
ICANN Transcription
GNSO New gTLD Subsequent Procedures Working Group
Monday, 07 October 2019 at 15:00 UTC

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MICHELLE DESMYTER: Welcome, everyone. Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures PDP Working Group call on the 7th of October 2019.

In the interest of time today, there will be no roll call as we have quite a few participants online, so attendance will be taken via the Zoom room. As a friendly reminder to all participants, if you would please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this, I'll hand the meeting back over to Jeff Neuman. Please begin.

JEFF NEUMAN: Thanks, Michelle. Welcome, everyone. I hope you all had a good weekend and ready to get back to talking about appeals and community. Those are the two items on our agenda. Before we get to that, let me just ask to see if there's any updates to any Statements of Interest. Okay, I'm not seeing anything on the list or on the chat, so there we go.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

Okay. Let me ask if there's any Any Other Business that we should discuss?

Okay, the way I want to review where we are on this is that link that was just sent out. I think it was a half hour, 45 minutes before the call, I tried to – as talked about in the last call – do a chart of the different types of evaluations and objections and the potential outcomes, so what could be appealed and what we've been talking about. I think this is good again to catch us up where we are. If you see any mistakes in here, any questions on here, please do bring it up. It was done relatively quickly in an attempt to try to get it ready for this call. So, hopefully this chart helps. Let's go through it in order to just pull out the concepts and to see whether we've captured all the issues and captured all the potential outcomes, etc. Kathy, please.

KATHY KLEIMAN:

Yeah. Jeff, first, thank you for the chart. It is responsive but the timing is not because we can't tell you what's missing if we hadn't had the chance. Many of us had prior obligations before this call. Well, I would love an overview. I think it's premature to ask us what's missing, although I would ask now about the difference between Community Objections and CPE evaluation disputes and where that's captured. But what I'd like to do is ask if you can give us an overview of what's here, and if we can schedule this for review on the next call after we've had the chance to look at it. Thanks.

JEFF NEUMAN: Yeah. Thanks, Kathy. I think we'll go over it now and then use the mailing list for comments on it. This is by no means closed at all. It's just really an aid to help everyone, considering that we just finished our conversation on Thursday evening for many people, turning it around the Monday morning was as quick as we could do at our time. Again, none of this is final. Then we could certainly make comments during the call and afterwards. It's really just an aid for us to help us write the final report section. This diagram will help for now. It's not intended to be the end product of the group.

KATHY KLEIMAN: A new hand. I'm going to have to ask for 24 hours in advance of new documents. It's just fair that people get a chance to review. We do this in my working group. We try to give far more than 24 hours, and I know it's hard with Thursday groups but you're asking us what's missing and then they have to argue on the list. It's much, much easier for everyone if we do it 24 hours later or a call away. Otherwise, you're not getting our full input, and it's harder for us. Thanks.

JEFF NEUMAN: Thanks, Kathy. I totally understand. Like I said, we're just going to discuss the document now. We'll accept comments at any point in time. Again, I think this is useful. This is not our output document, and I completely understand that. This is an aid for us to help [inaudible] our output. I'm going to go through it, hopefully it will all make sense and hopefully it will give you guidance so that you can make comments in writing on the e-mail list.

If we click on the Evaluation Procedures tab, which I think is up on the screen now, there are a bunch of different types of evaluations and the one we have not captured yet is the Community one, which I forgot to mention. We do need to add that in as another line item, so it'll be line 13, I guess, in here. Then we'll just need to fill that in.

So putting aside community for the moment and going through the other types of evaluations. These are evaluations, not objections. The first evaluation that applicants go through is the background screening. What is an outcome that might warrant an appeal? If the applicant fails the background screening then that would result in the application not proceeding from there. So an applicant would be affected by the background screening in this case, and then the applicant would have standing to appeal. I think what we've decided – or not decided, sorry. Bad choice of words. What we talked about the last time was that these appeals should be heard by those with the experience or expertise in deciding these cases, and so what we put in here for the arbiter of the appeal is the existing evaluator entity but a different individual evaluator. I hope that makes sense. I've put those in for almost all of them as you can see.

Kathy put in the chat, "Panel of evaluators two to three?" Sorry, Kathy. So you're suggesting that appeal should be heard by two to three panelists? Is that what –

KATHY KLEIMAN:

This is it. Background screening isn't my area of expertise but if you're having an evaluation of some sort, do you want to set up an

expedited ... Are we objecting to an expedited appeals process of the standing set of, say, senior evaluators who would just get these materials and be called on to look at appeals on an expedited basis?

JEFF NEUMAN:

If we look at string similarity that was done in the last round, there was a panel of certain number of people. I'm trying to remember where they came from, but it was a particular entity. Actually, they were farmed out to different entities in order to do the background screening depending on where the applicant was in the world, and what kind of background screening could actually be done. In this case, I don't know if there could be some sort of standing panel. But maybe – I don't know if anyone can address that. That may be someone from ICANN staff that might be on the call.

Alright. This one is a little bit tricky because I wasn't so familiar with the background screening as to who they employ to do that, but I think at the end of the day, I don't know how prescriptive we should be other than to say that it shouldn't ... I think the individual evaluator that made that decision should probably be not be the same as the one that decides the appeal. That kind of makes sense.

Okay. So then who bears the cost? We started to talk about this in the last call. For evaluations, it's an interesting one because there are likely two sides that we heard on the last call. One is that for the objections, we certainly talked about things like loser pays. But for evaluations, it's usually one, the applicant against an aspect of how his or its or her own application was decided. So, ultimately, it

would be very difficult to get an evaluator, a third party, that would agree to do evaluations and then pay the cost of an appeal if it lost an appeal.

What we also talked about was that an applicant paid for the appeal, but then what I put red in there is maybe something to give some thought to is, should there be some sort of partial refund if the applicant wins? Is that too much of a punishment for the evaluator? Is an evaluator going to want to sign up if it has to issue a partial refund or would that come from ICANN? That's what I put in there as something to discuss. I don't know if there's thoughts or comments on that.

I do see Paul and Rubens have put into chat who did the background screening. Paul says, "For background screening, applicant for identical string should also have a right to appeal. There was no mechanism for this in the last round. ICANN ignored objections when someone passed who should not have passed under the clear language of the Applicant Guidebook."

Okay. Let me just go to Rubens. Rubens just posted who did the evaluations. Paul, what you're saying I think is that if there's someone in the contention set that thinks the applicant should have failed but they passed, you think that other applicant should have a right to appeal?

PAUL MCGRADY: This is Paul McGrady. Can you hear me?

JEFF NEUMAN:

Yeah. Please go ahead.

PAUL MCGRADY:

Yes, that's right. If you have an applicant who should not have passed the background screening and passed the background screening anyways, anybody that has an identical string should have a right to appeal that decision. If we have – I don't know when contention sets will be done. I don't know if they're done before or after screening. But if contention sets are done before screening then anybody in the contention set should have a right to appeal as well. This is a real-life situation where somebody under the plain language of the Guidebook got through and ended up in a contention set with somebody who had a legitimate reason to apply for it and it cost a lot of money, and ICANN ignored communications. So not like, "Hey, we got it, thanks so much; we disagree," or anything. Just flat-out ignored it. So we do need an appeals mechanism for that kind of scenario.

I think this is sort of Step 1 to keep cybersquatters out of the space. I know it's insane to think somebody would pay \$200,000 to apply for a brand but these things happen. Yeah, we definitely need that appeals mechanism.

We can make it loser pays. In that case, if somebody appeals a decision and they're the party that's in the contention set or has the identical string and they lose, they can pay for the appeal. If the person who applied should not have applied in the first place and an appeals panelist sees that when for whatever reason the initial screening group did not see that, then the applicant who

shouldn't have applied should have to cover the cost of the appeal. Thanks.

JEFF NEUMAN: Okay. Thanks, Paul. I see two hands.

ALEXANDER SCHUBERT: Jeff, can I quickly add to Paul?

JEFF NEUMAN: Hold on a sec. Let me ask, is your comment on this particular –

ALEXANDER SCHUBERT: It's just an add-on to Paul. I want to agree with him and then add a small thing.

JEFF NEUMAN: Yeah, hold on, Alexander.

ALEXANDER SCHUBERT: Okay.

JEFF NEUMAN: Because Jamie's hand is up first. Jamie, are you commenting on this or do you have a separate topic and then we shall let Alexander go?

JAMIE BAXTER: It was more in response to your question about evaluation.

JEFF NEUMAN: Okay. Let me [inaudible] Alexander first and then I'll go back [to you]. Alexander, please.

ALEXANDER SCHUBERT: Okay. I can hear myself on the line. I want to agree with ... Do everyone else hear myself also double because I hear my own.

JEFF NEUMAN: I think you're good now.

ALEXANDER SCHUBERT: Okay. I want to agree with what Paul just said, and I want to add that especially if you want to prevent any kind of fraud, scam, or whatever that Paul mentioned. Maybe not just only the entities that are part of the contention set but also any entity that has impacted. If, for example, someone would hit a city but they should not pass the initial evaluation, so that community, for example, a city community should have sending as well and should say, "Look guys, the applicant should have never passed initial evaluation." That's already it. Thank you.

JEFF NEUMAN: Okay. Let me go to the chat on this subject because there are certainly people that have commented.

Elaine Pruis states, “Doesn’t that open every single applicant up to an additional layer of delay by contestants?”

Maxim says, “Does it mean that an applicant has to pay for bad work of the screeners of the first wave?”

Christopher Wilkinson: “Evaluators should be individuals with recognized personal expertise.”

So, if it’s loser pays, do you think that addresses potential frivolous appeals of this nature? Paul says yes.

While I ask for any other thoughts on that, let me go to Jamie.

JAMIE BAXTER: Thanks, Jeff. To go back to the question that you posed which is, is it fair to ask evaluators to cover the cost? I think we actually have a real-life example that we should probably bring to the forefront here. That was the Community Priority Evaluation, which had to be done the second time for .gay. Dot gay certainly did not pay for that, so maybe we can ask ICANN who actually paid to have the evaluators do that the second time when it was revealed that they didn’t do it correctly the first time. Thanks.

JEFF NEUMAN: Okay. Thanks, Jamie. That would be for community. Kathy asks, “How would a member of the public have access to the private portions of the application?” I guess Kathy is asking how would ...

specifically on the background screening, other than passing the evaluation, I don't think the public sees any of the results of the background screening.

Paul is saying, "Not all background information is private." Right. Some of the information was published like who the directors, officers, who [inaudible] was themselves was made public. Paul, please.

PAUL MCGRADY:

Jeff, you were just about to say some of the things that I was going to say. Listing that the background, the officers, which corporate entity is going to apply, additionally the history on cybersquatting is public, and there was the prohibition that was not followed in the first round against anybody with the history of cybersquatting being an applicant.

Yes, Kathy is correct. Some of the information is private and we don't have access to that, and I don't think that's unreasonable. But on the other hand, some of it is public and if somebody fails under one of the publicly known data points then that's what the appeal will be based on. Thanks.

JEFF NEUMAN:

Okay. Thanks, Paul. Kathy, please. And then we'll move on to the string similarity.

KATHY KLEIMAN: Yeah. I have a question for Paul. Paul, are you mostly concerned about brands here that the wrong brand will apply? And so the larger corporation can come in and make those objections early on without going through another type of objection process. Are you concerned about something else? Would brands take care of it? Thanks.

PAUL MCGRADY: Yes. This is Paul McGrady responding to Kathy. Jeff, sorry, I cut you out of the middle for efficiency sake, I thought I should. The wrong person applying for a .brand is certainly one example of it, and yeah, I worry about that but I worry about other things as well that people who should not be applying, getting into the program, and if there is some other harm that somebody else might see to their application, then it wouldn't necessarily have to be based upon .brand. It could be a standard registry model where the TLD is going to be running a [inaudible] variety open way and it's in a contention set with another party, and that other party has a felon on their Board or something. I think that that's something that the other applicant should be allowed to be heard over. In the last round there was no mechanism for this, so yes, I'm concerned about brands but not just brands. Thanks.

KATHY KLEIMAN: Okay. And I'll just voice my concern and then we'll hand it back to you, Jeff. Thanks for the flexibility.

This background screening – how do we put brackets on it so it doesn't become a bypass to the Legal Rights Objection to other

types of contention mechanisms? It seems like it could become all-encompassing if we don't limit it. Thanks.

JEFF NEUMAN:

Thanks, Kathy. What we'll do is we'll add a row in the chart where the applicant would be able to appeal. And then we'll add a second row under it for a contention set I think was the word that Paul used, or exact match. We'll italicize and bracket that so that we can get comments from people on the group because that's a new [idea], but certainly one we want to get some feedback on. We'll add that in the chart.

Let's go to string similarity. There are four scenarios where there could be an outcome that might – well, two scenarios where there's an outcome that could be appealable but two different outcomes, so two different parties that could file appeals in each one. That's why there's four rows.

The first one for string similarity is that let's say you have an applicant that their string was found to be similar to an existing top-level domain, reserved names, 2-char IDNs, all those other rules that were in there where the applicant could be dismissed or the application could fail because of string similarity. So the parties with standing. And this one, an applicant would of course have standing to appeal that decision. I put it in red here. The way I filled this chart in would be an existing TLD operator would not have standing to oppose the string similarity evaluation but would because it's got an objection, right? So it's got the string confusion objection that it could take it advantage of. If we had the existing TLD operator be able to file an appeal to the string similarity, that

would replace the string confusion objection for existing TLD operators. I just think that that just didn't seem like that made sense to me, but I could definitely be wrong on that. So what I had put in this chart was the applicant would be the only party that would have standing, that again same type of arbiter where it's different individual but from the evaluator entity. The likely result of an applicant winning its appeal would be the reinstatement of the application. Then again the applicant will bear the cost and then the question, should there be some sort of partial refund?

I'll go through the other three scenarios and then I'll take comments.

The other scenarios, let's say the string is found to be similar to and applied for TLD, therefore it was included in the contention. That was the outcome if you were found to be similar to another applied for TLD. Potential effect that parties could be the applicant who doesn't agree that they should be in that contention set or other applicants in that contention set who don't believe the applicant should be in that contention set. Both parties – I think we talked about this the last time – should have standing. Same thing for existing evaluator entity, different individual evaluator. Then the result, if applicants or other applicants are successful, it'll be to remove the string from the contention set. The third possibility is that the string is found not to be similar to an existing TLD. Who are the parties that are affected?

The applicant an existing TLD operator in that case. This one, again because it seemed to overlap with the whole objection. That's the purpose of the objection or one of the purposes of the objection. It didn't seem to make sense to also give them a right to

appeal. The same thing, if it's found not to be similar to an apply for TLD, which means it wouldn't be in the contention set, and therefore that didn't also make sense to be appealable because other applicants could file an objection to have them put in the same contention set if that's what it wanted to do. Does that make sense out of the four [inaudible]? Okay, no comments at this point, so I'll just move on.

DNS stability. This was really a very limited check on whether the applied for string would impact the security and stability of the DNS. This is not the same thing as a name collision check because that did not occur during the DNS stability. One potential outcome in theory from this NCAP study could in theory be an evaluation for name collision? If so, we'd have to add that to the processes, but because we don't know if that's going to be an outcome, I haven't put that on the chart yet. But again, this is for very strict rules of whether the string would violate the security and stability. I don't think any of these applied for strings actually fell on this category the last time, but assuming someone failed this and we disqualified the application from the program, the applicant would be impacted; the applicant would have standing. The same type of thing where different individual evaluator but same entity, and if they succeeded, that would result in the reinstatement of the application.

Geographic names, I have grayed out for now because we have not gotten the report from Work Track 5 and I don't want to delve into this area until Work Track 5 has its final report. So, at this point, let's not discuss that issue. Obviously, if anyone wants to say something on the list, that's fine. But intentionally, it's grayed

out because we should wait for the results of Work Track 5 before filling this in.

So then skipping ahead to line 10, which is technical and operations. Again, failure in this part of the evaluation would result in disqualifying the applicant from the program. What we didn't put on here is, technically, there's an extended evaluation that applicants could go to. This is assuming they failed both the initial and the extended evaluations. I see you, Christopher, just give me a minute to finish this and then we'll come to you. An applicant would be impacted could file an appeal and if successful, that would just reinstate the application into whatever part of the evaluation it was in. So we'll just put it back into the program. Christopher, please.

CHRISTOPHER WILKINSON: Good afternoon. Thank you, Jeff. And apologies for having to miss several conference calls in recent weeks for reasons beyond my personal control. I take your point that you don't want to discuss in detail the geographical names until you've seen the Work Track 5 report. I have, and I don't think it will stand the international scrutiny that it requires. But only in respect of this particular matrix that you've shown us, under Applicant, under affected party, you've said the applicant of the main affected parties in eventual disputes over the delegation of geographical names will be the public authorities and the communities who already use those names as their main geographical identification. I think Alexander's already alluded to this aspect of time. But it is quite wrong to put under the potentially affected parties, only the applicant. That's not correct. Thank you.

JEFF NEUMAN:

Thanks, Christopher. I'll take the blame for that. When I grayed it out, I didn't actually ... Someone had done an initial version of this and I grayed it out, I didn't add parties. But you're right, that affected parties will include the inapplicable geographic location. I take your point. Rather than deleting it from the chart, which is what I was going to do initially, I just grayed it out just so that people would know that we're thinking about geographic names. But, yes, a lot of the items in this [inaudible] are going to change, depending on the report that we get back. So I apologize for that.

Okay, going ahead then to Financial. Financial would be whatever we end up with in the final evaluation, which may or may not include things like business model, but certainly includes the financial health of the organization. If you fail that, your application is disqualified or is taken out of the process. So an applicant would be impacted, the applicant could appeal. A successful appeal would be the reinstatement of the application into ... whatever was kicked out, it gets put back in.

Registry services. This one, I have to think about for a while because it is an evaluation, but it's only an evaluation of ... I should say this is separate and apart from the technical and operations, which is above. But this evaluation is if an applicant proposes a new registry service and it needs to go to an RSTEP, so a panel to evaluate it. If it fails that evaluation, I believe that doesn't impact the application itself other than to say that you can't move forward with that extra service. I don't believe any of them did fail. So we never saw that happen. But I believe that was that was the potential outcome if you failed a registry services

evaluation. It wouldn't kill your application, it would just not allow you to have that or introduce that service in connection with the application.

So if you look at the chart then, the applicant would be impacted and the applicant then could appeal, same type of thing. The likely result of a successful appeal would be that the new service would be included in the new TLD Agreement.

Now, if we do Community Priority Evaluation, I guess the two potential outcomes that would warrant appeal would be a successful evaluation, may want to be appealed by – we talked about the last time a community that purports to represent the community upon which the applicant was granted community status. Of course, if an applicant doesn't get past Community Priority Evaluation, the applicant would want to or could appeal that decision. I think both of them would have standing as we discussed. I think it would be the same thing for the arbiter of the appeal and the likely result of a successful appeal for communities.

Well, if it's an applicant that appealed not getting the community priority and it wins, the applicant would then get the community priority. If a community that did not – I don't want to say objected – but a community that appeals a decision by the evaluator to grant community priority, if they appealed and were successful then the formerly community granted application would now become a standard application. We'll have to talk about the fees of who would bear the cost.

Yes, this is going to be put in writing into the chart, Kathy, but I was just trying to do this on the fly, because we did not put it in the chart earlier. Does anyone have any questions on that before we go to the objections? Jamie, please?

JAMIE BAXTER: Thanks, Jeff. I want to circle back to my earlier question because I think it provides some insight and I realized that the Reconsideration Request that was successful related to CPE was through the accountability mechanisms, but it is a similar situation where somebody has to bear the brunt of the cost. I'd be curious to know who paid for that second Community Priority Evaluation, whether that was an ICANN expense, or whether that was put back on the service provider to cover the cost because of the mistakes that they made from their delinquency and doing it correctly the first time. Thanks.

JEFF NEUMAN: Thanks, Jamie. So we'll capture that as an action item. So you're not talking about the study that was done. You're talking about in this one case where ... Did you win the reconsideration or was it an IRP? But whatever it was, it was in order to have the staff re-evaluate. Then the question is, who paid for that evaluation? Is that right?

JAMIE BAXTER: Yes. So to make it clear to everybody, there was a Reconsideration Request from a CPE result that was successful. Probably one of the only ones that was successful in

reconsideration. It demanded that a new Community Priority Evaluation was to take place. We did not certainly pay for the second Community Priority Evaluation, and this brings into the question of who pays for these new evaluations. I get that this was not an appeal and I get that it wasn't challenged, but I think it provides some insight as to what has happened in the past and how does ICANN handle Reconsideration Requests that involved evaluations that are successful.

I don't know if it's ever been publicly acknowledged as to who covered off on that cost, but I think it's an important piece to have discussed here. I do realize it was the accountability mechanism that ICANN has, that this went through and we're now talking about appeals mechanisms, which is something new that we're creating, but there are some parallels there that I think should be examined. Thanks.

JEFF NEUMAN:

Okay, thanks, Jamie. I got it. We jotted it down as an action item, so we'll find that out.

I want to move on now to Objections. I think those are all the evaluations. Like I said, if you go back and reread this later on and we missed an evaluation type, just let us know and we'll fill that in as well. The second overall area of ... Oh, Paul's got his hand up. Paul, please.

PAUL MCGRADY:

Hey, this is Paul McGrady. Can you hear me?

JEFF NEUMAN: Yep.

PAUL MCGRADY: Alright. Sorry to keep asking that but with multiple layers of mute, it's hard to be sure.

So, Jeff, instead of us getting that chart that you just had up there and going back and forth on the list in a vacuum, could it be a Google Doc that we could all fiddle with in a way that shows who did what? I think that would be a better process than 500 e-mails. Thanks.

JEFF NEUMAN: Currently, this is a Google Doc. So it's already on a Google Doc. I'm not sure how well sheets ... It's Google Sheets, not Google Doc, but same type of thing. I'm not sure that sheets actually let you see redlines and revisions. So that was one of the problems with using sheets. But people can put comments into the draft and we will certainly read those.

I noticed, for example, Rubens put in a comment already on one of them. So I think, yes. Sorry. It's a long way to say, "Yes, we have sheets, please put comments in. Just do insert comment, we'll see those." You can notice those because they have a triangle in them. So if you look at the objections and you look at line 10, independent objector, next in column B, you'll see a triangle in the upper right hand corner, that means that someone has put a comment in there. It's not as obvious as a redline but I

think that's the best that Google Sheets can do at this point. So we're not letting anyone revise the text but just for now, put comments in. Because if you revise the text, we wouldn't see it as revisions, it would look like it was the original draft.

So, Paul, the link is going to be the same link as what you have now that's in the updated agenda that went out and it'll be in the notes as well. So it'll be the same link. We're not going to change the link at all.

Okay. I see what you say. Okay, that's a good idea. So, Paul is saying if everybody can wait until ... give us 24 hours to put in some of the things that we missed in this call or comments that were made, so we can revise those, and then start making your comments, that's fine. Thanks, Paul.

Okay. Now to the types of objections, broadly speaking, there were four categories of objections and then the last one is not a category of an objection but another thing we had talked about. So we'll just go into order here. With string confusion ... Sorry, Christopher Wilkinson has his hand up. Christopher, please.

CHRISTOPHER WILKINSON: Thank you. I had decided not to intervene again. But there's another example of inadvertent bias and incorrect language here, a determination et cetera, public order recognized under principles of international law and applicable local law. You have countries who protects the geographical names under local law. ICANN and the application process has to respect that. It is not acceptable to limit this reference to the principles of

international law. The whole point of half of the discussion in WT5 has been to ensure that applicable local law as provided for in the articles of incorporation will be respected in this context. Thank you.

JEFF NEUMAN: So in this section, Christopher, I put in the language word for word that was in the Guidebook.

CHRISTOPHER WILKINSON: Yes. But, Jeff, we've been trying for two years to change the language in the Guidebook, which was so unsatisfactory and wrong in the context of geographical names. I say no more for tonight.

JEFF NEUMAN: Thank you, Christopher. I will note that that might be a very specific thing to geo names but for Limited Public Interest Objection, I do remember very specifically that it was international law. I believe what people were afraid of was that local law did outlaw certain things that other countries wouldn't necessarily outlaw. I think the ICANN community did not want to see applications that would be turned down because certain countries do not ... Homosexuality, for example, is not legal in every country. I don't think the community wanted to see a blocking of something like that because it was prohibited by local law.

So I think in this particular situation, Christopher, I think the Limited Public Interest Objection, it was very specifically

international law. You might be correct in the geo names ones, but at least at this point, there is no geographic names objection.

Let me go back to the String Confusion Objection and then we'll get back to the Limited Public Interest. For String Confusion Objection, there are three potential appellants in this case. There were three parties that could file appeals. One would be the applicant itself. Of course, if the objection resulted in either the existing TLD operator or the third party objector succeeding. Then what's being appealed, you can see there that it's determination, that there's string confusion with an existing TLD or a determination that there's string confusion with another application. The outcome of that successful appeal would be – well, if it's in the first case where there's determination that there is string confusion with existing TLD, if you remember, the objection resulted in the application being thrown out, this case, if they win, the applicant wins, then the applications are reinstated.

We talked about for all the objections that we have a loser pay model and then I'll get to the days in the note section. We'll come back to that, we'll cover that last.

If it's an existing TLD objector, meaning that someone objected because it was confusingly similar to an existing TLD, if the applicant prevailed in that objection, then the existing TLD operator could appeal. That would be appealing a determination that there's not confusion with an existing TLD. If the existing TLD objector wins, the application would not proceed.

If it was a third party applicant objector, which usually was someone objecting because it wasn't put in the same contention

set, if that was the case, then that applicant objector or the other applicant in the contention set, if there was a determination that there is not confusion and therefore it wasn't put in the same contention set as a result of the objection, then that other contention set applicant could appeal. The remedy for that would be that the application is placed into the objector's contention set. Hopefully that makes sense. Let me go to Kathy. Kathy, please.

KATHY KLEIMAN:

Sorry, coming off mute. Jeff, I have a question for you. Could you help me understand the difference between what you just outlined for string confusion and the appeals that are allowed on the prior document we were looking for string similarity? Are those carefully bracketed, or do we have an overlapping area there? Thanks.

JEFF NEUMAN:

Yes, we can have overlap, but the string similarity evaluation, at least as of the way that it was in 2012 was a strictly visual evaluation. Does the string look so visually similar as to create some sort of confusion? That was a pass-fail. Either the applicant passed that evaluation or failed. If it failed the evaluation and it was similar to an existing TLD then it was thrown out. If it failed the evaluation because it was similar to another application then it was put into a contention set with the other application.

But string confusion here, the objection itself is broader than does it visually look similar as to cause confusion? It's more of a likelihood of confusion type analysis, which could look at other factors other than visual. It could look at sound. Well, it could look

at a bunch of other things. Paul, maybe you're in the queue, because you want to respond to this.

PAUL MCGRADY: Are we comparing String Confusion versus Legal Rights Objections on the confusion question or am I missing what's being asked?

JEFF NEUMAN: We're comparing the String Confusion Objection with the String Similarity Evaluation.

PAUL MCGRADY: Got it. So the String Similarity Evaluation would be between the applicant and the reviewer. The reviewer would be looking back at prior TLDs that already exist. Then we have string confusion, which is between the applicant and an existing TLD objector or another applicant objector. So essentially, what the string confusion mechanism is, we don't call it this, but it's an appeal process if the existing TLD objector or another applicant objector believes that the evaluator got it wrong. Because of the evaluator gets it right, the string is bounced. Or if the evaluator gets it wrong, then the applicant of appeals and the string is then put back in place.

But in either event, the String Confusion Objection is essentially an appellate process to what the examiner already does. I don't think anybody viewed it that way when we built it back in 2011 or whenever it was, but that's sort of how it functions. I don't think we

need to build an appeals process for the string evaluation, because it already is here. Thanks.

JEFF NEUMAN:

So what we did, if you want to click on the evaluation procedures, in line with what Paul was saying, is that an applicant could appeal if it fails the string similarity. But what we said is that an existing TLD operator or a third party would not be able to appeal that because that's what the objection is for. The only exception to that was that if it was found to be similar to an applied for TLD and it was put into a contention set, because of the discussion the last time that it seemed like some members of this group wanted a appeal for other members in the contention set that don't believe it should be in the same contention set.

That's the one area, Paul, that's missing from the String Confusion Objection. There was no way to file an objection to a decision ... If it was decided that a string was in a contention set, there was no mechanism for a third party applicant that was in that contention set that it was put in to appeal, because you couldn't do an objection on that. For example, I'll give you an example. Let's say, Kathy, that unicorn and unicom which was an example, was put into the same contention set, because it was found that those two applications were visually similar. So during the evaluation, the evaluators found unicorn and unicom to be so visually similar that they should be in the same contention set. There was no appeal mechanism for that.

Similarly, you couldn't file an objection to that, because an objection is really filed because you think it is so similar to each

other that it should be in the same contention set. So there would be no reason to ever file an objection. That makes sense? Paul, does that make sense to you? So in this case, unicorn and unicom could appeal the decision or the evaluation result.

Paul saying, “Jeff, doesn’t this mean that contention sets need to be done very early so that any contention set folks can use the String Similarity Objection?” Yes, one thing we talked about, Paul, for the String Similarity Objection itself was that it needed to be done. There needed to be an objection period after the contention sets were already set out. Which means the String Similarity Evaluation needs to be done first before you could file an objection. So, yes, Paul. That did come up. We talked about that a couple of meetings ago.

Okay. Going back to the objections, second tab. Now we’re talking about the Legal Rights Objection. So Legal Rights Objection was at least for the purposes of 2012, did it infringe the legal rights of others? I’m using the word “infringe” not in the sense that we talked about the last time but the sense of the way it was in the Guidebook. So if there was a determination by a panel that found that, yes, it was likely to infringe the legal rights of others or of the objector, the remedy of that objection would be to have the application thrown out. But if the applicant can appeal that, then a possible outcome could be the applications reinstated, if the appeal found that the applicant should have prevailed.

On the other side, if an applicant did prevail on the Legal Rights Objection, the legal rights objector could appeal. A possible outcome of that if the objector prevails in the appeal would be that the application does not proceed.

Paul, I see your request for a flowchart. We'll see what we can do. I think everyone wanted the matrix. So we got the matrix here. We'll have to do one thing at a time. Let's get this in place and then we'll ... I think you're right. We do need a process flowchart for when everything occurs in the overall process.

Limited Public Interest Objection, this one is an interesting –

KATHY KLEIMAN: Jeff, this is Kathy. My hand is up, please.

JEFF NEUMAN: Sorry. Sorry, Kathy. Go ahead, Kathy.

KATHY KLEIMAN: Legal Rights Objection – can we go back up to that?

JEFF NEUMAN: Sure.

KATHY KLEIMAN: Weren't we trying to come up with narrowly tailored appeals? I don't remember what they were for Legal Rights Objection, but I thought it's not just a general appeal if you lose. I thought we were bounding it so that you could appeal for certain particular reasons. That's one question.

Second question is, how much consideration have we given to the 15 days that's in red? I just want to point out to anyone who's

thinking about that we should give this really careful consideration. Think about if the decision comes down on August 15 or December 15, you're going to have problems preparing an appeal. So I'm not sure that that's enough time. But again, Jeff, the narrowly tailored reasons for appeal, I didn't think it was a free for all. How will those go in? Thanks.

JEFF NEUMAN:

Thanks, Kathy. We couldn't capture everything on here on this chart but yes, each of these has its own grounds for making the objection. Yes, we have talked about changes to each one of these types of objections so we will consider those. But for this chart, let's just assume that whatever grounds there are under the Legal Rights Objection or that we decide on or used and then we're just now talking about the appeal of that. So whether there are limits to the types of appeals and what the standard is we still have to come to. We have not yet decided as to whether there should be a complete de novo type review or from the beginning review or whether it should be like a kind of clearly erroneous where the evaluator ... sorry, in this case, the panel clearly made a mistake. So we still have to decide what the burden of proof and the standards are.

Kathy, we've certainly had discussions but I don't know if we decided that it's not a de novo review. I don't necessarily disagree with that statement, in terms of whether it should be but I don't think we've finished that discussion yet.

As far as – I meant to include also – the days, I put that in red because I just wanted to put something on paper but we do need

to come to agreement as to what that timeline must be, so that's why it's in red, because that's not anything that's decided. That's just kind of a placeholder that we need to decide dates.

Paul is suggesting, for example, a notice of appeal within 10 days and the actual appeal within 20. That's as good of a suggestion as any. That's something that we have to settle on.

Okay. Going back to Limited Public Interest Objection, there are four potential objectors in the Limited Public Interest. You could have an applicant, a third party objector, and independent objector. The only reason I put ALAC is because ALAC in theory could be considered a third party objector. But I put ALAC in a separate category because their fees are paid for by ICANN. So when we talk about who bears the costs, that's when we have to get into the discussion of whether we think ICANN should also cover the costs of an appeal.

On the last call, obviously, it's pretty evident what options there are for an applicant. If an applicant loses, they can appeal and the application be reinstated if they won the appeal. Third party objectors, still, again, would be pretty clear if they won, then the application would not proceed. When we talked about it and the reason it's in red, and I see that Rubens has put a comment in here is on the last call, some people did not believe that the independent objector should have a right to an appeal because that could drastically increase the costs of the independent objector. Therefore, they thought that the independent objector should only have one bite at the apple. If that is the case, then obviously none of these other columns are relevant.

With the ALAC, there was also a discussion on the last call, while nothing would stop the ALAC or should stop them from filing an appeal, the question of who bears the cost of that? Whether that should be ICANN because it bears the cost of the objection, does it also bear the cost of an appeal? Why am I making you blush, Paul? I'm reading the chat.

Okay. So that's the difference. So I would love to hear some thoughts on this. This chart just reflects what was discussed. Again, keeping in mind the role of the independent objector, the fees of an independent objector. The independent objector, should they have multiple bites at the apple to appeal? What does everyone think?

I see a comment from Justine and then I'll get to Paul. Justine says, "Denying only the independent objector the right to appeal is rather discriminatory."

Paul, please.

PAUL MCGRADY:

Thanks. Jeff, help us think through when the independent objector would appeal. So the independent objector files against an applicant and the panel hears it, if the applicant wins, then we're saying that the independent objector could then file an appeal, hopefully on some limited grounds to some appellate body, in the same way that an applicant would be allowed to. That's what we're saying?

JEFF NEUMAN: The same way a third party objector could. Just remember, anyone's got standing, I think, for the Limited Public Interest Objection. The independent objector would be the same as a third party objector, the only difference is that the costs will be paid for by ICANN.

PAUL MCGRADY: This is Paul McGrady again. I'm sorry for responding directly, not letting anybody by their turn. But the concern about allowing the independent objector to have an appeal is because – I mean I was participating in the Work Track back in the day when the independent objector was discussed and there was a lot of consternation over how much it costs and whether or not it really ended up doing anything. Obviously, it's still here so that means the Work Track decided to keep it. Did the Work Track give us any thoughts on the appeals issue, or is this de novo in front of us?

JEFF NEUMAN: You are correct that the Work Track – there was certainly a lot of consternation about the cost. But the end of the day, it did not think there would be enough support to get rid of the independent objector at all, and also the thought that there may not be anyone with – other than an independent objector that could really have standing or not just standing but just have the will to file an appeal especially because the third party would have to pay all the costs. So the end of the day, the Work Track 3 decided to keep the independent objector, and no, there were no discussions on appeals at that point.

PAUL MCGRADY: Thanks, Jeff. That's helpful. Since the independent objector is fully funded by ICANN, what we're talking about here is do we want ICANN and ultimately, domain registrants on pass through basis through the contracted parties – I know that sounds nerdy, but that's what the reality here is – do we want the end users to pay for the independent objector to be able to appeal from a decision? There's a real possibility that the independent objector would want to – in order to demonstrate his or her good character or good faith, whatever, if they lost something. But that's the question that's in front of us.

So I wonder ... I'm not a big fan of independent objector in general, but I wonder if curtailing the right to appeal, if the independent objector loses is one method to keep the independent objector but not let it play out to the full circus that it could be. Thanks.

JEFF NEUMAN: I think that is part of it. The independent objector should have done its diligence when it filed the objection. If it didn't, then it lost, then to let it have a right of appeal. Again, this was two calls ago that this was discussed. It seemed to rub some people the wrong way, but certainly willing to go with the group.

Let's see what we have in the chat. Let's see. Taylor Bentley says, "If the independent objector fails, can another objection mechanism be used?" Well, this is separate and apart from accountability mechanisms. So in theory, if it can be alleged that

there's some Bylaws issue with accepting the decision of the evaluator, I suppose the independent objector could.

Taylor's next comment say, "The ALAC or GAC wanted to step in." So certainly the GAC could always file advice. Any third party that filed the objection initially could appeal. So if the ALAC file the objection initially, it could appeal. The question is about who bears the cost?

Kathy is saying, "Yes, if we are setting up fair rules of appeal, it should be openly available." Okay, but if it's available for the independent objector then we're saying ICANN pays.

Justine says, "But what if it is the panel who made a mistake and not the independent objector?" Right. That's the risk.

Kathy said, "Agree with Justine. The independent objector should have the same rights of an appeal so long as it's within their budget." I think that's what you're saying, Kathy. So long as it's within the budget. So that they've already exceeded whatever budget they had, they couldn't file an appeal.

Jamie says, "If appeals are designed to counter panel's mistakes, then that would discriminate."

Then Cheryl is saying, "Indeed, Justine, without my co-lead hat on."

Okay. We can put that back in and, basically, the independent objector would be no different than the third party objector except the loser pays model would be – well, it would still be the loser

pays, but it would be ICANN on behalf of the independent objector would pay if it loses the appeal.

Then we have the conversation on the ALAC, which again, does not lose its right to appeal but the question is whether ICANN pays the cost of that appeal if it loses.

Alan then Kathy. Alan, are you ... I heard you there for a second, Alan. You were off mute and then you went right back on. Alright, let me –

ALAN GREENBERG: How about now?

JEFF NEUMAN: Yes, we can hear you.

ALAN GREENBERG: Two people unmuted me at the same time, the second one muted me. I may have imagined it but I thought when we were originally discussing the independent objector, there was some discussion of not having an objector but a team that any objection discussion had to be made by the group. Assuming I didn't imagine it, I assume that was rejected. Is that correct? Does anyone remember that?

JEFF NEUMAN: Yes. That was not rejected that are still in there that there should be ... whether it's a team or how many members, we certainly

said that there should be multiple independent objectors, especially to handle things like conflicts and others. We use the independent objector in the singular, but it could be an organization or it could be a team of people.

ALAN GREENBERG: Okay, thank you. I guess the point I raised that is, if there is a team, three independent objectors and two of them have to prevail before a real objection is filed, then I can live without an appeal process, because it's already gone through some level of communal discussion within the independent objectors. I don't mind the appeal process but I can certainly live without it if the decision to object is not the decision of a single person.

CHERYL LANGDON-ORR: Can I just jump in? I'm also trying to battle for us to keep funding and even keep rights of appeal in independent objectors in new gTLD processes, like it's a critical, critical meeting that we're up against here today, [Alan]. It's just been battling as well. [inaudible] Can you hear me or not?

JEFF NEUMAN: Yes, we can hear you.

CHERYL LANGDON-ORR: Sorry. I was on the wrong call. I'm trying to grab the other call. Am I [inaudible]?

ALAN GREENBERG: Subsequent procedures call.

JEFF NEUMAN: Okay. Alan, did you want to respond?

ALAN GREENBERG: Okay. Anyway, I was just making a point that I could live without the objection if the decision to make an independent objection was a group decision, just noting that if it's relevant.

In terms of the ALAC, as I said, I'll be bringing it to the ALAC group on Wednesday to see to what extent we want to push for that. I'll simply point out that when this was discussed the other day, the comment was made that people aren't objecting to the ALAC having an objection but they are objecting to ICANN paying for it. The reality is, it makes absolutely no sense to have an ALAC have an objection and not have funding for it because the ALAC has no independent funds. The ALAC is a constituent part of ICANN; it is not a legal entity in its own right. So either the ALAC has an objection with being funded by ICANN or it disappears altogether, because the combination just doesn't make sense. There is no ALAC as such without ICANN. But we'll come back to the group hopefully after the Wednesday meeting with a statement of to what extent we believe we need to push for that. Thank you.

JEFF NEUMAN: Thanks, Alan. It was pointed out on chat, you said objection, but this is for the funding of an appeal of the decision of the panel.

ALAN GREENBERG: The same stands, there is no money. So a concept of something that is not funded by ICANN for ALAC, it doesn't have any meaning. Thank you.

JEFF NEUMAN: Thanks, Alan. When you talk about this, I think you said on Wednesday, if you could relay some of the concerns about what can be done about limits and to make sure that – I'll have to go back to the notes. I don't want to just repeat them but it would be good to just share the concerns expressed by members of the group and get their feedback on that.

ALAN GREENBERG: If someone could send that to me in an e-mail so I have it readily available, I would appreciate it. Thank you.

JEFF NEUMAN: Okay. We'll see what we can do on that one. Kathy, please.

KATHY KLEIMAN: Thanks, Jeff. Question for Alan. He's free to answer it in chat. When he's talking about group evaluations of public interest objections, I assume he's talking about ALAC there, but I wanted to clarify, in terms of the independent objector going forward – and ALAC as well – we talked about budgets. With ALAC, we talked about a budget, with the independent objector, the same thing. In fact, I don't think they went through even part of the budget in the

last round. So if they have the budget to go to appeal or they choose – I mean, last time was a very sophisticated jurors, they chose to maintain some budget for the possibility of appeals. I think that’s absolutely something that he or she should be allowed to take into account.

Quick note that the budget should probably be scaled to the number of applications. So if we get 10 applications or we get 20,000 applications, there’s going to be different number very likely of Public Interest Objections, as well as every other kind of objection. So, let the independent objector go forward with appeals if it’s cost-effective. Thanks.

JEFF NEUMAN:

Okay. So the budget is an important point. I don’t know if we’ll be able to set the budget or recommend it, but other than the fact that we would recommend there be a budget, but certainly discussion of the budget being variable depending on the number of applications is something that we could make a recommendation on.

Paul is saying that he wants to be the independent objector. I won’t comment on that at this point.

Community Objections, again, this is not the evaluation we’re talking about, this is an objection. This is an objection from a community against the application because the community believes that the applicant does not represent the community if it applied to be a community or if it applied to be just a regular open

TLD that the community for which that open TLD is aimed at does not believe that the application should go forward.

I've paraphrased, that's not exactly but trying to just make a distinction here. You could have an applicant appeal, a decision where the Community Objection had prevailed. You can obviously have the original objector, community objector that appeals if it did not succeed. Independent objector also had jurisdiction to object on community grounds on behalf of a community, and the ALAC could object on behalf of a community. Similar in terms of cost as the Limited Public Interest Objection. So I will take it that the independent objector comments that were made with limited public interest also apply here. We'll make those changes to both parts.

Are there any other comments other than the ones that were made to limited public interest which we will also reflect here?

"Column D feels very double negative-ish."

KATHY KLEIMAN: Jeff, this is Kathy.

JEFF NEUMAN: Let me just respond to that. Yes, in some cases, it is double negative. Because I just took the standard that was in the Guidebook and just put a word "not" in front of it. I'm sure it can be worded much better but again, limited time. But anyway, yes, Kathy, please.

KATHY KLEIMAN: In this case, with Community Objections, I think we should just make a note, it is really, really a problem because you don't just have necessarily one party. You've got a number of parties who have come together. Community Objections, you can be public interest groups, they just need more time. This isn't one group necessarily making the decision. So, 15 days is probably almost impossible in most situations that I can think of. Just a note. Special argument for more time for these cases for making the decision about that.

JEFF NEUMAN: Kathy, when you say more time, what are you thinking? What would be an acceptable amount of time?

KATHY KLEIMAN: Sorry, coming off mute again. Good question. I like Paul's idea of a flag, but even the flag is going to be 15 to 20 days. I would give this particular group at least 45. They're going to need some time to organize. A flag within 15 or 20 days that they'll be filing an appeal, and then the appeal within about 45 might be doable. Thanks for asking.

JEFF NEUMAN: Okay. Thanks, Kathy. So we'll get some discussion going on that as far as the timing, but it's good to have kind of a post to put in.

I know we're getting towards the end. The last type of appeal that we discussed anyway was a conflict of interest where someone had felt that the panelist that was appointed would have some conflict of interest, where it should not be in the position of making a decision. This was discussed in what in legal terms was referred to as interlocutory appeal, meaning one that the group felt should be able to be filed and decided prior to the actual substance of the case being heard. Otherwise, you have the danger of a conflict being found after the fact and after all the money is spent. I don't know if there's any other type of interlocutory type appeal that we should be talking about. One potential was to appeal a quick look but that seemed to me to be either a final decision that could be appealed. So if it's a quick look on a Community Objection, that ultimately means the objection and the applicant is successful in that, then that would just be a regular appeal of the Community Objection, for example. The only thing we'd be talking in a quick look is if someone finds that it's not frivolous, should the applicant then be able to appeal in an interlocutory manner. It just didn't make sense to me to do that, because you could easily wait until the outcome of the decision and appeal if it didn't go your way. Hope that makes sense. Let me go to Kathy and Justine.

KATHY KLEIMAN:

Jeff, you may want to explain what you mean by interlocutory appeal for everybody, but let me raise an issue here. I don't know, maybe I missed a call on this. But on the conflict of interest of the panelists, at least before the International Chamber of Commerce, you have the opportunity to raise that issue as soon as you find out who your panelist is.

We might call it supplemental rules but it's really the rules of the forum that exists that allow the challenging of an arbitrator or, in this case, the panelist who's appointed. You've already got that process. It's very quick process. I think you've got – seven days comes to mind, but I'd have to look it up. You can raise the objection pursuant to the rules and I'm sure almost every forum has this. If they don't, they should, but I'm sure they do. So if the issue has already been heard, then we don't want to encourage anyone to wait.

Maybe this is what you're referring to but it seems like this has to be an issue raised quickly. You don't want us to go to a decision and then appeal it, because then you spend \$100,000 potentially. It seems like this one has to get settled and at some point, the party that doesn't like the panelist may have to accept them. Because sometimes expertise is being confused, in this case, with bias. Some of these arbitration forums really want expert panelists in the area.

Anyway, this is a lot of information. But shouldn't this be done right after the panelist is named pursuant to the rules of the forum and not on the separate appeal? Thanks.

JEFF NEUMAN:

Right. I certainly misstated in the last column, in the notes column. Yes, you are correct; they should go to the normal conflict process with that evaluator. Then if they don't like the decision of that, this is what the appeal would be. It's the appeal disagrees with the decision of the entity that makes that determination. So really, in that last call, it should say 15 days from notice of a decision on

conflicts by the evaluator. It shouldn't take 15 days from notice of the appointment of the panel. So that's my mistake. Paul also put that into the chat.

Okay. By interlocutory, again, it means that before decision is made in the ultimate case. That is completely intended to avoid the \$100,000 or whatever it costs to have the full substantive decision.

Sorry. Justine, please. Sorry. Go ahead.

JUSTINE CHEW: Thanks, Jeff. This is Justine. Can you hear me?

JEFF NEUMAN: Yep.

JUSTINE CHEW: Thank you. Just going back to the evaluation procedures sheet, I'm just wondering whether we need to consider adding applicant support program as line 14. a possibility of appeals against decisions made by [ESARP]? Thanks.

JEFF NEUMAN: Thank you, Justine. That's a good comment. We should put that in there because it is a different type of evaluation. Maybe Justine or others can think about how we would fill in that other rest of the columns. I would think it would only be an applicant if it was denied support could appeal. I don't think it would make sense for

some third party that didn't like the fact that an applicant got support to appeal. I'll leave that for people to think about.

What we'll do is we'll spend the next 24 hours filling in the rest of this chart with the things we talked about and then send out the link again. I think we've made some progress on this. I did want to get to community part evaluation but I think this was time well spent. I look forward to talking to everyone on Thursday where we will start with Community Priority Evaluation but continue this discussion on appeals on the mailing list. Thanks, everyone.

MICHELLE DESMYTER: Thank you so much, Jeff. Meeting has been adjourned. Have a great remainder of your day, everyone.

[END OF TRANSCRIPTION]