ICANN Transcription

GNSO New gTLD Subsequent Procedures PDP Working Group

Thursday, 23 July 2020 at 15:00 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 23rd of July, 2020.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room.

I would like 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. As a reminder, those who take part in multi-stakeholder process are to comply with the expected standards of behavior.

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

JEFF NEUMAN: Thank you, Julie. Welcome, everyone. I know we're getting into the heart of the summer/winter, depending on where you are in the world, so thank you for attending. Today we are going to have a short discussion on the closed generics proposal from George and then go into finish private resolutions and then hopefully get onto the predictability model. I know that the … Well, before we start, let me just ask if there's anyone that has anything to add in Any Other Business.

Okay. Not seeing any. Is there anyone with any changes to their statements of interest?

Okay. Not seeing any either.

George has sent around the proposal from the small group he put together. That's on the mailing list. I think it's being displayed. I think there's been some interesting dialogue on the e-mail list and probably deserves … I guess, today, let's just see if people have questions for George. I'm trying to see if there's anyone else that was on that little committee that's on here.
I think, George, what we'll do today is just see if there's any questions that you can answer, but I think, as far as a full discussion, I'd rather wait until Monday's call to actually get more in depth so that'll give us more time to finish the other two subjects.

I think George had just responded to me an hour or two again. Actually, I'm checking to see if George is actually on the call. I'm not sure he is. Is George on?

[JULIE]: No, not seeing him, Jeff.

JEFF NEUMAN: Okay. Well, maybe it's okay then to just go on to the other subjects just because I think George should be on and probably could answer the question. In the meantime, keep the dialogue going on the e-mail list. I think that's going to be good for now. Then we can just move on to the private resolution stuff anyway. If George does join, let me know and maybe we can spend a couple minutes at the end to just go over some questions.

Where we are right now with mechanisms of last resort, I think, is on Model 5. I think that's got a lot of elements that, if we were to try and come up with the compromised solution that we think everyone or mostly everyone can live with, are embodied in Model 5.

I see that Paul has made some edits. I don't think many of them are hugely substantive. I think a lot of them are just to make things clearer than the original language, which is fine. As we go through this, we'll go through those edits.

I see Jim has got his hand up already, so go ahead, Jim.

JIM PRENDERGAST: Thanks, Jeff. Can you hear me?

JEFF NEUMAN: Yes, as I was just about to grab a drink. But yes.

JIM PRENDERGAST: Sorry about that. Jeff, I hate to do this to you, but I've got to object to us taking out Paul's changes on this call on such short notice. I checked the document this morning before I became engaged with the IGF-USA for the day, and there were no changes. Since then, changes have been made without the courtesy of an e-mail to the mailing list alerting the rest of the working group that changes have been made for people to review for preparation to the call. So asking us to ponder these changes on the fly and to make decisions on the fly I do not think is appropriate. We can review them. Paul can present them. But I don't feel comfortable reacting on the fly to changes that, in the 45 seconds I looked at them, are more than just clarifications. There are significant changes here, including rolling back some of the important transparency things that we had put in previously. So I'd like to urge you to not, as you said, complete the discussions on this call. Thanks.

JEFF NEUMAN: Thanks, Jim. Fair enough. But I would like to review the changes if we can on this call but understand that, especially if the group seems willing to look at the ones that are more substantive, yeah, we can have those outstanding. But let's see what we can get through as part of reviewing them and then go from there. Certainly dialogue on the list will help as well.

Paul, go ahead.

PAUL MCGRADY: Thanks, Jeff. I guess I'm a bit confused by Jim's comment. We were told to make changes on the last call. You said for us to go through and make edits. I have been on many, many working group calls and many, many working groups, and I do not recall that it is our standard that we send an e-mail out to the mailing list indicating, when we've made changes to the document, that the working group [inaudible] of access to make changes.

So I take a little bit of umbrage to Jim's implication that I somehow did something discourteous for doing what we were told to do. Thank you.

JEFF NEUMAN: Thanks, Paul. I appreciate that. If we could move on. I think, at this point, just for future changes, probably it would be a good idea to give a heads up in an e-mail to explain it. But nothing was done wrong here, so I don't want to imply that. But, in the future, let's put some rationale into e-mails so that we can all be prepared before the call.

Step 1 of this … Or I'll go to Bullet 2, which I really that we're saying here that private resolution is still permitted to resolve contention sets, including joint ventures or private auctions and other mechanisms, obviously subject to what's below. The first one states that, "All private resolutions reached by means of forming partnerships or other joint ventures resulting in the withdrawal of one or more applications must follow the processes set forth in Section …" and then there's a citation.

Paul, to me, that just seems like just some wording/some clarification. But, Paul, did you want to give some rationale for that?

PAUL MCGRADY: Sure. This, like most everything else in here, is just a clarification. Before, it said, "All partnerships or other joint ventures created after this mission of applications must follow the application change processes set forth in Section (whatever)," and so forth. I added the other … The bottom line is that this about private resolutions, not about when applications are filed. There, in theory, might be a joint venture or other partnership formed that has nothing to do with private resolution. An applicant could enter into a partnership or something like that with a non-applicant that's not in a contention set. So this language just tightens things up.

JEFF NEUMAN: Thanks, Paul. Since this section does relate to resolution of contention sets, I think that, to me, doesn't—it's a good clarification—change anything substantively. I guess, if it weren't a private resolution but it's still a change in an application, they would still have to [file that] anyways. So, like I said, I don't think that this changes anything in the meaning but obviously I'm looking for hands up or anyone who wants to discuss that one.

The next one in the next sub-bullet point also looks like a clarification. "Any modified application resulting from a non-auction private resolution is subject to public comment," etc. I think that's right. I don't think a private resolution via an auction would be

subject to a public comment period. I think that's right. Then I think the surviving application or the withdrawn applications in the contention set makes sense.

Again, if anyone has got any questions, just raise them. Also, when you reread this after the call, you're free to ask questions as well. We're not nailing this completely down tonight.

The next main bullet point is, "Applications must be submitted by a bona-fide good-faith intention to operate the gTLD. Applicants must affirmatively attest to the bona fide use clause for any and all applications that they submit." So that wasn't changed, but the sub-bullet point underneath says, "Evaluators would be able to ask clarifying questions to any applicant it believes may not be submitting a good faith application." Paul has added, "Applicants will be given a reasonable timeframe to respond. Applicants can mark portions of any such responses as confidential." I think there's probably a typo there. Let's see. "Responses confidential of the responses include" … That might be, "If the responses include proprietary business—

PAUL MCGRADY: Yeah. Sorry about that. In my haste to get something on to the list as soon as possible, I was typing while my son was [driving]. So sorry for the typo.

JEFF NEUMAN: Okay, thanks. That's okay. "If the responses include proprietary business information and such portions will not be shared or communicated by the evaluator, in no event will an applicant be

required to”—oops; sorry; it jumped around a little bit—“disclose any trade secrets.”

On the first part of that –“reasonable timeframe to respond”—I think all clarifying questions have—I can’t remember where it states that—a certain time period. So I’m not sure that first sentence is needed, but if it is needed or the group wants it, maybe, instead of a “reasonable timeframe,” it should be “the same timeframe that all clarifying questions get.” I don’t want this to be yet another timeframe we’re creating, and I don’t think that’s your intent, Paul. So we probably should clarify that to say applicants will be given whatever the time period is to respond to clarifying questions.

The next one is marking responses confidential. That’s proprietary business information. “Such portions will not be shared or communicated by the evaluator.” I’m assuming you mean by the evaluator to the community or to even ICANN, I guess, if ICANN is not the evaluator. Is that the intention?

Yeah, I see that there’s hands up. I just want to make sure we understand this change, and then we’ll get to the hands.

Paul says, “It will not be shared or communicated by the evaluator to the community or even ICANN.” So we need to say that in there because I think that’s an important distinction.

Then, “In no event will an applicant be required to disclose any trade secrets.” That one is probably the most open to interpretation.

Let’s go to Anne and Jim. Anne, go ahead.

ANNE AIKMAN-SCALESE: Hi, Jeff. You actually sped past me a long time ago. My hand was up with a question regarding that second bullet point above where it says, “Any modified application resulting from a non-auction private resolution.” I question whether we need to the words “resulting from a non-auction private resolution,” because, any time an application is modified, it makes it sound as though you could have a modified application that did not result from a non-auction private resolution that was somehow not subject to new public comment. But the subject of this sentence is “any modified application,” so it doesn’t … I don’t know. It just doesn’t make a lot of sense to me there.

JEFF NEUMAN: Thanks, Anne. Paul, if we just made the sentence “Any modified application resulting”—not even “resulting.” “Any modified application” … Well, see, this section is on private resolution, so I think that’s why Paul put it in there. I guess you can turn the sentence around and say, “Any private resolution that results in a modified application is subject to …” Therefore, you’re just revering the words and changing the subject. Would that be okay, Paul?

ANNE AIKMAN-SCALESE: [Yeah, I think somebody needs to] work on that. I’m sorry. You were flying by so fast, Jeff. I honestly, after this point, didn’t really even get to an understanding of what the changes are. I apologize again. I hadn’t reviewed these either. My hand was actually up

right when you finished reading this other one, so now I'm … But I guess what you're saying is that we are making changes on the fly and we should comment later on the list about them? Is that what we're doing?

JEFF NEUMAN: Well, right now we're just trying to add some clarity to what Paul has suggested, but, absolutely, if there's any questions or other issue (because this is the first time you're seeing it) that you want to raise at that point on the list, that's totally fine.

If we reverse the question, I think, Anne, it would say what Paul meant it to say and wouldn't have the issue that raised. So essentially it would be, "Any private resolution resulting in a modified application is subject to," blah, blah, blah.

Back to Jim. Go ahead.

JIM PRENDERGAST: Thanks, Jeff. I just want to put a marker down. I've got concerns about this (I'm pointing out my screen as if you can see it): the highlighted section there of evaluators being able to ask clarifying question. I will come back with suggested alternative language. My concern here lies squarely with the fact that evaluators will disappear shortly after the evaluation is done. This is an ICANN-administered program and they should be the ones to ensure compliance. If we're not disclosing any information to ICANN, this is really some worthless language. As I said, when it's not 11:21 and I'm trying to react on the fly, I'll come back on the list with some suggested alternative language. Thanks.

JEFF NEUMAN: Okay. Thanks, Jim. Absolutely, please do come back with that. Any other questions on either this element or the changes that Paul wants to make?

Okay. The next part is dealing with … Now we get into more of the process elements of how things work. We are—sorry. Anne has got a new hand up. Sorry, Anne, I thought that was an old hand. Go ahead, Anne.

ANNE AIKMAN-SCALESE: Just a question regarding the sentence that has “trade secrets” in it. “In no event will an applicant be required to disclose any trade secrets.” In principle, I’m actually for that principle. The issue I have with that is, who would determine that? Because I think, from an applicant standpoint, I would just say, “Hey, I’m not going to tell you what my business model is here, for sure, because that is a trade secret and that’s going to be my competitive advantage.” That could be a very legitimate position to be in, but does it address the issues that the Board is concerned about and that we’re trying to address here? I don’t know because I think it’s a pretty big catch-all. As much as I would say that, yeah, I’m in favor of applicants not having to disclose trade secrets, this is very broad language. I think you could drive a truck through it. Maybe my client would very much appreciate that. I certainly understand why Paul wants to assert it. Of course, if you disclose it without the adequate confidentiality provision with labeling it as a trade secret and treating it as a trade secret, then, yeah, it’s not a trade secret anymore. But this is a pretty wide permission. I’d have to

think about whether it's just too big of a whole, if you will, if not worded differently.

JEFF NEUMAN: Thanks, Anne. That was what I said at the outset when I was reading this. In fact, that's a really broad statement. I agree with you, Anne. I think, obviously, in principle, no one should ever be required to disclose any trade secrets. But saying it as an affirmative—giving people an affirmative way out that they can just allege everything in those trade secrets when they have to reveal certain elements to evaluators in order for them to evaluate the application—I think is a little much to state as in this sentence.

Paul is saying, "Jeff, will applicants be required to disclose a trade secret in order to get past the evaluator?" Paul, the answer would be, if they consider the model that they're going to use to operate the TLD a trade secret, yeah, because that's required to do the evaluation. Or, if they don't disclose it, then they'll just get rejected, I guess. I think here giving applicants an affirmative statement to say you can assert this as your "defense"—that in no event will you be required to disclose it … Actually, if you consider your business model to be a trade secret, you probably shouldn't be applying for a TLD. So I don't know.

Yeah, Paul, go ahead.

PAUL MCGRADY: Thanks, Jeff. I hate to say it, but that's a really terrific old-model ICANN thinking: "If your business model is a trade secret, then you shouldn't apply for a TLD." What if there are some very

important safety and security issues that you're baking in to your new TLD application that … And that's the purpose of it, right? A new TLD that will be used in a special way to [connect Internet] [inaudible]. There's just one thing that immediately comes to mind, and I'm not that clever. To set up a framework where you have to disclose trade secrets that vitiate the purposes of the application or put your downstream users, not registrants—at risk later when there's no method in the Applicant Guidebook to [prevent] that? I think that could not be more unwelcoming. If the goal is to keep new market entrants out, then this is a great way to do it.

So, if we can't say that trade secrets don't need to be disclosed … That's not to say that that gives somebody a free ticket out, but if an evaluator can compel trade secret disclosures, then that's a real problem. So maybe who people who have concerns about it can clarify what their concerns about. But to make trade secrets a free-for-all just because you filed an ICANN application? Wow. That's way out there. Thank you.

JEFF NEUMAN: Thanks, Paul. But I think your example of security and stability is exactly the reason why it needs to be disclosed to the evaluator. They could be marked confidential and then you can fight out as to whether that needs to be disclosed to ICANN or the community, but if there's a security/stability issue with the purpose of the TLD and that needs to go get evaluated in order for you to be awarded a TLD, yeah, I think you do have to disclose it.

The point here, Paul, is not that I'm saying you have to disclose any trade secret an evaluator tells you to. The point is I don't think

we need the statement in here. Essentially, an evaluator needs to have enough information to evaluate the security and stability aspects of every application. You as the applicant need to figure out a way to describe what you want to do in enough detail without revealing your trade secrets. But that's up to you as the applicant. I don't think you need this sentence in here. That's what I'm trying to say. And not having the sentence here is not the same thing—

PAUL MCGRADY: [No, I get that]—

JEFF NEUMAN: Sorry. Let me clarify. Not having that sentence in here is not the same thing as saying you are required to disclose trade secrets. I don't see that as the logical conclusion of not having the sentence in here. Sorry. Thanks. Go ahead, Paul.

PAUL MCGRADY: Again, not every innovative us of a TLD is automatically a security and stability issue that needs to be evaluated. Some of the stuff may [inaudible] are the trade secret, not necessarily the methodology. So I think it's a leap to say that any innovative use of a TLD is automatically a trade secret that needs to be disclosed. I don't think that that's what we're trying to say.

Right now, we have a binary. Maybe we can work past the binary because my [inaudible] to the one is that applicants aren't going to be forced to disclose a trade secret. Other people wanted to say applicants can be forced to disclose a trade secret. I think that's a

binary. I think my binary option is more sensible than the other one, but okay. But maybe what we're trying to say is that applicants will not be forced to disclose a trade secret; however, if at the end of the … Something along the lines of, "if the overarching question is not adequately answered because the applicant withheld a trade secret, then simply withholding that trade secret doesn't automatically get you approval." It's super late where I'm at, after a long day of travel, so I may not be coherent. I definitely think that we can make it clear that you don't have to disclose a trade secret, but that's not a free ticket out to getting past the evaluator. I think that's personally reasonable middle ground. Thanks.

JEFF NEUMAN: I was on mute. Sorry. Let's go to Anne, who has her hand up. Go ahead, Anne.

ANNE AIKMAN-SCALESE: Jeff, I think that, in part, since this was becoming a hot topic here, this points up while it's so difficult to review changes on the fly like this. It's a little bit bothersome that we're devoting this much time to these changes on this call when we had people say, "Gosh, I haven't had a chance to review it." Paul is going ahead and he's making his arguments, and there's certainly weight to those arguments. Other people are just trying to get used to, "Hey, what does this mean?" I'm sure that Paul is very aware that, with respect to trade secrets, when you start negotiating with somebody—let's say your joint venture or a supplier that you need to make your business model work and you enter into an NDA—

you oftentimes disclose secrets under trade secret law, training them as trade secrets, and that there are solutions that are private here that could be … You could have procedures in place in relation to the evaluator that would be comparable to private market procedures where you have to disclose your trade secrets in order to get anywhere with your suppliers or your joint venture. There are, as Paul says, middle grounds. It's not a matter of just either/or, and it's not a matter of, "Hey, everybody has got to always disclose their trade secrets to the whole community." Nobody really wants to posit that extreme example, but it's really hard to come up with solutions to a very substantive point in this kind of environment.

So what concerns me is there'll just be more of these debates on the list. I almost just think that … I don't know. I haven't seen the rest of these things, but it almost seems like we ought to move on to predictability frameworks [for] the people because Paul, of course—

JEFF NEUMAN: Anne, we got it. We got the point. Sorry. We got it. We got the point. We'll move on to the next point. I understand. I'm just trying to follow what you're saying: to not spend so much time on it.

ANNE AIKMAN-SCALESE: Yeah. Just review them and move on. Let's not have an argument about them because nobody has had time to figure out what they even think about it.

JEFF NEUMAN: Okay. Can we scroll ahead to the next element? Again, please do review the changes. What we're saying here essentially is that, once a submission period closes, then the similarity evaluation takes place of all the strings. At that point, once the strings are grouped into contention sets, the applicants will be informed of a number of other application but not other information and then may need to put in their sealed bid if they want to participate in an ICANN auction of last resort. Again, I'm not reviewing Paul's changes specifically, just the elements.

The next element is the—can we scroll down a little here? We talked about, the last time, deposits. I think we agreed that deposits would be handled in the same way that it was in 2012. So essentially deposits for that auction of last resort would be due just before the actual mechanism of last resort is done/revealed/whatever you want to call it.

The next part is: obviously, once those sealed bids are submitted, then you have the reveal day. After … I'm just looking. Paul, if there's anything substantive that you want to point out as we're going through, let me know. But I don't think, other than some clarity there, there was substantive changes. After that point, again, it goes through what it would always go through in all of the other—in 2012—evaluation components, all the comment periods; everything that normally would happen. Then, if there's nothing resolved through private resolution, it would ultimately go to the sealed bid auction. Then (what we talked about last time), if there is an application that is modified, resulting in some form of JV, it would not just be the modified application that would get to submit a sealed bid at that point in time, but all the other applicants in that

contention set would have the option if they wanted to submit a new sealed bid at that point in time.

Jim is saying, “Limiting it to sealed bids for only last-resort auction is substantive.” Jim, I had gone back—Paul had raised this on (or maybe it was Susan?) the last call—and I did not think there was anything in the language that was put in there that meant to say that any private auction had to be sealed bid auction. I think private resolution is just that—private resolution—so long as they comply with the transparency requirements.

So, Jim, you may not have understood it that way, so, Jim, if you want to get in the queue. And I see Paul’s hand is up, but I’m not sure if that’s new.

No? Okay. Jim, do you want to … Well, Jim, can you explain why you think that’s a substantive change?

Yeah, go ahead, Jim.

JIM PRENDERGAST: Sure, Jeff. I guess my point on it is, as currently drafted with this language, we’re not doing anything to prevent the [roll in] of auction proceeds from one to another, which is the second part of the Board’s major concern with private resolution. So I think, by limiting this here, this is a substantive change that could impact us fully addressing the Board’s concerns. So there’s a lot of interdependencies here. All these changes have impacts on other parts of this proposal. Again, asking us to do this on the fly at this hour for many of the call participants (not all) I just don’t think is an appropriate way to deal with this, as others have also said.

JEFF NEUMAN: Thanks. Again, I did not understand that to be a substantive change, but I do agree that, really, the only things in this proposal that would address the Board's statements about using money from one to fund another … I think the only new stuff we have in here really is the transparency requirements.

Donna is saying, "To interpret it the way that, Jim, you were interpreting it could be a substantive change."

So let's give that some thought. I had always understood and thought that, on private resolution, it didn't matter how that was handled as long as the transparency requirements were met. But we can do that on the list.

Jamie has got his hand up.

JAMIE BAXTER: Thanks, Jeff. I may have heard this incorrectly on one of the prior calls, but my takeaway was that what we discussed is that the sealed bids would be used for both private auction and auction of last resort. The distinction between the two of them was that the applicants either decide to split the money amongst the losers in a private, or the money all goes to ICANN in an auction of last resort. That was my takeaway from the Paul.

So I do agree that this seems like a substantive change, but perhaps I misunderstood it. But I get that private resolution beyond an auction is something completely different, like JV, etc.

But that's how I understood when we talked about it in one of the recent calls. Thanks.

JEFF NEUMAN: Thanks, Jamie. Fair enough. We can discuss more on the e-mail list. But, right now, in here it's drafted as, again: if there's a private resolution it can be done any way that the parties agree to handle it so long as the transparency requirements are met.

The next part of this is—let's see—just pointing to the auctions of last resort that take place at the very end of the process, basically saying that the auction of last resort can't occur if other applications in the contention set are still involved in an appeal or an accountability mechanism or—I guess Paul just added just some clarification—of it's being reevaluated, etc. Obviously, I'm not sure if that new language is needed, but I think that doesn't change the point that we're making here, which is that you don't hold the auction of last resort until all the other steps have been completed.

Kathy, go ahead.

KATHY KLEIMAN: Thanks, Jeff. Help me out here because these are busy days with IGF-US and other things going on. Is the proposal now the proposal with—I missed the beginning—Paul's edits in? Or can we go back and look at the original and maybe see his edits put along the right side so that we can compare with what it was and what's coming in? It almost looks like his edits are now the default that have to be argued against, and that doesn't seem quite right.

So I just wanted to ask you our favorite question: what's the default, why, and whether the edits can be put along the right side so we can see where we started from because—I don't know about other people—I'm seeing multiple colors, highlights, and cross-outs. It's really hard to tell who and what is going on here. Thanks.

JEFF NEUMAN: Thanks, Kathy. We've pointed out the situations where there are substantive changes that are more than just clarity for wording. So I don't want to spend a lot of time talking about what is the default. I want people to focus on the substantive matters because, frankly, none of this is, if you want to look at anything, default because the default is what happened in 2012. So, if you could just take a look at the substance in here. We've pointed out areas, and we'll continue to point our areas, where the edits indicate a substantive change. But these edits in this particular bullet point, which starts with that auctions of last resort will take place after that added language at the end is not a substantive change.

Does everybody hear static, or is it my line? I need to check.

JULIE: Jeff, I think it's coming from your line but occasionally Cheryl's line. It's like your static bounces off her phone line. So I'm not 100% sure it's just you.

JEFF NEUMAN: Yeah, because even when I put it on mute, I'm hearing the static. So I don't know.

JULIE: And I was not hearing static when you put it on mute, so I think it is your line. Do you want to take a moment and maybe reconnect and get a better connection?

JEFF NEUMAN: Yeah. Well, let's continue and then … hmm. Okay. Let's just continue if we can live with it a little bit. Then, when someone else comes up to speak, I can then try reconnecting.

JULIE: Okay.

JEFF NEUMAN: I'm going to go on to the transparency requirements … Did I just get disconnected? Can everyone still hear me?

JULIE: I can still hear you.

JEFF NEUMAN: Awesome. Maybe that was a click that made the static go away. Okay, good. This is the transparency for the bidding process [of the] ICANN auction. This is what we discussed the last time, which is that all parties in interest to any agreements relating to

participation of the applicants in the private auction or ICANN auction of last resort must be disclosed. And just some more specificity that we discussed on the last call although didn't come down to any conclusion of timeline. But we did talk about adding some specificity about when those disclosures need to be made. The proposal here is within 72 hours of the resolution.

So, Paul, I'm assuming that proposal is 72 hours after the resolution? I guess that makes sense. Or we're not saying that, at least in Paul's proposal, it must be disclosed before a private auction or before the auction of last resort. That's something that we need to think about.

So that's an open question: when do want the reveal? Let's talk about that, or let's think about that as an issue for the list.

The next part was just some of the elements: more and more specificity of what needs to be disclosed. List the names and contact information was in there. Paul has crossed out "contact information." I think, for the purpose of … Well, let me ask Paul. Why do you think the contact—I don't to make assumptions—information does not need to be disclosed? Now, whether it's published is another issue. Maybe that's your concern. Go ahead, Paul. Why do you think contact information doesn't need to be disclosed?

PAUL MCGRADY: We just spent, what, three years trying to determine whether or not contact information can be disclosed. I don't want the program to get snarled up because of GDPR review. So maybe there's

some other way other than publishing everybody's home address and numbers out there. So I guess I don't understand what the difference is between WHOIS data and other WHOIS data. Thanks.

JEFF NEUMAN: Well, the difference in this case is that ICANN may need to do background checks on parties in interest to the application. So—

PAUL MGRADY: For clarity, I have no problem disclosing it to ICANN to do their background information, but if we're talking about publishing it, that's a different issue. Thanks.

JEFF NEUMAN: Sure. I think this was meant for disclosing it to ICANN from the applicants. I'm assuming … I shouldn't assume, but ICANN did, the last time, I believe, redact specific contact information that they were given. But it's good for clarity's sake that you're saying your concern is not on the publishing and not on the collection.

PAUL MCGRADY: Yeah.

JEFF NEUMAN: Okay. Great, Paul. So we should make a note of that, Steve, when we go back to that.

Can we scroll down? If there's another form of private resolution, what we talked about the last time is that all material terms of any arrangement between applicants to privately resolve a contention set, financial or otherwise, must be disclosed to ICANN. We put in parentheses "and the community" because that was still up for discussion. Paul has put in a comment essentially that he'd like to see that deleted. I think that's a pretty big, substantive change because I think that was the whole purpose of these transparency requirements: to make it very clear that ICANN knew who the applicant was and that they understood any arrangements that were made. Again, this was lifted when I initially drafted it from spectrum auctions and other auction where these were material terms.

Paul, go ahead.

PAUL MCGRADY: Thanks, Jeff. I'm saying that I want this language deleted, but I'm not saying that I want the concept deleted. This language has simply become redundant with language above, where we set forth what has to be disclosed and to who. So this is vestigial language that is just not needed anymore because we say, higher up, what it is that's going to be disclosed and when. Thanks.

JEFF NEUMAN: Ah. Okay. Sorry. If we scroll up a little bit because I think it was last put in in the forms of private resolution—yeah. See? So the reason why it's twice, sort of, is because the first bullet point talks about a very specific kind of resolution, whether it's private or the

ICANN auction. But maybe we talk about it above. Do we talk about it above as well? Sorry, Steve. Can you scroll—no. So, Paul, the reason why I don't think it's redundant is because the first section is one form of resolution, and then what we're talking about now is other forms of private resolution that don't fall into the above category. So that's why it was in both places. Paul, go ahead.

PAUL MCGRADY: Thanks, Jeff. I appreciate this, Jeff. If we're going to put it back in, now we're stuck because, above, we have the crowd that wants trade secrets disclosed. That may be a material term of an arrangement, but it may be far more information than you would normally put into an ICANN application [that] all material terms have to be disclosed and ultimately disclosed to the public, like the [red] [inaudible] language said [inaudible]. So, if we put this back in, we are going to have to work this paragraph a whole lot. Thanks.

JEFF NEUMAN: Okay. Understood. I think the intention here was you could, like what we say above, mark parts confidential that may not be disclosed to the community, but ICANN needs to understand the arrangements.

Anne has got a question. Anne, go ahead.

ANNE AIKMAN-SCALESE: Thanks, Jeff. Mine is not about this particular topic—I think you guys have outlined that one pretty well--but the next bullet point underneath the other forms of private resolution, where it says, “In the event that the arrangement results in any material changes, it should go through the application change process.” In that section, we clearly say that ICANN is going to decide whether or not public comment is in order. Then we give examples in the application change request section where public comments is in order. I think that this particular bullet point needs to be included in the section as an example of something where public comment is in order because what you have is a material change to the surviving application. So that one needs to be flagged—an application change request—as one that’s subject to public comment.

JEFF NEUMAN: So this whole section is going to be flagged for public comment. I think all of this is new.

ANNE AIKMAN-SCALESE: Yeah, but this particular language says only that it’s subject to the application change process.

JEFF NEUMAN: Oh, I’m sorry. I misunderstood. Sorry. I was thinking of a section for the draft final report. You’re talking about in general. Sorry. Can you restate that position again? Because I misunderstood then.

ANNE AIKMAN-SCALESE: Yeah. So this second bullet point says, if there's a material change to the surviving application, that's got to be submitted through application change process. There we're talking about … It's a reference. It's incorporating an application change request, which is a whole different section. But in that section on application change request, only certain types of changes end up being subject to public comment. We have flagged some of those in application change requests to say, "Well, these types of changes need to be subject to public comment."

So the point is here that this particular section should be referred to and flagged in application change request as one that would have to be subject to public comment because its material and it's a surviving application.

You see what I'm saying? Not all application change requests are subject to public comment—they're not all subject to—because—

JEFF NEUMAN: [inaudible] we are declaring in this section, and we state it above. So maybe we just don't need it? But we do state in the application change section that private resolution … or actually, sorry. I get your point. We just need to make sure—

ANNE AIKMAN-SCALESE: Yeah. So we should [inaudible] private resolution as one of the public comment section things in the application change request section. That's [my only] point.

JEFF NEUMAN: Okay. Thanks. Then we have in here, under the section of protections for disclosing applicants that we talked about the last time … The first bullet point was … Again, this is akin to what we were talking about 20 minutes ago about trade secrets. What we say here is that that stuff doesn't need to be disclosed unless the information is otherwise required as part of the standard TLD application.

The next bullet point talks about not using the information from contention resolution. So ICANN cannot use that information it gets for any purpose other than to evaluate the application.

This last was says that there'll be no disclose requirements for non-auction private resolutions beyond what is required under the usual application process.

In the last call, we talked about deleting this last bullet point. Paul has tried to, I guess, save the provision by putting in that last proviso in there. So we'll have to all just review that afterwards.

Paul is saying, "Forcing disclosures for JVs beyond what last resort auction participants have to do is a solution in search of a problem. As Jim mentioned on our last call, JVs were not allowed, so there have been no abusive JVs."

I look at it a little differently. I can let Jim speak. Because it wasn't allowed the last time and we're changing the rules to allow it, the disclosure requirements are necessary to evaluate whether allowing JVs and these types of things is a good thing. So I think this is a new change that we're making to the process which

needs data to analyze whether in fact it is a good change or not for future rounds.

Jim, sorry. Your hand was up. I don't know if I covered what you were going to say.

Okay. Thanks, Jim.

Moving on to the next one, these were just an effort to—I think Marc actually just asked a question in the chat a little bit ago about how do we determine intent anyway … So these were three elements that we discussed on the last call. I don't see any changes to this from the last discussion we had on the last call, so I don't think we need to … Well, let me ask if there's any question on that. Again, this has been out there for a few days now.

Okay. Let's move on then to … I see Paul's comment about letting a problem materialize before we try to fix it. I don't think disclosure and getting data … I think the biggest problem of the last round, whether it was indicated by the CCT Review Team or frankly others, is the last of data out there. So we're not saying that entering JVs is a problem. In fact, we're saying it's the opposite. What we're saying is we need data. And that has been indicated as a problem.

Go ahead, Paul.

PAUL MCGRADY: Thanks, Jeff. I don't necessarily want to talk about the JV thing again. It wasn't mentioned in the Board's letter. It wasn't a problem in the last round. If people want to create solutions for

problems that haven't come into existence yet, there's very little that could be done, other than pointing that that seems like we're jumping ahead.

I wanted to address, however, the issue of the bona fide intention. You asked if there are any other comments on this. I guess I have a general question about this, which is, with regard, for example, to a rebuttal presumption, is it an IRT question, like how somebody would rebut that and to whom? And is that the kind of thing that would be an implementation issue? Thanks.

JEFF NEUMAN: I would say that anything the implementation review team believes as a whole in the implementation is certainly ripe for an implementation review team to fill in. I know that's sort of a non-answer, but I'm not saying that there's … If they think this language is good enough, they may not feel a need to explain it anymore, but I'm sure some of us will be on the implementation review team and could then help guide them if we feel like it needs to be filled in. I know that's sort of a non-answer.

PAUL MCGRADY: No, I think it's helpful. I doubt that it will remain a [free-rein] rebuttal presumption, but I expect the IRT will tackle it. I just wanted to make sure that I was understanding the process. So thank you, Jeff. It was helpful.

JEFF NEUMAN: Sure. Elaine, you have your hand up. Please go ahead.

ELAINE PRUIS: Thank you. Two things. If we're going to presume that we don't need to think about what kinds of problems might come up because of changes that we're making, probably half of this document could go away. I think it's naïve to assume that people won't find ways to take advantage of whatever new rules that we're proposing, so we need to be ahead of the curve and think about what those could be. So I'm agreeing with several people's statements here: if we're going to introduce new avenues, we also need to consider what mitigation efforts could be made and put those in place.

Secondly, I'm wondering if any of the things in the rebuttal presumption of non-good-faith intent occurred in the last round. Do we have data on that; particularly #3: if an applicant who's awarded a top-level domain sells the TLD, it might create a rebuttal presumption of non-good-faith intent for that applicant. How many tens of TLDs have changed hands? So are we saying that, indeed, there really was a problem in the last round, which several people have been denying there's a problem? I want clarity on that in order to consider that language. Thank you.

JEFF NEUMAN: Elaine, good point. I'm just looking at that third element to see if we're missing some timeframe. There may have been a timeframe initially. Actually, I'm the one who probably drafted that, so I may have just forgotten that. I don't think it's fair to say that, if an applicant is awarded a top-level domain and sells the TLD five years down the road, that should be a rebuttable presumption. But

I think there was a time element that's probably missing from there, just like there is in #2.

Paul, is this a new hand or old hand?

Okay. Old hand.

So, Elaine, yeah, let's talk about that third one. I think it is missing a time element in there. I don't know, Elaine, if that helps in your thinking or not.

Okay. So some things—oh, Elaine. Go ahead.

ELAINE PRUIS: Thanks. Yeah, a time element would be important here. I think Rubens also indicated that #2 happened without malintent. I don't want to include this language without taking a look at what happened in the last round and determining if this is truly presumptions of non-good-faith intent. If we're going to put some teeth on our bona fide or our [tease and seize], they need to be factual.

JEFF NEUMAN: Great point. So please do look at these. It's not easy to determine a non-good-faith intent or even a good-faith intent. So please do look at this and think of elements that could be an indication of at least further investigation into an applicant's intent.

If we scroll down, there's some questions that we still haven't, I think, answered. Let's say someone is found to have engaged in a non-good-faith intent. So, what? So what do we do? So there's

some suggestions in there. Some have been crossed out by Paul, which I guess indicates Paul's disagreement with those. I'd like to actually keep them as non-crossed-out so everyone can look at them but obviously indicate disagreement from Paul on those elements?

Marc, I see your hand. Go ahead.

I'm just waiting for Marc to unmute. It's probably a double-mute issue here.

MARC TRACHTENBERG: Can you hear me now?

JEFF NEUMAN: Yes. Good.

MARC TRACHTENBERG: If you could just scroll back up. My comment, when I put my hand up, was on the presumptions of non-good-faith intent. I just don't think that these are good proxies. I don't know what would be good proxies, but I don't think these are it. So the applicant applies for five or more strings that are within contention sets and participates in private auctions for more than 50%? That doesn't even work with five, but whatever. Forget that. Then, in half of those, the losing bidder received money from the successful bidder, and the applicant loses each of those private auctions. If you're applying for a lot of strings and you get outbid by everybody, I don't think that that's a reason to all of sudden have a

presumption of non-good-faith intent, especially seeing the high amounts of the bids in both public and private auctions in the first round. It's the same for the second one. The string is not delegated into the root within two years. There could be a variety of reasons why that happened. It's more likely than not that the applicant was acting in bad faith. Same thing with the third one. The applicant sells the TLD. Even if it's within a certain period of time—let's say one year or two years after it's delegated—I don't think that makes it more likely than not that the applicant was acting in bad faith. So, if the applicant launches and delegates and gets an offer it can't refuse, now all of a sudden they're not acting in good faith and face some sort of punishment? I don't think that's reasonable. We can't know these people's intent. I don't think there's any good proxies, but if there are, these three are not them.

JEFF NEUMAN: Thanks, Marc. I share your concerns, and I think any one of them alone is not really a showing of non-good-faith intent.

So any creativity or thoughts on this would be greatly appreciated on the list. What we're trying to do is address the Board's concern, which is the fear of applicants in the future applying for gTLDs solely for the purpose of making money in private resolution. I don't want to get into the issue again of whether people actually believe that's a problem or not. There's obviously people on different sides of the fence. This notion of ensuring a good-faith intent is a compromised solution to address the concerns. I think we're just trying to come up with factors that one could use as indicators, but these indicators on their own may not be, as you

said, an indication. God, that was terrible English. Sorry. It's late for me, too. But let's put our heads together and try to see if we could come up with what could be used as criteria.

Rubens says, "#2 initially said "launch."" #2 initially, when Paul drafted it way back when, said, if an applicant's string is not launched within two years, there is no definition of "launch." Absolutely none. I admit I changed that for discussion purposes to "delegation" because that's the only thing that has a definition. I suppose you could say, "if you haven't gone through the RPMs"—the launch RPMs. Maybe one could say that. It was really more for discussion purposes. So let's try to refine that on the list.

I understand Paul is saying that "launch" is better. Again, there's no definition of launch. So we need something that we can attach an objective definition to.

Greg, go ahead.

GREG SHATAN: A couple of additional points. We need to think about what it would take to rebut these presumptions, since essentially this puts the burden of proof on the applicant. So how do you prove that you were acting in good faith when you didn't delegate a domain into the [root.] I'm not saying it can't be done, but we can't just propose that there be a rebuttable assumption if we have no idea how one might rebut it or even if it can be rebutted.

Secondly, these all say that they may create a rebuttable presumption. Going on the use of the term "may," does that also mean that these may also not create a rebuttable presumption?

And who makes the decision whether or not they create a rebuttable presumption at a given time? Or is there a presumption that there's a rebuttable presumption, and does that presumption have to be rebutted as well?

JEFF NEUMAN: Thanks, Greg. I was struggling with the use of "rebuttal presumption" for the reason that you're getting to and think about it more as factors or things that may be take into consideration by ICANN to make a determination. I think Paul had put in "rebuttal presumption" in his initial proposal, so we didn't change that. Something to think about, again, to the list is whether we just say "factors that may be taken into consideration." That may get us around the whole discussion you were just starting, Greg. I don't know. That might help.

GREG SHATAN: I think it would help. Maybe it trades one problem for another, of course. But then again, that's always an issue. Maybe it's prima facie evidence. Then we also have to watch out for using terms that are primarily legal terms and perhaps common law and just American legal terms because we're going to have plenty of people for whom that is no more meaningful than some term from dressage to somebody who doesn't ride horses. So "rebuttal presumption" is a term of art, but it's certainly not a term of art in this area. So that's another reason why it's not great: it comes with a lot of baggage that we don't necessarily need and most people won't understand. Thanks.

JEFF NEUMAN: Okay. That makes sense. I think Paul and others are agreeing. So we can make them as factors that may be taken into consideration.

We have about 13 minutes left. I do want to get into a couple things on the predictability, so if we can scroll to that. Okay. We're getting very close on this predictability. I think we've gotten—I'll call it the hard stuff—out of the way. I think we have agreement on the different scenarios of when a SPIRIT team be invoked and wouldn't and the ramifications of that. You all have not only this document here, but everyone also has the revised chart on the concerns that were expressed during ICANN68 and our responses to that. There's also a chart or a visual form of when the SPIRIT team—yeah, the procedural steps. So please do take a look at that.

The biggest thing from the last discussion we had on this is we got down into the weeds of the wording of the annex in particular. So the question here … We don't want to get too far down into the weeds of the wording, but we also don't want to do a major overhaul of Annex A so that everybody is happy with every single word. One way to do that, is in this first paragraph, is recommending that the implementation review team use Annex A as a guideline or use the language in Annex A as guideline as opposed to being prescriptive. So Steve has come up with these terms of it being indicative as opposed to prescriptive.

I wanted to get people's thoughts on that. I do think that that will hopefully—I'm knocking on [inaudible] wood here—get us away

from focusing on the exact wording and looking more at the concepts.

If you scroll down to Annex A, Steve, a lot of Annex A uses the language directly from either the implementation review team procedures or procedures that were put into place for some of the standing committees that the GNSO Council has used. We got very much into the weeds. Yes, sorry, scroll down to—well, all of this. Actually—no, no, no. Sorry, you're right. Keep scrolling down. Here. This is, in particular, the section. So maybe we should limit it. It's not all of Annex A that is indicative. I think some of the parts of Annex A before this are prescriptive because I think we spent a lot of time talking about the different scenarios and when SPIRIT team would be called in, but, on this part—specifically about the chartering, the recruitment, and composition—I wanted to see if the group would be comfortable with it being more guidelines as opposed to the implementation review team having to take all of this language as is written.

Does that make sense to everyone? I know it's late, so it may not be coming across clear.

Anne, go ahead.

ANNE AIKMAN-SCALESE: Jeff, I know I'm the one who brings this up all the time, but the business about how we call for volunteers and that being extended to members of the PDP working group shouldn't just be guidelines that don't have to be accepted by the IRT. That should be required.

JEFF NEUMAN: Okay. I just the higher-level point is that there are some elements that may need to be prescriptive. So maybe it's a worthwhile exercise to go through those—not on this call but I mean to go through and try to figure out if there are elements here that we think are that important.

ANNE AIKMAN-SCALESE: Well, Jeff, very quickly in the follow-up, all along the way the concept here has been that, wherever applicable, IRT provisions should apply because this is a standing IRT and, all along the way, what was discussed in the working group is that we were going to incorporate the IRT provisions—all of them—except for where they weren't applicable. So now, if you want to change their status by only picking out certain ones, you're actually changing what our deliberations have been.

JEFF NEUMAN: I understand the point. I think, again, this is a discussion. If everyone is happy with this exact language and we don't have to drill down into every single word (because this was taken from actual sources, and we have that chart that was sent around several months ago that talks about where the IRT language doesn't apply and where we got the source the language in here), I'm fine with keeping all of these as being prescriptive if everyone can agree on it. I just don't want to spend days and weeks going through all of this language if people have issues with it.

So I guess that's the outstanding question. Are we comfortable with all of this language to keep it as being prescriptive? Or do we pick out certain elements that we think are prescriptive and others where the IRT should or may want to be more flexible? I'm fine in either case, but what I don't want to do is spend weeks on this exact language, even though we've had this language now for several months.

Donna says, "We need some flexibility here to support the intent of the SPIRIT. It may not actual be possible at the time that the SPIRIT is constituted to find someone who is on the working group." Kathy says, "We spend a lot of time talking about this."

Look, if the full group is comfortable with the language here, I'm totally onboard with that. I just was under the impression, during the last call that we spent so much time going into the weeds and asking questions—"Why was this word used?" …The answer to most of them is, "Well, that's the way it is in the implementation guidelines." So I ask that everyone consider that.

Paul is saying, "Isn't a little late to be doing a tonsillectomy on this plan?" I agree. Like I said, my first choice would be to keep this language and keep it prescriptive, but I don't want people now coming back, saying, "Well, now it's prescriptive. So why did we use this word here and not here?"

Anne, is this a new hand?

ANNE AIKMAN-SCALESE: Yes, it is. Very quickly, I think using the word "prescriptive" is a little bit of a pejorative reference. I'm not sure why this is coming

up again at this time at all because it's been the principle all along and it's a recommendation. It's not "prescriptive." And there's nothing about it that says that, if people aren't available, they're not available and they're not going to volunteer. So it's going to get formed, and it's going to get formed in accordance with IRT principles. So it seems to me it was settled long ago. Thanks.

JEFF NEUMAN: Fair enough. If you scroll down—sorry, Steve—I think we have talked about each of these elements. Let me see. There are some highlighted areas in here. I know we only have a few minutes left and we're not going to have time—oh, I'm sorry, Kathy. You're up next. Kathy, go ahead. Sorry.

KATHY KLEIMAN: First a question and then a quick comment. Is this whole area--- everything in this section; the chartering—what you want to make tentative and not prescriptive? That's a question.

Also, I want to put a flag down that I think we should go back to the conflict of interest at some point because it seems to be missing some of our discussion. Thanks.

JEFF NEUMAN: Thanks, Kathy. The first part is, to the extent we agree on making it indicative as opposed to prescriptive, yes, it would be starting at just basically this chartering question.

The second part of conflict of interest, yeah, absolutely, I think is one of the, if we scroll down … I think there's not too many issues outstanding from this. Keep going. I think the conflict of interest was the one area where we had some discussion.

Go ahead, Kathy.

KATHY KLEIMAN: What had been proposed here—I don't recall massive objections—was that, if a SPIRIT member—the SPIRIT is going to be going for a long time—is—I don't have the exact language—directly involved in an application, it should be disclosed. That SPIRIT member has the obligation of disclosing. It's not the job—the scavenger hunt—of other people on the SPIRIT team. Some of these changes may involve just one application. They may involve small groups of applications. If that's there … A statement of interest can be very broad. My law firm represents lots of applicants. That's not the type of disclosure that would be very useful to other members of the SPIRIT and other members of the public in the transparency to let say, "I am directly involved in one of the applications that will be directly affected by the changes that we're proposing." Notice I'm not even saying "recusing." I'm saying "disclosure." It's my law firm. It's my client. It's mine.

JEFF NEUMAN: That is in the section, and it's highlighted up on the screen.

KATHY KLEIMAN: No. If you put in your statement of interest … Statements of interest are very, very broad. They may or may not … Where does it say that, on a specific issue, you will tell … So you're three years in, where does it say—if I'm missing it, this is great, or we should clarify—that you point out to the other members that you've been working for three years, "The application we're now talking about is mine"?

JEFF NEUMAN: In that second bullet point, under D (Conflicts of Interest), it seems, "Members of a SPIRIT should accordingly disclose in their"—it says "statements of interest"; it's probably more statement of participation, but whatever (no, actually, that's right; statement of interest)—any financial interests and possibly incentives as they pertain to a specific complaint or issue under review." So that's the intent.

KATHY KLEIMAN: Well, first, does anyone else think that this should be [inaudible]? We ask for updates to statements of interest in every meeting. Would it be possible for the SPIRIT, at the start of every meeting, to say, "Do you have a direct interest in any of the applications being discussed or any of the changes being proposed?"

JEFF NEUMAN: I don't see why not.

KATHY KLEIMAN: Great. Thanks. That would be great for transparency and all sorts of other purposes. Thank you.

JEFF NEUMAN: Okay. Then, if you scroll down below that—I know we are after time—what I want everyone to pay attention to … We'll start here on Monday on the next call. Please do review this. We're not going to go step-by-step through this document on Monday. We're just going to go to the highlighted areas, or if people raise concerns on the list. Otherwise, this is mostly done (this section); at least done for the draft final report.

Anne, is it okay if we, since we're going to discuss this on the next call … Your hand is up but I don't know if that's an old hand or new one.

KATHY KLEIMAN: I just put a comment in the chat. If there is an individual application that's being discussed, at least some of us may have rules as attorneys that prevent us from disclosing that we represent a particular client on a particular application because the privilege belongs to the client, as I'm sure Kathy knows. But the phrasing we'd have to work around because it's one thing to say, "I represent somebody in this group of applications." It's something entirely different to say, "I represent X and Y Application," because even the representation itself can be subject to privilege, which belongs to the client.

JEFF NEUMAN: Okay. Kathy says [we] can work on the wording, so let's do that. We understand the concept, so I think there's ways to, as Paul says, make it work.

Again, we're not going to step-by-step through this document again on the predictability stuff. So, please, if you have any issues, we'll go through those and we'll go through the highlighted areas because those are where there may be some outstanding issue. Then we will, on Monday, we'll start with this, then we'll go to the closed generic stuff-hopefully, George will be on—and then we'll go to the—what am I missing?—the private resolution auctions.

We're also going to be circulating fairly soon language for the preamble. You've already seen some of that already. Ah, geez, I used the word "already" twice. You've seen some of that, but you haven't seen all of it. There's certain things we said we'd do in the preamble that we have not yet come out with, but we're working on that. So we'll send that out very soon. I think we're getting there. We're getting towards the end of this.

Thanks, everyone. Lots covered today, as [Cheryl] says in the chat. Let's get us over the hump here. We're just about there. Thanks, everyone.

[END OF TRANSCRIPTION]