ICANN Transcription

New gTLD Subsequent Procedures Working Group

Thursday, 16 April 2020 at 2000 UTC

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JULIE BISLAND: Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures Working Group call on Thursday, the 16th of April, 2020, at 20:00 UTC for two hours today.

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 audio bridge at this time, could you please let yourself be known now?

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

With this, I will turn it over to Jeff Neuman. You can begin, Jeff.

JEFF NEUMAN: Thank you very much. Welcome, everyone. As was just announced, this is a little bit longer call than usual. Of course, if we get done through the materials in quicker time than the two hours, then great. Then we can leave early. We've only got one subject that's on the agenda for today, and it is one of the bigger ones in the sense that it's a new area that was not in the program the last time around. So we'll spend time today talking about really the appeals process, the section that used to be called accountability mechanisms, but we realize that that has a specific meaning in the ICANN bylaws, so we changed it to what we were really talking about, which is the chance for a limited appeal or challenge mechanism, and then a confusing term called post-delegation resolution procedures, which is not the same thing as what you're reading about now, if you're reading the rights protection mechanisms document, which is the post-delegation dispute resolution process. So I apologize for the confusion there, but we'll talk a little bit more about that as we get towards that part of this subject.

With that said, let me just see if anyone has any questions on the agenda or any other business.

Okay. Any updates to any statements of interest?

All right. Before we get on to the topic as we're copying the link into the chat, you probably should have noticed by now that we sent out several of the sections as the draft final sections, including the Applicant Guidebook, the systems, communications, fees, and the applicants terms and conditions. We're asking for

you, if you have any comments on those draft final sections, to do so in the form and really limit those comments to the things you cannot live with.

I did see an e-mail from Alexander on the chat with some questions, so I'll try to address those by e-mail back. If there are real problems with the wording in the sections, then please do indicate it on those forms. They're going to be very important, and we're also going to use what you fill out in the form to keep track of all the comment in a spreadsheet which was sent to you in that same link that has the form and the first set of sections.

We are looking to do another batch of sections next week after the timeframe for that first set of sections has passed, so you should be getting another update next week.

Any questions on that before we get started with the substance?

Great. As we pull up this document, just a reminder: if you've got the new version of Zoom, you may not be able to just click on that. You might have to actually cut and paste it, but I hear that may be being updated soon, where it'll be a link again.

The first affirmation is from the 2007 policy, which states that, "Dispute resolution and challenges processes must be established prior to the start of the process." So that's pretty basic. Our first recommendation goes a little bit further than that in two ways. The first recommendation is that: "The working group recommends that ICANN establishes a mechanism that allows specific parties to challenge or appeal certain types of actions or inactions that are inconsistent with the Applicant Guidebook." It goes on. There's a

lot more information in this. This is a fairly long recommendation. It states that, “The new substantive challenge/appeal mechanism is not a substitute or a replacement for the accountability mechanisms in the ICANN bylaws that may be invoked to determine whether ICANN staff or Board violated the bylaws by making or not making a certain decision. Implementation of this mechanism must not conflict with or impinge access to Accountability Mechanisms”—that’s capital A and capital M—“under the ICANN bylaws.”

Any questions before we got onto these specific types?

Kathy, go ahead.

KATHY KLEIMAN: Hi, Jeff. Hi, everyone. Shouldn’t we be a little more specific about “The working group recommends that ICANN establish a mechanism that allows specific parties to challenge or appeal certain types of actions”? I don’t know what the recommendation means. I do know we had long discussions about balancing and making sure that there were [certain parties vis-à-vis ICANN that could challenge certain parties] vis-à-vis each other and could challenge the rights [and responsibilities]. But I think the recommendation [inaudible]. I’m not sure the recommendation needs anything [so far], Jeff.

JEFF NEUMAN: Thanks, Kathy. Yeah, I agree. If we had stopped here with only these two paragraphs, it’d be broad, but the rest of the recommendations and implementation guidance below this go on

to define this. So we set up the principle here and then you'll see below all the other recommendations and how we narrow this down to who can do what. So I agree with you. If it was just these two paragraphs and we stopped, you're absolutely right, but there are more details below. We'll go through those and, if you still think it's broad and we have to limit certain things, then let me know.

KATHY KLEIMAN: [Okay].

JEFF NEUMAN: Kavouss, go ahead.

Kavouss, you still might be on mute.

KAVOUSS ARASTEH: Jeff, I have general questions. In Rationale 2 and in many other rationales previously and maybe in the future, you have said, or we are saying, that ICANN establish [blah, blah, blah]. How could we do this? Are we saying before the start of the process? It's a limited time. Is it something that we ask ICANN to do? How quickly could we do that? Are they able to do that?

The second part of Rationale 2 that I have difficulty with is you're talking about action or inaction—this verb or expression: "action or inaction." In the bylaws, we [say] action or inaction by the ICANN Board or ICANN staff, but here we are talking of action and

inaction of whom? The applicant? The one who replied to the application? Whom are we addressing? [inaudible]. Thank you.

JEFF NEUMAN: Again, there is more detail below and then a chart that we referenced. For the who can bring what action against whom, the rest of it hopefully can be answered with all the materials below. If, after we go through hall of these you still don't have the answers, then we can see if we can work on the wording to address whatever needs to still be addressed.

KAVOUSS ARASTEH: Okay. I will wait to see whether I am [inaudible] or not. Thank you.

JEFF NEUMAN: Thanks, Kavouss. Kathy, I think that's still the same hand, so—yeah. Okay.

Let's move down. What are these types of challenge mechanisms and appeals mechanisms? Remember, we have two different names because we view them as two different types of reviews of actions or inactions. The first type we call evaluation challenges. The evaluation challenges relate to challenging the—well, it's harder to use the same words—evaluation results. These are the different types of evaluations that can occur during the application process. There's a background screening. There's a string similarity. There's DNS stability and geographic names. So you have a panel that determines whether what you're applying for is a geographic name. There's the technical operational evaluation

panel. There's a financial evaluation. There's registry services evaluation and a community priority evaluation, which is for those who are seeking community status. There's also an application support evaluation for those that are seeking some kind of report. Related to the technical operational evaluation, we're establishing a program for RSP pre-evaluations. That's the technical and operational evaluation prior to the round opening up through this program that we're setting up. An applicant may not—in some cases, some third parties; we'll talk about who and what those are—may not be satisfied with how an evaluation turns out, so this is a process by which an applicant or another party withs standing—we'll talk about that—can challenge the results of an evaluation.

Then there are five types of what we're calling appeals because they're appeals of existing objection decisions. If there's a decision with a string confusion objection, legal rights objection, limited public interest objection, community objection or something that we're calling the conflict-of-interest panelists, these are each determinations that can be appealed. We'll get into a little bit more detail about the processes themselves.

These are the 15 types of either challenges or appeals that we came up with in all of our discussions.

Going on to the next recommendation—again, we'll get in more detail about all of these things—"In service of transparency, clear procedures and rules must be established for challenge/appeal processes that are described in the implementation guidance below."

The first implementation guidance is, "Parties with standing to file a challenge/appeal should vary depending on the process being challenged/appealed. The working group's guidance on this issue is summarized here."

Before we click on that document, which we're going to, let me read the other implementation guidance that's related to it so that you're looking for this as well. Rationale 4 relates to standing. Rationale 5 relates to the type of decision that could be challenged or appealed—so the subject matter which can be challenged or appealed. The next one is the working group's guidance on the arbiters—so who can hear this type of challenge or appeal. By the way, these are links to the same document, in case you haven't noticed that, which is why I'm reading through these before going to the actual document. In the case of challenges to evaluations, [inaudible] arbiters should typically be an individual from the existing evaluator entity who did not conduct the original evaluation. In the case of an appeal or an objection decision, the arbiter will typically be a panelist or multiple panelists from the entity that handled the original objection but will not be the same panelist or panelists that provided the original objection decision.

We also state that, for all types of appeals to objections, parties should be able to mutually agree upon having a single or three-person panel. We then go on in Rationale 8—again, we'll get to the chart; the chart has more details—"All challenges and appeals, except for the conflict-of-interest one should be reviewed." Clearly erroneous.

Actually, let's go to the chart and maybe come back this implementation guidance. The first few, I think, were the important one. So let's go the document.

I see Kavouss and Christopher have their hands raised. Before calling on you, it may be that your questions may be answered within this chart, but, Kavouss, please go ahead and then Christopher.

KAVOUSS ARASTEH: I have one question and I have one comment. The question is that, in case of objections, is there an exhaustive list or an inexhaustive? Is there any other possibility when someone makes another objection if it is not inside these 15? Will be rejected/not accepted? Just a question.

The second is just a matter of transparency. You said that "for the service transparency." I say we say "for the sake of transparency," but not "for the service of transparency." Thank you.

JEFF NEUMAN: Thanks. On the second one, I think that makes sense. The wording change makes sense. So we'll make that change.

For the first question as to whether is this exhaustive or this is an example, these are all of the known objections and evaluations, so it's intended to be an exhaustive list. I suppose we can add a … Well, what we do in this footnote that you see—I do remember drafting this, so I remembered it here—is it says, "The list of challenges and appeals here are based on the current and

envisaged processes and procedures for the New gTLD Program. In the event that additional evaluation elements and/or objections are added, modified, or removed from the program, the challenges and/or appeals may have to modified as appropriate." So what we're intending to say is that this list is exhaustive because they are all of the types of current objections and/or evaluations, but, if any are added to the program subsequent to our work, then one of the tasks that whoever adds or modifies or does whatever to the objections or evaluations needs to think also about whether there should be an appeals process for those additional elements or modified elements. Hopefully that makes sense.

If we have missed any, by the way, off this list, do let us know. I think we've covered them all, but if we have missed something, please do let us know.

Christopher, go ahead.

CHRISTOPHER WILKINSON: Hi, everybody. It's 10:00-post here. Jeff, I have several comments on this range of issues, but since you were on the screen, I wish to make one very firm point. There's language here about the evaluation entity. I think that must be deleted. The previous experience, notably with the Economist Intelligence Unit and the International Chamber of Commerce, in effect put the evaluation entity between the applicant and the evaluators. I think that is completely wrong. There should not be evaluation entities. You have evaluators, and they should be nominative and known, and there qualifications and their experience should be on the record. But there's no

question of, to my mind, in the interest of transparency and objectivity and sometimes competence, of having an evaluation entity that interfaces between ICANN and the applicant. Thank you.

JEFF NEUMAN: Thanks, Christopher.

CHRISTOPHER WILKINSON: Please delete the word "entity." Thank you.

JEFF NEUMAN: I know you're thinking of one type of evaluation. So community priority evaluation might be unique because—

CHRISTOPHER WILKINSON: No. This is general. I have other thing to say about application support and community evaluation and so on. But, in general, ICANN must not outsource the responsibility for the evaluation to entities.

JEFF NEUMAN: This is something that's a little bit new in terms of the concern., except with communities. We've certainly talked about that. But, with respect to outsourcing the legal rights objections to the World Intellectual Property Organization for them to select panelists, I don't think that has ever been controversial, or at least isn't

controversial now. Outsourcing the technical evaluation to an organization like KPMG—I think they used KPMG—is not a bad thing either.

So we need to be careful, when we're making sweeping statements, especially when we have maybe one or two types of evaluations in mind, not to make overly broad generalizations. We do talk about—

CHRISTOPHER WILKINSON: Wait a minute, Jeff.

JEFF NEUMAN: Wait a minute. Hold on a minute Let me finish, Christopher. We did specifically talk about communities and the types of evaluation. There are recommendations—we're not going to go into that today—on those. But, at the end of the day, those recommendations don't necessarily apply to all of the other types of evaluations and objections.

Go ahead, Christopher—you want to respond—and then I'll go to Anne.

CHRISTOPHER WILKINSON: That is not a sweeping comment. I think the general principle must be that ICANN—ICANN Org, if you wish—takes full responsibility for the evaluation. They may delegate parts of that to individual evaluators. I do not accept, in this concept of global development of DNS—all languages, all

scripts, and all cultures—that ICANN can appoint and outsource to a few—how shall I put it?—conventional entities serious responsibility for the evaluation and the appointment of the evaluators? No. That is going too far.

There may be exceptions. There may be mutual areas. For the sake of argument, you could make an exception for WIPO. You could make an exception for technical evaluation, but I have no idea why KPMG would be competent to evaluate the technical or the financial aspects of an application. I wish to change the root of this problem. ICANN cannot delegate the responsibility for approving a gTLD. Thank you.

JEFF NEUMAN: Okay. Anne, go ahead.

ANNE AIKMAN-SCALESE: Thank you very much, Jeff. I think the point here that I would like to make is, let's not throw out the baby with the bathwater because we have acknowledged problems in relation to community evaluation and talked about how we might address those. We've also talked about expenses, particularly in relation to the ICC.

But I believe it's in the community's interest and has actually not been really questioned in our initial report or otherwise. We should be looking to these outside organizations because, theoretically at least, they ensure a more objective and consistent process. In this regard, WIPO is very widely respected. They're certainly the right

organization for, as you mentioned, legal rights objections. And there are others.

I think it also goes to a point that Christopher has previously made, which is that, where ICANN is financially interested, they should not necessarily be a decision maker. The user of an outside entity that's deciding on a basis other than something that will cause additional revenues to come into ICANN if the decision goes in that direction ensures more objectivity.

I see my time is up. Thank you.

JEFF NEUMAN: Thanks, Anne. I agree with what you said. We are getting a little bit off topic because we're talking about the appeals and I do read want to read Susan's comment before I go to Greg.

Oh, let me read Jamie's first. Jamie says, "I've always expressed concern about the lack of transparency around CPE evaluators." Thanks, Jamie. We have talked about that and we do have recommendations about that. This is not taking the place of those, of course.

Susan states, "At least one of the reasons to have this appeal challenge process is to ensure that, where an entity makes a decision, there is a path to seek reconsideration, rather than having to try to bring an accountability mechanism against ICANN for an act of the entity—i.e., we were recognizing that there are entities and building an improvement. Why on earth wouldn't KPMG be able to assess things like financial and other matters?" I think those are good points.

Let me go to Greg.

GREG SHATAN: Thanks. Can you hear me?

JEFF NEUMAN: Yes, we can.

GREG SHATAN: All right. Testing out a new headset, so, if anything is weird, let me know. Other than me.

In any case, I think the issue here is, while appeals is part of this, that the larger part of this is looking at oversight and transparency and accountability with regard to the panels and the entities running the panels. There's certainly room for improvement. I think that is where we should be aiming, not at burning down the whole system and causing ICANN to build a whole new suite of offices for a series of people running panels. I do think they need to make sure that there is a bit more oversight and more concern, now that we've seen that some were better than others. In some cases, it was not just the entity but the review process itself that they were given. In some cases, it was how they interpreted it.

In any case, I think they were given far too free a rein. Especially without an accountability process, we ended up with some very wonky decisions that basically may have been modified through other processes. But they were not good. I think the solution is to try to do this better. Certainly, if we don't know why KPMG is

capable, we also don't know why there are incapable. They're a huge consulting firm. It's been a lot time since they were just a bunch of accounts.

So I think, by and large, there are plenty of people out there who will do this well, but they'll only do it as well as the oversight which we give them. Thanks.

JEFF NEUMAN: Thanks, Greg. We've addressed the evaluations. Those are in other sections, so I want to get back to these appeals specifically. The entity information will come up again when we talk about conflicts of interest. But, other than that, let's try to stick to what's on this agenda for today, which is talking specifically about challenges and appeals.

Can we go to the chart? Sorry, Christopher and Greg. I think those are leftover hands.

CHRISTOPHER WILKINSON: Well, it's not exactly a leftover hand from Christopher. I thank Greg for his attempt—

JEFF NEUMAN: Okay, go ahead.

CHRISTOPHER WILKINSON: I thank Greg for his attempt to find some middle ground, but the basic fact is that there is a lack of

transparency. In the lack of transparency, there is no assurance of competence at the level of evaluations. So I leave it at that. We can work on how to improve transparency. I think the matter is still open. You can't get away with just delegating this to an entity. Thank you.

JEFF NEUMAN: Okay. Christopher and others, if you still have concerns, please go back and read the sections that we've spent the last several weeks going over, which include evaluations and objections. We have lots of recommendations in there about transparency and clarity and selection of evaluators and all of that. We've already hit those issues. If you still think something is missing, then please do [pick] those.

Paul, go ahead.

PAUL MCGRADY: Thanks. Very briefly because I can tell Jeff is getting tired of this, I don't believe Chris was suggesting that the work can't be farmed out. I think he's just suggesting that farming out can't relieve ICANN of the responsibility of the outcome of the work that it farms out. So I don't think there's any babies or bathwater being thrown out here. With the +1s that Christopher was getting, I think that that indicates that this group, at least, still feels a little bit prickly about making sure ICANN is on the hook for the quality of the outcomes. Thanks.

JEFF NEUMAN: Thanks. Ultimately, at the end of the day, it's ICANN that selects or doesn't select an application, so ICANN is always on the hook, period. Anyone at any time can do an accountability mechanism if they think they've shirked their responsibility in some way. But what we're talking about here is simply an evaluation result that someone thinks is wrong or an objection decision that someone with standing thinks is wrong. So, when we get into conflicts of interest and who should be the arbiter, that's when we start talking a little bit about an entity and not having the same person that did the initial evaluation or the objection decision be the same person that is going to review the appeal or the evaluation challenge—whatever is applicable in that case.

Let's go the chart for a sec—well, for more than sec. Okay. So we break each of these down. This chart should look familiar because we spent a number of sessions going through this, but this was a couple months ago at this point. I think we also discussed it at the Montreal—I want to say Montreal—ICANN meeting, so it was two ICANN meetings ago. This chart has the specific process for the evaluation—the next tab is the objections—the outcome that might warrant a challenge, and the potential effected parties. I think Column D is a little bit more important, which are the parties that we believe should have standing to bring, in this case for evaluation procedures, a challenge. The next tab would be a standing to bring an appeal of an objection decision. Sorry, can we stay on the evaluation procedures? The next one is who should hear the challenge, and then what happens if there's a successful challenge—what does that mean? And then, of course, who bears the cost, which is always an important part.

Evaluations is different than disputes in the sense that evaluations are generally going to be brought by the party—an applicant in a lot of cases—but it's not an adversarial proceeding. Yes, you are challenging the results of the evaluation and, yes, there was an evaluator, but you're not engaging in an adversarial process with the evaluator. That'll mean more when we talk about who has standing.

In the background screening, what we talked about is an outcome that might warrant challenge. The first outcome that might warrant a challenge is if the applicant fails the background screening. In that circumstance—you go to the next column—the applicant would be a likely challenger of that decision where it failed.

Now, other people had said that we should look at, if there's a contention set, whether other members of the contention set should be able to challenge if the applicant fails.

I've been going through that in my head as to how that would ever come up, and I'm not sure that it would really make sense. If there is a challenger in a contention set, why would they be upset if the applicant failed and got removed from the contention set? So I just wanted to ask that question. Certainly the applicant would have standing to challenge its failure.

Paul is saying, "Agreed. It seems unlikely." So it's bracketed. If you can think of any reason why anyone else would want to challenge that, let us know. But, at this point, the only party that we think has standing, if we go to the next column, is the applicant itself.

Now, who would hear that? Obviously the background screening was done by a … Well, this gets to the entity question. In the last round, ICANN picked an entity to do the background screening, and that entity farmed it out to one or two people, I'm sure. What we're saying here is to challenge the background screening. The challenge would go to the same entity that performed the evaluation, but it would be a different individual at that entity that would hear the challenge.

The second column, or Row 3: The second possible outcome is that the applicant actually passed the background screening evaluation—so no issues were found. An applicant wouldn't challenge if they've passed. I think they'd be happy and wouldn't say, "Hey, why wouldn't you fail me?" But what we did talk about is that potentially other members of the contention set may challenge or may want to challenge because they might think that the applicant shouldn't have passed that part of the evaluation.

Some working members mentioned that there might be other third parties, but I wasn't 100% sure as to who those other third parties would be: if they were … Well, actually, I do remember this one. I think Paul was the one who mentioned it: if someone passed the background screening and they didn't apply for it but they have some other basis to object to the application. I think that's why we talked about it. I think Paul mentioned an example at that point. Certainly, if no issues are found, we were discussing that other members of the contention set may want to challenge, but we didn't come to a decision on that: whether we think that they should have standing or anyone should have standing to challenge if someone passed a background check.

Paul, go ahead.

PAUL MCGRADY: Thanks. I'd like to speak up for both ideas. The first one, I think, is more important. I think that members of the contention set should surely have standing to challenge for background screening that has gone wrong. It's patently ridiculously that an applicant who should not be there should be causing another applicant to have to spend millions and millions of dollars in order to proceed with their TLD application in an ICANN auction. So that to me seems like a no-brainer.

On my Christmas list—maybe I'll get lucky today—I also think third parties should have standing to challenge because third parties may know something that ICANN needs to know. There are all kinds of associations and that kind of thing that represents various people. It would be good if there was that mechanism besides public comment for them to get their two cents in.

But the one that I think is especially important is anybody that's in a contention set. That seems to me like we really ought to do that. Thanks.

JEFF NEUMAN: Thank, Paul. I see that Susan has agreed with you on the contention set members.

Let me ask the question the other way. Does anyone disagree that other members of a contention set should have standing to challenge if an applicant passes the background screening? Also

keep in mind, because the first thing I know that usually comes up is, “Well, what if they’re just doing it to waste time or drag things out?” that, in a later recommendation, you’ll see asking that each appeal/challenge mechanism should have a quick look associated with it to make sure that it’s not being filed for harassing or other types of reasons.

Christopher, go ahead.

CHRISTOPHER WILKINSON: Thank you, Jeff. Two small points. First of all, I have a pretty neutral attitude towards this whole dossier, but it would be really nice if we could have a report or an analysis of how this issue was dealt with in the 2012 round. I think we’re not working on purely abstract concepts. We’re working on how to correct and improve the results of what went before. Personally, I have no idea. So, as I say, I’m quite neutral about this and would hope that, at some juncture soon, ICANN could issue a working document about how this worked out last time around. Thank you.

JEFF NEUMAN: Thanks, Christopher. Last time around, there were no substantive appeal or challenge processes. What ended up happening was that applicants—or those aggrieved, I should say—whether it was a result of an evaluation or a dispute, where forced to file accountability mechanisms, and ICANN as an organization tried to fit the square peg in a circle hole to try to hear challenges or disputes. At the end of the day, many, if not most, of the

challenges or accountability processes resulted in no action because, at the end of the day, the standard of reviewing accountability mechanisms was whether the Board or the staff violated the bylaws. In order to violate the bylaws, you had to act inconsistent with the bylaws. For many, if not most, of the cases, that did not include a substantive review. So we spent many weeks—months, in fact—talking about the need for the appeals process. So this is not in a vacuum. We have a lot of materials already on these subjects. If you're interested, please do go back to the documents that we do have.

Kavouss, go ahead.

KAVOUSS ARASTEH: I understand what the contention or "contentious" is, but I have difficulty: what do you mean by contention set? What does the set apply to?

JEFF NEUMAN: Where there was contention, the set of applicants that are in contention with each other in called a contention set. The term that ICANN used were, let's say, on the string dot—I don't know—web. [New.co, Limited], Donuts, and many others were part of the contention set. So it usually refers to that group of applicants all vying for the same string. They're known as a contention set.

KAVOUSS ARASTEH: So you mean one contention? Or second or third or fourth or a series of contentions? Is this why you call them a “set”? If it’s not a set—

JEFF NEUMAN: Well, it’s over one string. It’s all of the applications—

KAVOUSS ARASTEH: Contention or contentious. Yeah, put something but not “set.” It is not a set of something. What set is that? Set of [inaudible]? Set of [inaudible]? I know it’s from 2012, but I don’t understand what you mean by “set.” Thank you.

JEFF NEUMAN: Sure, Kavouss. “Set” is the term that is used in the Applicant Guidebook. We can maybe do a footnote to the section in the guidebook.

KAVOUSS ARASTEH: If you can explain what a set means, I have no problem. Thank you.

JEFF NEUMAN: Okay. Thanks, Kavouss. The next column there for those to is, who is the arbiter of the challenge? Before we started this discussion on entities, the background screening was farmed out to a third party that actually has experience in doing background screenings. It may have actually been more than one entity, but it

was at least one entity. What we're trying to make sure here is that the challenge of that is heard by … We still think it should be the same entity that's got the experience in doing background screening, but we need to make sure it's a different individual or individuals than the person or persons who did the first evaluation.

Does that make sense?

Christopher and Kavouss, you still have your hands up. I'm thinking those are old ones, but I just want to double-check.

Paul, go ahead.

PAUL MCGRADY: Thanks. I don't like the idea of the same entity appointing another employee of theirs to check up the work on another employee. I don't know how many guys down the hall are going to be gunning for their buddy down the hall or able to be neutral.

That having been said, it's better than what we had last time, which was a dark hole where everybody was ignored. So I guess, even if we do it that way, is it an improvement on how it was? Yes. So, if we end up there, I guess I'd be not as happy as I could be but happier than I was, if that makes sense. So I think that's important.

I also can't necessarily think of another idea on who should hear these without going down the path of ICANN appointing super-panelists or whatever. Thant would be an entire level of extra construction that I don't think anybody has stomach for.

Anyway, all that's to say this: not perfect, but some is better than none. Thanks.

Also, by the way, nobody spoke against the idea of contention set members having standing, so hopefully that's cemented at this point. I hope so. Thanks. Bye.

JEFF NEUMAN: Thanks, Paul. We're going to remove the brackets from the contention set in the second case, not in the first case because we can't really think why a contention set member would want to challenge their fellow contention set member failing. So I think we can eliminate it there.

What could be the likely result if the challenge is successful? Well, if the challenge is successful in the first case, where the applicant failed, and the applicant challenges and succeeds in its challenge, then the application is reinstated with a passing grade. Then the application can continue to be processed.

In the second case, if an applicant initially passed the evaluation and that was challenged successfully, then the application is then disqualified from the program as if it failed the first time.

I think that's pretty obvious, but I just want to stop there and just see if there are any questions.

Okay. There not being any questions, let's then talk about who bears the cost. This one had a lot of comments back and forth. At the end of the day, we need to make a decision on this. It's a tough one because, where there's one party going against another

party, you could say the loser pays. But here we have one party just challenging the results of an evaluation. Assuming an evaluator acted in good faith, which I think we always need to assume, we can't really ask the evaluator to bear the cost of the failure. We went back and forth on this one. At the end of the day, certainly in the first case, where an applicant is challenging the results, we do think that the applicant should be responsible for paying.

The only question, however, is, if they succeed, should they get some sort of refund? Again, the problem there is that ICANN needs to pay the evaluator, and a refund would come out of ICANN's budget which, at the end of the day, would come out of everybody else's applications fees because this is a revenue/cost-neutral program.

So, when I was thinking about this issue, it still was tough for me to imagine a situation where they should be eligible for a partial refund, but I really want to hear comments.

All right. Nobody has got any thoughts. Sorry, let me scroll down and make sure. Okay. So let's keep it the way it is—oh, no. Jamie, go ahead.

JAMIE BAXTER: Thanks, Jeff. This may actually apply to some of the other ones when we get to them as well. It seems as though—I'm thinking aloud here—the information that was included in the application has not change, yet the evaluation was applied incorrectly, therefore resulting in a false or a bad result that then gets fixed by

somebody who looks at the information correctly through the right lens. It does seem that the cost should be borne on the evaluator because they didn't do a thorough job/they didn't do their job properly. Now, it would be a different scenario if new information was brought to light that wasn't available to the evaluator in making a bad decision.

I guess the point I'm trying to get at is that there are instances here when evaluators have be responsible for the work that they do, even if it's bad work—especially if it's bad work. I don't know how we work that into this, but I don't like the assumption that the evaluator should be able to just get paid and walk away. They are part of this process and they do provide a service that they're getting paid for. If they don't provide good service, they should be responsible for that. Thanks.

JEFF NEUMAN: Thanks, Jamie. You were the one, I do remember in those last conversations, bringing this up.

I think Paul makes a good point in his chat. If they know that this could result in a partial refund, then wouldn't the evaluator—the other individual at the same evaluation entity, if there is an entity … Why would want to give up their entity's money to get a partial refund? So it would be very difficult to get an impartial review if they know that a successful review would result I loss of money. So it would be difficult under that circumstance.

Christopher and then Greg.

CHRISTOPHER WILKINSON: First of all, I really think that ICANN and GNSO need to look seriously at the costs arising for some of these procedures. You're going to be increasingly dealing with companies and communities worldwide who do not consider that the costs arising from, if I may use the expression, the American legal profession are an acceptable basis for taking decisions. So I think we need to reevaluate the threshold of costs.

I think, from reading some of the stuff that has been produced by these expensive lawyers, ICANN and GNSO should go to great lengths to ensure that, as much as possible, the legal and technical work that is required to deal with these kinds of problems should be pro bono. Ask for experts who have the experience and are prepared to work for a few hours pro bono to help to solve problems. I do not accept the long-term proposition that hundreds of thousands of U.S. dollars will have to be spent in order to make the wheels turn. This is not a good idea. Thank you.

JEFF NEUMAN: Thanks, Christopher. Greg, you want to respond?

GREG SHATAN: Thanks. I think what we have here is an issue of oversight. I'm thinking that more listening to Jamie than Christopher, which I'll put to the side. It's not a simple question of correct or incorrect. Anybody who has dealt with appeals of anything knows that there are different judgments and different ways of looking at things. In a sense, we may be talking about KPIs. If there is a review that essentially would be a breach of contract—that is, a [clear error]—

that is a gross misapplication of the basic standards that … In other words, if it's a stinker, that's one thing where perhaps a refund could be considered but probably more on contractual basis with the provider and not as a general matter. The question of who's right and who's wrong and on what basis is just not going to be, most of the time, quite so clear as to say, "You need to give us a refund because you installed a stairway to nowhere." There's a lot more judgment involved in this—not that every one of these is going to be a judgement. Some of them could be stinkers.

As for expensive American lawyers, I don't think there's anything that says that these are all done by people who are lawyers, people who are American, or people who are expensive. In any case, nobody is going to do this pro bono. That's just a compete misapplication of the concept and a misunderstanding of why people do such things.

In any case, I think here, again, we're back to oversight and we're back to controls. I think a partial refund would only come, basically, if something was essentially sanctionable/breach-able and not just from being overruled. Thanks.

JEFF NEUMAN: So having a standard that basically says that, if the arbiter finds that there's—I don't know—intentional whatever—but I don't know why they would ever find that because it's someone else that works at their entity—and they themselves know that their work is reviewable, then there could be a refund.

Jamie, go ahead.

JAMIE BAXTER: Thanks. I know we don't have an example of this from the last round because this obviously didn't exist in the last round, but what we do have is a clear example from the accountability mechanisms. I probably have raised this before, but we were one of the only folks to win a reconsideration request which I guess is very similar to what we're talking about now with respect to the appeals process. The reconsideration request was won because it was shown that the evaluators did not actually do their job the way it was described they were supposed to do it. That gave us a reconsideration.

Now, we certainly didn't pay for a reconsideration—a second evaluation—from the Economist Intelligence Unit. I've asked this question before, but I've never received a response: Did the Economist Intelligence Unit actually do it for free, or did ICANN pay them to a second evaluation for our CPE? So there is an example that exists. I don't know if anybody is willing to explain what really happened there, but that is a true-life example that literally probably would have went through this appeals process if it existed at the time. But it didn't. If somebody can shed more light on that and help explain how the financials were handled in that case, it might give us an insight as to a way forward in this situation. Thanks.

JEFF NEUMAN: I think, in that case, because it was the result of a reconsideration request—right—you didn't bear the cost. My guess is—we can find out—obviously that ICANN paid for it, but they also paid for

another study to be done on all community evaluations. But I don't think we can except that to be the case of every single appeal. You're then talking about, if you built that into the cost of the program, a million dollars. I don't even know what assumptions they would make as to what percentage would be appealed or how much money they would have to raise from all the other applications [when], on a contingency, there's a lot of appeals and challenges filed.

We need to come up with an answer to this. We obviously know, if an applicant loses, that they should bear the costs. I'm waiting for a concrete suggestion.

Greg, is this a new hand or old?

Old. Okay. Paul, go ahead.

GREG SHATAN: Actually, sorry. It was a new hand. I just put it down too quickly.

JEFF NEUMAN: Oh, sorry. Go ahead.

GREG SHATAN: To respond directly to what you're asking, I think, if the appeal is won, then there shouldn't be a refund, unless there's an additional finding of clear error or fundamental failure to apply the standards. It's essentially along the lines of what Jamie said: it was not an error in judgement but it was a more gross error in not doing then job they were supposed to do.

Now, of course, that does go back to Paul's guy-down-the-hall question, but I think this goes in legal cases that American expensive lawyers deal with—also cheap American lawyers. We have what's sometimes called exceptional circumstances. Typically we don't have a system where a loser pays or anything like that, but sometimes there are exception standards. So it has to be an exceptionally bad case.

My final suggestion is that perhaps cases of essentially major screwups should not be handled. If there is an additional problem of a major screwup, that should probably go back to somebody at ICANN who is essentially in charge of the oversight and KPI administration for all of the evaluators to say that this just went beyond a difference of view or opinion or being smarter. So I think that that's where I would go. I would divorce the two, void the buddy-down-the-hall problem, and make it an additional claim. You have to say at the beginning that you have a good-faith belief that this was completely fucked up. Sorry. Take that word out of the transcript, please. Completely screwed up. But, just for the typical win/loss, there should be no more money differential. Thanks.

JEFF NEUMAN: Thanks, Greg. We will strike that word from the record, but we all know what you meant. I think that does make some sense.

Jamie, if that were the standard in general, it's the applicant that pays, but, if they show some sort of major issue, only in extraordinary circumstances would they be eligible to get some sort of refund for that.

Paul, go ahead.

PAUL MCGRADY: Thanks. I kind of agree with Greg, but I'm a little bit hesitant about the extraordinary circumstances because what good lawyer won't claim that it is an extraordinary circumstance? Then we're back stuck with the buddy-down-the-hall problem.

I think the better solution comes out of something Christopher was saying, which is that perhaps what we should say is that the applicant or the party who has benefit of the outcome if it goes their way—in the first row, applicant, and the second row, members of contention set—needs to pay the fee but that the fee should be flat, it should be knowable, and it should be modest so as not to be so high as to preclude the parties from taking advantage of the mechanism. That way, no one is going to get rich by screwing something and then having an appeal filed, but no one is going to be impoverished for bringing up the screwup.

So that's where I would put it. I would put some guardrails around how much these things can cost rather than redistributing money at the end of the day based on who won or lost. That seems to be extra complicated and actually has some adverse side effects of making the process less trustworthy. Thanks.

JEFF NEUMAN: Right. And the cost is the function of how lightweight the process is, which is why, when we talk about the standard of proof, higher than always reviewing everything as what we call de novo, which is reviewing it from the beginning, because, if you have to review

everything as if it were new, it's going to be quite costly. But, if you're applying a clearly erroneous standard, you can review what the initial evaluator did and see if there was some clear error that they made.

So I think we could take Paul's comments and make that into the who-bears-the-cost. And it probably applies to all of these. I don't know if it'll be any different. What I'm saying is that that concept could apply to all the different types of evaluations.

Let's look at string similarity. There are several different outcomes in string similarity that could warrant a challenge. If a string is found to be similar to an existing TLD, a reserve name, a two-character code IDN—any of the "you're not allowed to apply for these" terms—then, if you're the applicant and you're found to be similar, your application will be thrown out. Obviously, an applicant would have standing to challenge a finding that it's similar to an existing TLD. Even though an existing TLD operator can be impacted or affected, I guess, if it's found to be similar and thrown out, we didn't think that there would be a reason for them to file an appeal on the string similarity evaluation if they're found to be similar. It didn't make sense.

Does everyone understand that? Can everyone picture that?

The second case is if it's found to be similar to another applied-for TLD, which means that, if it is, it's going to be in the same contention set as the one or ones in which it was found to be similar. An applicant could appeal that because they may not be happy about being in that contention set. Other applicants in the contention set may also not be happy that it's being included in

their contention set. Therefore, we think that either or both of those parties should have standing to challenge.

The third situation is where string similarity is not found to be similar to an existing TLD, reserve name, two-character IDNs, etc. In that case, the application would be allowed to proceed. The applicant is not going to appeal that it's allowed to proceed because they're probably going to like that, but an existing TLD operator may want to challenge that decision. So an existing TLD operator should be able to challenge.

But what we end up saying there is, because they have a challenge mechanism already in the form of an objection, that they do not have standing. So, if it's found not to be similar to an existing similar TLD, or if it's found to not be similar to another applied-for TLD, because we have the string confusion objection, there's no reason to have an appeals process for those same entities.

If you think back to our recommendation on string similarity evaluation, we do say that the string similarity evaluation results have to come out several weeks—I forget exactly the timeframe—prior to the deadline for filing an objection. So, if that time period is extended, where the string similarity results come out later, then the time period to file an objection will also be extended. So that's why, in these two cases, we don't think anyone would have standing to file a challenge of an evaluation result.

Anne, go ahead.

ANNE AIKMAN-SCALESE: Thanks, Jeff. On string similarity, it seems that the tool that was used in the 2012 round was a specific algorithm. I think it's something called the SWORD algorithm. So I don't know exactly how much discretion there is in the evaluation panel as far as determining string similarity.

Do we know if this algorithm is what will be used? How does that—oh. It didn't work. Okay.

JEFF NEUMAN: Yeah, they ditched the algorithm. They ditched and were recommending that they continue it or that they continue to not use it.

ANNE AIKMAN-SCALESE: So is there any sort of objective test or algorithm that they're now supposed to use that we're recommending? I apologize for not knowing what that is.

JEFF NEUMAN: Nope, there's no algorithm. We don't recommend an algorithm. There's a test that's been developed that they use now. They need that test not just with the new TLDs but they use that with the ccTLDs as well. We talked about that during the string similarity evaluation. But it's manual. It's not from an automated tool.

ANNE AIKMAN-SCALESE: So, if there's a uniform tool and that's the test and that's the one that's applied, does appeal make sense in that context?

JEFF NEUMAN: No, it's a test that humans use to weigh factors, and humans can always make mistakes. It's not automated.

ANNE AIKMAN-SCALESE: Ah, okay. Thank you.

JEFF NEUMAN: Sure.

On, DNS stability, which, by the way, none of the applications failed last time, if there is a failure on the DNS security check, an applicant is obviously going to be the one that's effected because his application is thrown out. So an applicant would have standing to challenge, but we didn't think that there would be any need for anyone else to have a right to challenge the findings of the DNS stability.

In the geographic names, however, there is a geographic names panel. If they found that it was designated as a geographic name, then there were certain rules that applied to it. Some geographic names couldn't be applied for. Some could only be delegated if they had consent of the applicable government. For others, it depended on how they were using it. We're not going to go through all those geographic rules, but one outcome is that it is designated a geographic name, and therefore an applicant should

have standing to challenge. There's also a result where the string is not designated as a geographic name. An applicant, I guess, if it wanted to be considered a geographic name, could challenge. I'm not sure that would happen a lot, but it is at least conceivable that an applicant would not be happy if it wasn't delegated a geographic name, especially if it had government consent. Maybe it's that there are others in a potential contention set. If a string is not designated as a geographic name, then the applicable relevant government or public authority may not be happy with that, so we think that they should have some sort of standing to challenge those results. If there's a challenge over what the definition of the relevant government is or there's some other deficiency in the document which results in the application not being processed any further, an applicant could certainly challenge that. Or, if there's a finding that there was consent from the relevant government authority, and another relevant government or public authority had an issue with that, they may have standing to challenge that as well. So those are the different scenarios we can foresee with geographic names.

Christopher, go ahead.

CHRISTOPHER WILKINSON: Thank you, Jeff. Allow me to remind you that, in the corridors of ICANN X in Copenhagen, we referred to this issue. I must say that most of these problems would be completely evacuated if the PDP adopted the strong recommendation that we have made that all geographical names should be subject to prior authorization by the authorities in the geographical area concerned.

I rest my case. I shall maintain it. This is the limit. [What somebody has written recently I can't live with.] No.

Furthermore, since I have the floor and I won't speak much longer, I'm very, very disappointed and concerned that the PDP has not initiated a thorough discussion of the Work Track 5 recommendations. The recommendations of Work Track 5 were highly controversial and will cause GNSO serious political problems in the future, and it's extremely unwise of GNSO and the PDP to have evacuated any further discussion of the Work Track 5 recommendations. Thank you.

JEFF NEUMAN: Thanks, Christopher. Please, let's not go down the geographic names topic at this point. I know there may be some things that you said that some others might want to try to correct the record on from their view.

I would really ask, Paul, if you could, if it's on responding to Christopher, to keep it to 30 seconds. But, if it's on these types of challenges or appeals, then please go ahead with whatever time you need up to the two minutes. Paul, go ahead.

PAUL MCGRADY: Thanks, Jeff. Not responding to Christopher. I actually became a bit paranoid about the second column (Column B): Designation as a geographic name. Do we mean designation as a geographic name, or do we mean designations as a geographic name that's prohibited under the guidebook or has special requirements under

the guidebook? Does that make sense? That's all. Maybe a point of clarification. Maybe I'm overthinking it. Thanks.

JEFF NEUMAN: We use shorthand in this chart, so it really is designation as a geographic name under the guidebook. They have a specific definition for it. But you're right. It's not any geographic name. It's designation of a geographic name that would have other requirements associated with it: one that you're not allowed to apply for, one that requires consent. It's a specific type of geographic name, so it's the latter of your options.

CHRISTOPHER WILKINSON: But—Jeff, I still have my and up—that is exactly one of then points of disagreement. A geographical [name] is a geographical name. The definition in 2012 is completely irrelevant. Thank you.

JEFF NEUMAN: Thanks. That is a subject for another day. We're trying to skip that and focus on the appeals portion of it or the challenge portion of it.

Kavouss—

CHRISTOPHER WILKINSON: Jeff, I agree. It's 20 past 11 here. But that' for another day. But the other day has been explicitly excluded by the GNSO conclusions in the last face-to-face meeting.

JEFF NEUMAN: We understand, Christopher. You've documented and you've said your position. We will discuss geographic names on another day.

CHRISTOPHER WILKINSON: Thank you.

JEFF NEUMAN: This is for appeals. Let me go to Kavouss and to Susan.

KAVOUSS ARASTEH: Jeff, we could not ignore this very crucial, important issue of geographic names. I wholeheartedly and fully support and share the views of Christopher. There would be some contradiction. You want to approve something here, and then the recommendation is under the dispute now. Then what would the end be? The one that is here may prevail. We should not discuss this issue at all until the recommendation is finalized. I know that the participants, except very few people, are not in favor of geographical names, any clarification, or any [inaudible] for that. They want to just ignore that. We know the community.

So we don't agree to do this here. You should postpone this discussion to a specific meeting in which there are people concerned, particularly from GAC and so on and so forth. I am very grateful to Christopher to raise this point because no one else is interested in this matter. I don't see anyone raising his hands except Christopher and me. That means that that issue … Please

kindly put a note that there was objections—serious objections—that the recommendation of the task group or working group of Work Track 5 is pending on this feud between the people disagreeing and must be clear. Thank you.

JEFF NEUMAN: Right. Yes, we will note that there are some that have issues with the topic of geographic names and the conclusions, but this is not talking about. This is talking about challenging a decision, however geographic names are defined under the guidebook. So these apply under any definition that ultimately we end up with. These are still the situations.

Let's go Susan, please.

SUSAN PAYNE: Really briefly because this off-topic, I feel I feel like, when we've had so many other people speaking off-topic on one side of the argument, it's important that there's at least a voice other than yours. Well done on you for trying to keep us on track, pointing out that we're trying here to talk about whatever the definition of a geographic name and that it really doesn't matter what it is for this purpose. Whatever it is, we're just talking about, if someone disagrees with the outcome of the determination, what's the appeal path, what appeal is appropriate, and what is the process? It doesn't matter for this purpose of this discussion what the definition of a geographic name is. I think it's very clear, from all of the time we spent on Work Track 5, that we've spend months and

months talking about that. We've reached a conclusion, and that discussion is done. It's time to move on.

JEFF NEUMAN: Thanks, Susan. I'm going to—

KAVOUSS ARASTEH: Excuse me. I'm sorry. Until the time that we have not a clear idea about geographic names, we could not discuss the challenge of geographic names. These are the connections to each other. These are connected. You can't do that. Thank you.

JEFF NEUMAN: Thanks, Kavouss. Let me jump to the next type of appeal. Greg, unless you have something to add to an outcome or affected parties, I'm going to ask that you hold it. But, if this is related to outcomes, affected parties, or standing, please go ahead.

GREG SHATAN: I actually have something I think is on-topic. I'm actually going to play devil's advocate to the extent that I'm going to take up a point that I would have thought that Christopher and Kavouss might have brought up if they were actually concentrating on the topic as opposed to rehashing a general position that is not what's on the Board for the moment.

Looking at the first outcome that might warrant challenge—designation as a geographic name—it is possible that another entity or geographic place with the same name might not want that

to be designated as a geographic name. They may have different thoughts about it. So it is possible that one of the parties with standing can … I wasn't attacking other people. I was attacking going off topic as a concept. In any case, the point is that, if we're going to kick the tires on a challenge here, we should do it and not talk about things that are not on-topic.

In any case, there may be third parties other than the applicant who would want to challenge that designation, so I don't think we necessarily want to take it as being … It could be the same as well in terms of the string not designated. So I don't think we necessarily want to skip over these. I do think we need to give these careful thought as opposed to … We need to look at the challenges themselves, on topic.

JEFF NEUMAN: Thanks, Greg. Interesting on the—I'm trying to walk through it as to … You're saying that there may be some other entity that is not happy that it did get designated a geographic name. It is interesting to think about how that would work.

Justine, go ahead.

JUSTINE CHEW: I'd like to pick up Greg's point. I tend to agree with what he said, but my difficulty then is which challenge do you take up in an evaluation challenge? And which challenge, in another sense, do you take up in an objection process? That's going to be a bit confusing if we're going to start moving the borders, so to speak, so perhaps you could address from that point of view?

JEFF NEUMAN: Greg, can you write up scenario? I'm not sure what objection they could use, Justine. Let's say an applicant applies for—I don't know … Well, we'll use an existing one. I don't want to get controversial. Let's say … Paul, what's the one you always use from Ohio? There's a brand. Is it Dayton?

GREG SHATAN: We could use Middletown or Springfield, of which—

PAUL MCGRADY: It's Toledo Scales.

JEFF NEUMAN: There you go. Let's say the company applies and it's designated as a geographic name and therefore they go to the applicant and say, "You need to do whatever it is you need to do to comply, if it has got requirements, because it's designated as a geographic name under the guidebook."

Paul, in that case, where there would be someone who would want to challenge that if they're designated as geographic, other than the applicant who may not have wanted that?

It's interesting. It is worth giving it more thoughts.

Justine is saying, "Well, why could that not be an objection?" Because we haven't created a geographic names objection. That

was not one of the recommendations out of Work Track 5. They did discuss it.

Martin, keep me honest. I don't know if any of the other work track leads are on. I know I saw Martin. I think they discussed the concept and ruled out having an objection process. So there is no … Well, with legal right, you have to have a trademark. For community objections, you'd have to be representing a community as that's defined.

So it's certainly worth thinking about. I'm not sure if it would be covered with other forms of objection. I think that's one of those we have to think through.

Kathy, go head.

KATHY KLEIMAN: Isn't the situation here almost the reverse of the one you posited, that you have something—Toledo X or whatever it is—and it has not been designated as a geographic name? Because there's no other place for it—as you said, it's not a community objection, it's not a string objection, it's not a legal rights objection—but here we've created standing for the relevant government or public authority to raise the challenge. I think the—

JEFF NEUMAN: Right.

KATHY KLEIMAN: … [inaudible] education component here, but I think that's what we set it up for and created standing that went beyond the applicant in this case. That makes sense to me.

JEFF NEUMAN: For the second scenario, yes, that does make sense. I'm just trying to think of, in the first scenario, if it makes sense, where it's designated a geographic name. So let's continue to think about that.

Let me see if there's anything else on this before we go to the … I think the other ones are fairly easy. In fact, let me just go through them because I think they're much more straightforward. Geographic is always one of those that's a little bit more difficult to think about.

Technical and operations. If you have as an applicant … This, actually, by the way, is similar to … Actually, it's not. Disregard it. If you are getting a technical and operational evaluation during the main evaluation—assume no RSP pre-evaluations; assume you're technically evaluated during the actual [inaudible] evaluation process—if you fail, then you're disqualified. If you're disqualified, obviously the applicant should have the right to challenge. We did discuss at some point the option of a backend registry operator if there was one that could challenge in that circumstance, but in our discussions that didn't make to make sense because it's the applicant that's applying and is taking all the responsibility for the subcontractors in its application. Therefore, if they use a third-party RSP, they are the ones that need to challenge on behalf of that third party.

Make sense?

Okay. Financial: similar. Well, similar, not that there would be a third party, in that an applicant is going to want to challenge if it fails.

By the way, on this technical and on this financial, if they succeed, we did not think that any other third party should have standing to challenge it. You could understand, maybe, that a contention set might want to get rid of the application because it doesn't think that the other entity is technically qualified, but, really, that's the decision of the evaluators, and that should not be the subjection, in our conversations, of giving them a right to challenge.

Registry services. This is: if a registry proposes additional registry services that are not the core registry services because the core registry services are the ones that are evaluated under technical and operations, but, let's say, they want to do this unique DNS service, they're going to have it reviewed by an [RCEP] panel. Let's say the [RCEP] panel says, "Nope. We don't like it. Terrible service. We think it's going to cause a security/stability mess. Therefore, you can't approve that service." The applicant may want to appeal if that was the circumstance.

If they're successful—if the applicant … This is where it's a little bit weird and why I'm reading the likely result of successful challenge: the only result of failing a registry service is not the disqualification of your application as a whole. It would just be not allowing that additional registry service. In this case, if the registry service is allowed because of the results of the challenging, then the new service goes back into the application and all is just as it was.

Community priority evaluation. I'm going to stop there because this one might get a little thorny here. Let me just ask if there's any questions on this.

Anne go ahead.

ANNE AIKMAN-SCALESE: Just another question about the procedures. How do these appeals that we envision, particularly in this case about RCEP, relate to the existing procedures of request for reconsideration and ultimately an independent review process? Could you please remind me how these things are integrated and how that works, for example, in an RCEP evaluation?

JEFF NEUMAN: The RCEP evaluation … All of these are providing for substantive appeals or challenge mechanisms that are not necessarily provided for in the bylaws' accountability mechanisms. Go back if you want to read the more comprehensive documents. We'll talk a little bit more about what's involved in these challenges when we go back to the document and get away from this grid. You'll see some more recommendations that hopefully will make thing a little bit more clear.

ANNE AIKMAN-SCALESE: Well, obviously, what I'm trying to understand is, once the appeal is determined, is there further action by the party that's alleged to be wrong, where they are still eligible for requests for reconsideration and/or … I think it's important that we know that.

JEFF NEUMAN: The very first recommendation here was that—I don't know if you want to switch back to; I think it was the first or second … Sorry. Second—the first recommendation. Sorry—second recommendation. Yeah, first recommendation—Rationale 2—second paragraph: "The new substantive appeal mechanism is not a substitute or replacement for the accountability mechanisms in the bylaws." So anyone at any time could choose to forego this substantive appeal and go straight to an accountability mechanism. Anyone can wait until after the appeal. But remember, the standard of review of an accountability mechanism is very different than this new appeals process that we're creating. The ICANN Board can always say that, despite how the evaluation turned out, it was acting in accordance with its bylaws. Remember that a decision by the evaluator can be wrong. ICANN can accept the wrong decision and still arguably be in compliance with its own bylaws. We're trying to solve for that and say that, if an evaluation is wrong, there should be an appeals process that looks at that—or a challenge process, in the case of evaluations, that looks at the substance. But anybody could always forego that appeals mechanism and go straight to accountability if they want to. I think that would be a very expensive choice but certainly one that anyone could make.

ANNE AIKMAN-SCALESE: Just to clarify, they could also do both of those at the same time. In other words, if you're an attorney advising somebody, you have this mechanism—a request for reconsideration—and you also

have appeal. We have to tell them that, to preserve all their rights, they potentially need to pursue both at the same time.

JEFF NEUMAN: I'm not going to provide legal advice. That sounds semi-logical. I believe the time period by which to file an appeal may be different than a time period of filing an accountability mechanism. I'm not sure whether clients would necessarily want to spend all that money, but I'm not giving legal advice. But, sure, [inaudible].

ANNE AIKMAN-SCALESE: I sort of agree with you that they wouldn't, so the fundamental question that I'm asking is about the integration of the appeal system with the others. What you're telling me is we haven't done any work as a working group to integrate those mechanisms. We're just saying that they're both available.

JEFF NEUMAN: Right. And we can't do any work on the accountability mechanisms because that's outside our jurisdiction. There's nothing we can do.

ANNE AIKMAN-SCALESE: We would only be able to do the work unrelated to … Because IRP is Work Stream 2 implementation. Thank you for the clarification in that we can't integrate the systems. Thank you.

JEFF NEUMAN: Yeah, they're completely separate.

Kavouss, go ahead.

KAVOUSS ARASTEH: This paragraph says that this new challenge is not a substitute or a replacement of the accountability and so on. If it is not, what is it? Is it in addition? What is it? This text coming from the people having an idea before these accountability mechanism were stablished in 2016/2018, but, now that we have that one, what does this mean—"Does not substitute nor replace"? What is it? It is an addition. It's supplementing? It's not substituting. What is it? There might be a conflict. Which one prevails? No doubt, the accountability, which is the [inaudible], will prevail. If it prevails, then [what is this]? So I'm not quite clear about the appropriateness of this paragraph here. Thank you.

JEFF NEUMAN: What we're creating here is an appeals mechanism or challenge mechanism. We put this paragraph in here because there were many in the working group that were worried that we were trying to amend the bylaws or impact the accountability mechanisms that are built in. Really, all we're saying here is that this has nothing to do with the accountability mechanisms in the bylaws. We're adding an addition. It doesn't have to be used. Anyone can go straight to the accountability mechanisms if they want. We're not making a judgment as to which one controls. We're just saying, "Here is something else you can use that will look at the substance of your evaluation or challenge or appeal as opposed

to relying on the standard that's set forth in the bylaws which doesn't necessarily address all the things that we're talking about here."

KAVOUSS ARASTEH: Fair enough, but you have to amend that. At the end, you should say that, in case of discrepancies, the accountability mechanism and bylaw prevails. We should put the hierarchy in that because, otherwise, if it is not substituting, then it is supplementing. We don't want to supplement the bylaw. We'll say that, in case of discrepancies or differences, the bylaw prevails. [That's what you want to add to this.] I understand. I was listening to the people saying this mechanism may be totally replacing. You want to clearly make it sure that it does not replace. However, you should mention, at the end, that, in case of discrepancies or difficulties or differences of views or whatever you want—[that's not] a proper word—that the mechanism contains that the bylaw shall prevail. Thank you.

JEFF NEUMAN: Thanks, Kavouss. I think that's something we should talk about a little further, not because I necessarily disagree with that. It's just that I don't know if we have the authority to say in our PDP report what prevails and what doesn't prevail. I think that's up to how ICANN does its accountability mechanisms. So I'm not opposed to the concept. I'm just not sure if we have jurisdiction to even say something like that.

Anyone else with thoughts on that?

Christopher, go ahead.

CHRISTOPHER WILKINSON: Thank you. I thought this was a 90-minute call, and it's bedtime. But I'm persevering. I just wanted to make a slight drafting improvement. I take Kavouss' point about the bylaws, but maybe we should, in vote, determine whether the evaluators, ICANN staff, or the ICANN Board violated the bylaws.

I go back to the roots of the problem. We have a system here which, at present, is not transparent vis-à-vis the evaluators. History has led us to the feeling that the evaluations were not correct.

So I would add the evaluators in addition to ICANN staff or the Board, particularly as long as ICANN considers that they can outsource the evaluation, which, as you know, I have reservations about.

JEFF NEUMAN: Thanks. We'll give that a little bit of thought. Again, I have to go back. I'm not sure evaluators could technically violate ICANN's bylaws. ICANN, by accepting the evaluators' decision, could be violating the bylaws in theory, but I'm not sure the actions of a third party can ever violate someone's bylaws. But maybe I'm wrong. So I think it's a good comment. Let's think about that: whether that's a possibility. Certainly this mechanism is being established. At least the challenge is to determine whether or not an evaluator didn't follow the rules in the guidebook for whatever reasons or didn't get something right.

Going back to, as Emily's typing some notes—I skipped over it but it is important, so I want to go back to it—the community priority evaluation results, I don't want us to get into the substance of the community priority evaluation because I think that would take us off topic. We're talking about whether one is satisfied with the results or not satisfied with the results. Results could either be that an applicant prevails in CPE, meaning that the community applicant receives priority, or the applicant does not prevail in the CPE, and therefore it's put into a contention set. The third—oh, I'm sorry. That's it. Those are the two options. Sorry, I was reading into applicant support. I didn't mean to do that. So there are two options: the applicant either passes or the applicant fails. If it passes, then members of the contention set may not appreciate that or like it and may want to appeal or challenge. If the applicant doesn't prevail, then it's going to want to challenge. It's fairly straightforward. Again, let's not focus on the substance of these appeals but, again, look at the fact of whatever the substance of the decision is. These are the outcomes.

Jamie, go ahead. Kavouss, is that a new hand? Jamie go. Kavouss, if it's a new hand, I'll put you in after Jamie.

JAMIE BAXTER: Thanks, Jeff. I have two points to raise here that I think need more clarity. The first one would be around whether or not this acknowledges that there is more transparency around the evaluators because I don't know whether it's been made clear as to whether there's going to be … Because to say it's a different evaluator? You don't really know it's a different evaluator if you don't actually have any transparency to it.

But the more important point I want to make is that I don't think that this text sufficiently addresses the actual community priority evaluation process because it isn't an evaluator. It was two evaluators that also had a manager, and then they also had teams. So who exactly is different for community priority evaluations if they're being challenged? Because there were layers of people involved in it, none of which we knew who they were. They were never obviously made public. But there were two evaluators that worked separately and then they compared their notes but they were managed by somebody and then they also had administrative teams below them.

So I think there needs to be more clarity here on who is different if it is being challenged. Thanks.

JEFF NEUMAN: Thanks, Jamie. It is interesting in that scenario because the entity itself [was] probably a number of people that reviewed.

One of the other options then, if it's not … It certainly needs to be someone other than the person and person that looked at this application in any kind of way.

Is that want to clarify there? That it has to be by people that were not involved in any way? Or are you saying that, because it's so intertwined, we might need a different entity?

JAMIE BAXTER: Well, I think that I'm suggesting is that we need to be clear here because, if there is a person overseeing the two evaluators that

don't actually get taken off the case during an appeal, is there going to be undue influence on the evaluators that work below them? I'm just asking for clarity because my hope would be that the entire team is different. That may be asking too much of many people on this call, but I need people to understand that it's not as simple as that there is just one evaluator working on this. For community priority evaluations, there's a whole slew of people that are involved, at least from what was revealed during the 2012 round.

So I think it needs to be very clear here as to who you're saying needs to be different. Is it just the two evaluators? Is it the manager of those two evaluators that also needs to be changed? Is it the administrative support that's below them that seem to do most of the legwork? Do they have to be changed? There needs to be more clarity specifically for community priority evaluation, I believe. Thanks.

JEFF NEUMAN: Thanks, Jamie. Can we say something like, "The ultimate decision makers have to be different than the decision makers the first time"? So, while you can have support staff still work on the same thing, ultimately, at the end of the day, it's got to be different decision makers.

JAMIE BAXTER: But we don't know who the decision makers were, Jeff. That's my point. There's so many people—

JEFF NEUMAN: Right. I think that goes into the community priority evaluator. What we did talk about under that evaluation is improving that so we would know who was working on. So this, combined with those recommendations back in the community evaluation section, should hopefully make a difference. Hopefully. But I completely take your point.

Yeah. "Transparency," as Cheryl says, "is the key." We're going to have to rely a little bit on that.

Kavouss, I'm still trying to figure out if that's a new hand or not.

KAVOUSS ARASTEH: I don't want to get into the evaluator, [inaudible], the final decision, [inaudible] decision. The sentence that you read—replacement of substitution—I would add. "nor does it complement or supplement the bylaw and, under all circumstances, shall be consistent with the provisions of the bylaw." I want to add that one: "should not be considered as a supplement." No doubt that it does not replace nor substitute. That should not supplement nor complement. That is what I want to put in that paragraph: "nor does it supplement or complement and, under all circumstances, shall be consistent with the provisions of the bylaw." If you add that one—

JEFF NEUMAN: The second part—not being in consistent with the bylaws—makes sense to me. Well, they both make sense. A question on the first one, though, is, if a reconsideration or an independent review process wants to look at an appeal that was filed to supplement the record of what happened in the case, why would we

necessarily want to prevent that? We're not saying that they have to use it, but I am just asking a question of why should we say that they can't supplement it if that's what those that hear a reconsideration or … Just a question.

KAVOUSS ARASTEH: Jeff, we have a problem with that. I am a member of the implementation oversight team of the process in ICANN and would have difficulty if you have supplements. Then we have the rules for supplements or complements. So I would suggest to maintain that "nor supplement or complement the bylaws and, in all cases, should be consistent with that." This is not a supplement. You cannot supplement that. If you supplement that in the applications of the IRT, you need to have additional rules for supplements. So we should be consistent. All parties working in ICANN should be consistent with each other in their decisions. So it's not hard to say that shall not be a supplement or complement or shall not supplement or complement the bylaw as well. Thank you.

JEFF NEUMAN: I think I understand how you're using the word "supplement" now, so I think that's fine. We'll talk about how we can put that in there. I know we're getting close to the top of the hour.

Justine, and then, after Justine, I'll wrap it up. Justine, go ahead.

JUSTINE CHEW: Thank you, Jeff. I want to point back to what Jamie was talking about in terms of transparency of the process within the evaluators for CPE, again, because we only have [inaudible] to look back into, as an example. My point was that this is also one the reasons why we would like to see more community participation in the selection of evaluators: to actually build in a request for whoever is participating in the call for expressions of interest to be a provider to have all these things stated up front so that we can evaluate those as well. That might help solve the problem for the next round. Thank you.

JEFF NEUMAN: Thanks, Justine. I seem to recall that we did put that into the evaluation section. We'll all go back and make sure that this was incorporated because I am remembering us discussing it and putting in there, but I want to go double-check to make sure. I think that is certainly something we discussed and seemed to get a lot of people agreeing with.

Before we go, I want to make sure that Paul's comment is taken up: that, in all of the evaluations—it shouldn't just be the community priority evaluation but all of them—it should be the ultimate decision makers. We should change "individual evaluator" to "ultimate decision makers" because I think it applies equally to all the different ones. Paul had mentioned it only with the background one, but I think it applies equally to all of them.

I want to thank everyone for staying for the full two hours. I know people have to drop off, but I think it was helpful of us to have the longer period of time so we could not have a break in between these meetings. We are through the most difficult parts of these accountability mechanisms, so I think we should be able to finish

this up fairly soon in the next session. So we'll pick this up on—let's see—Monday on the next call, which is … I'm waiting for someone post that. So our next call is on Monday the 20th. It's a 90-minute call on Monday. We'll start with this. It won't take the whole time because I really do think we covered the most difficult, lengthy, complex parts of this session.

Thanks, everyone. Have a great weekend, wherever you are in the world. Hopefully things will start to seem a bit better. I really am looking forward to the day that we all can see each other face-to-face. Thanks, everyone.

[END OF TRANSCRIPTION]