.

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Obviously, there is most likely not going to be consensus on any of these options, but we could—if the group thinks that this is worth doing—indicate the level of support or non-support for the different options.

And those would be the complete allowance, the complete non-allowance, or something in between. I know I'm paraphrasing real quick.

Marc's got his hand up, so let me go to Marc and then Alan and Greg.

**MARC TRACHTENBERG:** It seems like the one thing that we can all agree on is that we can't agree here. There is no agreement. We've gone back and forth on this. Every point has been made. Right?

I agree with Paul, and I think it's not really fair that all of a sudden people are turning ... The default policy we had from day one which was to leave things as they are if we can't agree to them unless they don't like the outcome. I don't think that's really fair.

But that aside, the Board or anyone else can't force consensus on us. We don't have consensus, so there's no recommendation to make. Let's just be done with this and let the Board do what they're going to do.

Maybe the Board will respect GAC advice and ban Closed Generics. Or maybe they won't. But we're done now, and we're just wasting time. So, let's be done with this issue.

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And if they kick it back to us or another group, then so be it. But let's not manufacture some sort of artificial consensus or Frankenstein pseudo-variable consensus with different support. Let's just move on.

JEFF NEUMAN: Thanks, Marc. We have to air this out, so we're airing it out now. But that ultimately may be what we do.

Let's go to Greg and then Alan.

GREG SHATAN: Thanks for calling on me just after the guy who says we're wasting time and we should move on and stop talking. I'll keep talking, though.

I think there are a couple of things we can do here other than just throwing it back. I think we do need to be responsive. I know staff will do a good job, as they always do, of summarizing our discussions.

And I think we may even want to be a little bit more pointed than just the objective summary in a sense that we need to highlight the reasons why this was difficult: the difficulty of defining the public interest in this context, which has also bedeviled ICANN for years in other contexts when seeking a definition, at least, etc.

So, I think we need to be responsible. We have to have a result even if the result is that we have no result—no recommendation to make.

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Secondly, I think one thing that we could do in order to put some closure on this—and this is kind of playing off of what Alan said—is that we could determine whether we have consensus against unfettered Closed Generics. So, that would be a result. And we have established, in a prior working group that I was in, that there is such a thing as consensus against.

And so, we are making a consensus recommendation. I would actually suggest the recommendation should be that Closed Generics are suspended, not banned forever, but are suspended until a resolution of the issue one way or the other by however that will happen. Because I think a ban assumes a level of reasoning that's also beyond what we have done here, what we can come up with.

So, they would continue to be suspended—essentially in suspended animation. So, to some extent, I think that is actually the closest to continuing the status quo even though the status quo to the extent that the suspension is due to the Board decision is kind of evaporating.

So, I would say that there is probably a reasonable chance that we would in fact find a consensus on continuing suspension until the issue is dealt with more fully in another group and hopefully taking heed to some of the specific issues we had in dealing with this. Thanks.

JEFF NEUMAN:

Thanks, Greg. And I'm trying to follow the chat, too. But let me go to Alan and then George and Anne.

ALAN GREENBERG: Thank you. I strongly support what Greg is saying. I think that is reasonable to say it's suspended because we don't want to ban it because somebody may come up with a solution sometime. But at this point, I think we have to presume that the GAC advice will be there, that there will also be ALAC advice to that extent. And I think there was also SSAC advice, although I'm not sure about that.

So, I think a suspension going forward at this point until we can resolve the issue is quite reasonable. And let the GNSO charter another group to try to address it in some other way. Maybe the public interest will be addressed in a more global way for other reasons within ICANN and that will address it. I don't know. But I think that's reasonable.

And I strongly disagree with trying to judge the level of consensus for all the different options we have considered. That is equivalent to a poll. This is a completely unbalanced group. Certainly, the people on this call is not balanced. The people on the working group itself is a huge number that is essentially self-selected and randomly selected. I just don't think that we can do polls. Thank you.

JEFF NEUMAN: Okay. Thanks, Alan. George, and Paul. I assume Paul is going to cover a bunch of the stuff that's in the chat. If not, I'll go back after Paul. So go ahead, George.

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GEORGE SADOWSKY: Thanks. I strongly support Greg's formulation of the problem also, although I'm not sure how much strength I would put into this group saying, "We ban Closed Generics." I don't think we have the power to do that.

I also think that some of the comments that have been made regarding, "This is a waste of time," are essentially correct. We've talked about this for a long time. I wish we had been able to come to some kind of a conclusion on it.

One thing that's interesting is that the problem that we face in terms of defining the global public interest is one that ICANN has not only with respect to Closed Generics, but with respect to a number of other things that they do because their mission includes reference to the global public interest.

One would think that they would take this as a wakeup call to say, "This is an important issue, and we need to somehow solve it or bound it or in some way lower the variance of concepts around it so that we could actually use this as an operating characteristic to decide some of the decisions that are made." Thank you.

JEFF NEUMAN: Thanks, George. Let's see. Who's next? We have Anne, and then I'll leave it to Paul and Marc to decide which one goes first. Anne, go ahead.

ANNE AIKMAN-SCALESE: I'm a member of the IPC. I do not speak for the IPC, but to the extent that we as IPC stated, "Hey, guys. We need a policy or else

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this just becomes a melee, if you will,” I support Greg’s proposal as well, including a recommendation that suspension would not prohibit applications for Closed Generics, but that it would be subject to further policy development. That way, applicants know when they apply for Closed Generics, they are taking a risk, and that way we limit the litigation risk to ICANN.

It’s a much more practical solution, so I want to communicate individual support for that as well—suspension. Because when they apply, they’re going to get priority. Apply for a Closed Generic, you’re going to get priority subject to further policy development. The same string can’t be applied for if their application is on the books because we adopted that policy.

And it’s going to get far more predictability, guys. We’re looking for predictability. We should accept Greg’s suggestion. Thanks.

JEFF NEUMAN: Thanks, Anne. Let me go to Paul or Marc. Which one should I go to?

MARC TRACHTENBERG: I’ll go.

JEFF NEUMAN: All right, Marc. Go ahead.

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MARC TRACHTENBERG: One, I would just say now, all of a sudden, people want predictability after we were talking about things like: intent to use a string where there's really no way to have predictability and we're guaranteeing disputes. But now, people want predictability. Again, these are not consistent approaches from the people in this working group and on the call.

And as far as the suspension approach, that wasn't discussed before and that is not the consensus. We don't have a consensus that Closed Generics should be suspended, and that's basically just making an end run around the fact that we have no consensus and allowing people who believe that there should be no Closed Generics to achieve their goal by making an end run. So, I don't think that's really fair.

We all agree that there's no consensus, so that's just where we are. Let's let the Board decide. The Board is going to do what it's going to do, and then we're done.

JEFF NEUMAN: Thanks, Marc. And then Paul and Donna.

PAUL MCGRADY: Thanks. Just to address a few things. One, I have no idea how filing an application and then having it suspended forever is predictable other than it's predictably a waste of money.

Two, I agree with Marc that this last-minute suspension idea is essentially a different way to express a ban, which there's no consensus to have.



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If ICANN has not, in 20 years, figured out what a public interest goal is, there is no reason to think that in the next 20 years they will do that either, which means that these will be suspended indefinitely.

Third, Elaine says, “We have no consensus that Closed Generics should be allowed as well.” Well, they’re not prohibited in the 2012 Guidebook, and if we don’t reach a consensus to change the 2012 Guidebook—unless we’re upending the entire work of the last four or five years—we’re defaulting back to the 2012 Guidebook. And the Board liaisons have said that what the Board did last time doesn’t bind the future.

So, what we do have is a consensus that there’s going to be some ambiguity, but we certainly don’t have a ban. Nor do we need an affirmative consensus to allow them now because the 2012 Guidebook speaks for itself and is readable.

And then lastly, most importantly, I think that I have grave concerns about the idea of somehow ranging the three models and trying to figure out where support is for all those.

I’ve put this in the chat already. This is a moment where we’re just going to have to rely on Jeff and Cheryl to do the right thing here. There is no consensus to change the 2012 AGB. I wish there were. We had four years to do it. We’ve got a pretty straightforward comment from the IPC and the BC on a path forward.

I understand if people don’t want to go down that path. Fine. I understand we’ve only got like a week left. Okay. But I don’t want

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there to be some sort of fake, quasi-consensus here when there isn't any. No matter how it's labeled, a ban or a suspension, there just isn't any stomach for it. There's no consensus for it. Thank you.

JEFF NEUMAN:

Thanks, Paul. Before I get to Donna and Greg, let me also ask another question.

So, there have been several people who have said during the call that we'll have no agreement on it, and then ultimately the Board may just refer it back to the GNSO. Do we have any advice or any comments for a subsequent group that were to tackle this issue?

Any approaches or anything we can say in this report that would not make it a waste of time for the Board to just refer it back? Any guidelines we can give so that it's not just, the Board sends it back and says, "Okay, guys. Finish the job that SubPro couldn't do"?

I'm not saying that there has to be. I'm just trying to throw out some ideas so that we don't ... We will obviously detail the level of agreement, non-agreement, whatever it is that we have. But I think if we can provide anything constructive for a future group that would consider this, we probably should do that rather than have them just waste—or start from scratch. I shouldn't say "waste." Start from scratch.

Donna, obviously you weren't prepared to answer that question. So, go ahead. If you want to address, great. If not, that's fine, too.

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DONNA AUSTIN:

Thanks, Jeff. I won't respond to your questions. It's just, looking at what's on this screen at the moment, I wondered whether it's possible to agree to allow for Closed Generics with some assessment. The BC's called for on a case-by-case basis.

The GBOC has said, "urge the working group to craft and reach its consensus on the recommendation permitting applications for Closed Generics, subject to a specific objection mechanism for challenging ..."

I wonder if there is a way to allow for Closed Generics but find a way for them to be challenged. I don't support the suspension idea. We've been talking about this for a couple of years. I don't think anything new is going to come up. I don't think the GAC is going to change their mind.

Yes, the Board could kick it back for an EPDP, as Paul suggested. But the Board could also decide to reject the GAC advice once they wade through all the information that we've been through here.

I'm just wondering whether there's a way to allow for Closed Generics with some kind of objection mechanisms that has been recommended by the GBOC. Thanks.

JEFF NEUMAN:

Thanks. I think we did tackle that, Donna, in one of our very early discussions and it didn't seem to go very far at the time. We could probably pull it out from the initial report, but I seem to recall discussing that.

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I have Greg and Cheryl.

DONNA AUSTIN: Jeff, I know you [note] that we discussed it very early on and now we're very late in the game, so I'm just wondering whether it's worthwhile having a conversation again.

JEFF NEUMAN: Okay. Thanks, Donna. Greg and then Cheryl.

GREG SHATAN: Thanks. I certainly think that we can give some advice or reflection based on the discussions we've had. Anything we recommend, it doesn't have to be rising to the level of a recommendation as to what we think could be a way to resolve this in the future. Or at least telling people what we thought stood in the way of resolving it in the future.

Unfortunately, I don't think we're going to make any decision on mechanisms that would allow Closed Generics to go forward. I think, essentially, this has to be adjourned and held over to the next session of whatever.

We have not resolved the problem. The Board's request is there and whatever we do, there's going to be a decision placed on the Board or maybe back on the GNSO Council. But I think we can say something about it.

I think we can also make it clear that we are not looking for a ban disguised as a suspension, that we want this to be worked on by

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an appropriate group and to come up with a permanent result and it needs to be a priority to be dealt with.

I'll say one last time, if there is in fact a consensus on holding things where they are, in fact, now which is suspended, we should see whether there's a consensus on that. I know some people who probably would not join that consensus, think there is no such consensus. I know I don't need to remind the co-chairs that the only people who can determine consensus in a working group are the co-chairs. Hearing about consensus from interested parties is not fruitful.

So, I think we should see if, in fact, we can arrive at something which there is a consensus or the level below consensus—that is still a decision—and see how we can move this out of here in some way other way than a dumpster fire which seems to be very 2020. But I will leave it there. Thank you.

JEFF NEUMAN:

Thanks, Greg. Okay. So, trying to sum up what we have here which is not very different from what we had in the Draft Final Report.

So, one of the questions I want to ask. There has been some discussion of maybe suggesting—and I'm not saying the word "recommending"—that there may be another group that could look at this. Greg said that it should be a priority, but I'm not sure we could throw it out there that this is yet another dependency we want to throw on the next round starting.

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But we have done a lot of work on this. We have had a lot of discussions on this. A new group should start with a fresh pair of eyes, but also should not reinvent the wheel. Otherwise, they will just end up where we did.

So the thinking, at least my personal thinking—I have not talked about this with Cheryl or the other leadership—like I said, it's still having the same “no agreement” as our recommendation or as the overall status; but perhaps making suggestions in the rationale for future work or some guidance on future work.

I'm trying not to be very definitive because I want to hear from everyone. Thoughts on that in general?

CHERYL LANGDON-ORR: Jeff, just noting the time. Cheryl doing a time check.

JEFF NEUMAN: Yeah, thanks. Okay. All right. Leadership has a meeting tomorrow, I want to say, and we will come back with some lower-case recommendations on how we go from here. So, we'll leave it at that.

So, on the next call, which is 03:00 on Thursday, the topics we will cover are all in the Work Plan. But if, for some reason, you don't have it up right now, the Work Plan includes: Reserve Names, Geographic Names, Different TLD Types.

So, please come prepare or those. Not quite as controversial as ... Well, I shouldn't say that, actually. So, please come prepared

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to discuss those. And then look out for e-mails. There will be some more topical e-mails that come out as well.

All right. Thanks, everyone. Any last comments? Cheryl, anything you want to add?

CHERYL LANGDON-ORR: Nope. I took my hand down. There's no time.

JEFF NEUMAN: Greg does have his hand up. Greg, is there something you wanted to add to close?

GREG SHATAN: I have no time either.

JEFF NEUMAN: Okay. There you go. All right. We'll talk to everyone on Thursday. Thanks.

TERRI AGNEW: Thanks, everyone. Once again, the meeting has been adjourned.

**[END OF TRANSCRIPTION]**