
ICANN Transcription
GNSO New gTLD Subsequent Procedures Working Group
Monday, 04 May 2020 at 15:00 UTC

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<https://community.icann.org/x/t4PsBw>

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TERRI AGNEW:

Good morning, good afternoon, good evening, and welcome to the new gTLD SubPro working group call taking place on the 4th of May 2020.

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

Hearing no one, I'd like to remind all to 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. As a reminder, those who take part in ICANN multi-stakeholder process are to comply with the expected standards of behavior.

With this, I'll turn the call back over to our co-chair, Jeff Neuman. Please begin.

JEFF NEUMAN:

Thank you very much. Welcome, everyone. Just a quick reminder that today, we will have a two-hour call—or 120 minutes—so it's a

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little bit longer just because of the topic and it'd be great to get all the way through this fairly difficult high interest topic during this call.

So before we do that, let me just ask if there are any updates to any statements of interest. Okay. Not seeing any hands, the other thing I want to do before we get to the topic of auctions, mechanisms of last resort, and private resolution, just to acknowledge that and steer you towards a document we got—well, this morning, I guess—from the GAC, it's a compilation of the views of their 20-something members of the small group they set up on looking at issues with subsequent procedures and it relates to the topics that we addressed during ICANN 67, plus I think also community applications which although we didn't get a chance to talk about it at ICANN 67, it was one of the issues that we had planned on discussing and then we talked about it, I think it was the day we “got back” from ICANN 67.

So I've not been through that document. I understand it's a fairly lengthy document and comprehensive, so I can't really answer any questions about the document itself because I haven't made my way through it, but I know Christopher had said something before the call that he wanted to address it. So Christopher, did you want to say something about it now, or did you want to wait until Any Other Business? Go ahead, Christopher.

CHRISTOPHER WILKINSON: Thank you, Jeff. I've also received this from the mailing list. I frankly had no idea that anything like this was in the works. But my main suggestion this time would be that leadership and the

staff should consider scheduling at least one dedicated PDP meeting to review and discuss the recommendations and subject matter covered by these documents.

In addition to the community applications which you mentioned, there's a lot to talk about because they address public interest commitments, early warnings and GAC advice, applicant support, community applications and closed generics.

So I think on the one hand, our members will need time to take this all on board, and secondly, in terms of an efficient use of our time online, we could consider taking this as a distinct dedicated meeting subject. Thank you.

JEFF NEUMAN:

Thanks, Christopher. We will definitely be discussing these views. Whether it's as we talk about these particular subjects or whether we separate out a call just to talk about these, we'll discuss with the leadership team on this week's call, though I will say since our topic for the next call is going to be to delve in a little bit on the GAC early warnings and advice because of the proposal made by Paul McGrady on the list, and there's already been some discussion, then perhaps we can use that time to talk about not only Paul's proposal but also any other proposals out there but specifically—again, I haven't been through it, but my assumption is that there'll be things to talk about from this GAC document.

Again, it's not consensus advice, it's the views of the member of this smaller committee. But it may make sense to at least discuss that part on the call on Thursday. So if you don't read any other

section this week, just read that one on the early warnings and GAC advice because we'll incorporate that into the Thursday discussion.

Okay, there's been some questions on the chat of whether we anticipated this document. We know that they've been putting together kind of a scorecard type document. Again, I haven't looked at this one specifically, but it's not a surprise that we got this document. and hopefully, there'll be a good, concise view of where the GAC members are. So again, I haven't really taken a look at it, but hopefully we'll at least get to the part on early warnings and GAC advice on Thursday's call.

Okay. Any other questions on that before we get talking about auctions? Okay, so on the auctions, mechanisms of last resort, etc., we started to draft the normal kinds of affirmations and recommendations, but as we were going through it, we realized that it's kind of difficult to draft recommendations because we're not sure as to where the working group is. We've had a lot of discussions on it. We devoted a supplemental initial report, a good part of that on these topics which we've now sort of combined into one as they're all really related to each other. And we got, of course, a lot of comments back and have had a number of discussions, but it was really difficult to try to put recommendations again together because there's such fundamental differences in views that we didn't see one clear recommendation above at all.

So what we did—and thanks to our policy staff because they were the ones that helped come up with this—is we tried to define the problem to hopefully make sure that we get some agreement on

the problem statement, kind of a review of the options that were presented, and then sort of a potential path forward that would incorporate at least a number of the concepts. While it is not fully one way or the other, it tries to at least mitigate some of the problems. But for any solution that we try to come up with, I think we need to acknowledge that we're not going to solve every single problem completely. But if we can mitigate it and do the best we can to address the problem statement, hopefully that'll be considered a win.

With that said—and I know that this was a different document than you're used to reading, but it's fairly short. Hopefully, you all read this prior to this call. But we'll go through it anyway.

In this document which is up on the screen, what we state here as the problem is in 2012, there were some applicants that resolved their contention sets by agreeing to participate in what had been known or called private auctions where the losers of the private auction split the auction price, minus some small administrative fee for the auction provider, but essentially, the losing bidders divided up the price. So some applicants that applied for multiple top-level domains, we sometimes colloquially refer to them as portfolio applicants, they were able to leverage funds that they got from lost private auctions to help them financially to bid on other strings that they may have wanted, so gave them extra money to do that.

So while we certainly don't have unanimous agreement in this group that this is a problem, certainly, we've heard from a number of community members and the ICANN board as well that there's a concern about this practice of applying for top-level domains

with the purpose of financial gain. So this would include the notion of using funds from a lost auction to apply towards future other auctions.

So in the future, we know that if we were to do exactly what happened in 2012 without any other impediments in place, it seems very logical that there will be a number of applicants that will take advantage of this type of system and that they would certainly leverage those past actions to try to get financial gain in the future, either to keep the financial gain or to use that financial gain in connection with other auctions.

And I know that there have been some in the group that have said, well, how do we know that this actually happened? We have in the past pointed out several examples where we know that this has happened where some public companies that had to report these gains expressed during those earnings calls that they did this. And so it is not something we're just guessing or that we're supposing happened. We know that it happened. And it seems very logical that it will happen again and probably in greater numbers.

So with all of that in place and no expected changes to the refund structure that ICANN had, namely if you withdraw your application at different stages, there'll be potential refunds that the applicant may be able to get back, so with all of that, plus the possibility or likelihood of these types of private auctions, that this risk of financial gain is certainly there.

So if we can reduce the risk—or I should say that if this risk is reduced even further, either because of a lower application fee or

no ramifications from participating in a private auction, then we know that there'll be more of these actions and we know that there'll be or likely to be speculative applications.

So again, while there's not unanimous agreement that this is problematic, we do see this as a likely outcome and we therefore think that there are two options that we've been discussing—there are more options that we actually discussed, but we've narrowed it down to two which have focused on sealed bid auctions with the primary differences residing in the timing of submitting the bids. We'll talk about those, but I see Paul has his hand raised. Go ahead.

PAUL MCGRADY:

Thanks, Jeff. This is one of those pivotal moments in ICANN land where it's important to point out that this is a groupthink orthodoxy situation. We are about to propose solutions to a problem that has not been universally agreed even exists. Even in this document, there's no indication of what the harms are. If the harm is that ICANN didn't get as much money as it could have gotten—it certainly got enough. It raided the auction funds to pay for the Obama spinoff. It's sitting on millions of dollars. We're in a situation where I guess enough people collectively decided that a problem exists, although it's yet to be identified and the harms have yet to be identified.

So we're moving from orthodoxy now into a mitigation strategy to address an orthodoxical problem, but in large measure, I think it's a fictional problem. I've been down the road enough in ICANN land when orthodoxy and groupthink takes over, and I've just

decided to always make it my habit to flag it when I see it. I don't know that there's much to be done about it because this looks like it's going to happen one way or the other. But here we are. Thanks.

JEFF NEUMAN:

Thanks, Paul. Certainly, as we said, this is not universally accepted that this is problematic, but there were certainly enough comments from the community as well as from the board itself that to basically allow financial gain from auctions from those that lose auctions just doesn't, from a reputational perspective, fit with the whole notion of operating in the global public interest and the allocation of public resources.

So while we know that it's not universally accepted, I think this is more than a sufficient threshold to want to try to address the problems, even if they are problems perceived as ICANN does have to operate in this environment and even reputational harm is significant enough to try and address these things.

Elaine puts in the chat that the harm is that single applicants got beat by portfolio applicants with money earned by losing other strings. Just to respond to that one, we don't know if those single applicants wouldn't have lost the auction anyway, but certainly, the ability to capture additional funds from lost auctions does in fact help the portfolio applicant and does provide a disadvantage to those that are only seeking one string.

Jim says, "I agree with Jeff, the focus on ICANN now is much different than it was prior to the 2012 round." Paul, your hand is still up. Does that mean you want back in?

PAUL MCGRADY: Yes, thanks.

JEFF NEUMAN: Go ahead.

PAUL MCGRADY: This is just to reply to one thing you said, Jeff, which is that, again, no real harm is identified, orthodoxy is that there's harms, we can't identify them. We have now in front of us this idea of reputation harm, but ICANN also suffers from reputational harm when it stockpiles millions of dollars and sits on them for decades except to raid them to fill in budgetary gaps when they make bad business decisions.

I've seen no studies indicating whatsoever that ICANN will suffer more reputational harm by sticking with the status quo on this topic than it will from [turning up] the status quo and ICANN stockpiling even many more millions of dollars. So even the reputational harm idea, interesting idea, we just simply hadn't looked at it. I've not seen a reputational harm study. Again, I think it's an interesting assertion of a possible harm, but we've not actually looked into it.

So again, I just want to be clear, this is a groupthink orthodoxy moment and if it's going to happen, it's going to happen, but I don't think we should pretend that we have developed any real basis to make this change. We haven't. Thanks.

JEFF NEUMAN:

Thanks, Paul. Let me just read Donna's comment. Donna says not in all instances, one applicant could opt for auction of last resort and all the money went to ICANN. Christopher Wilkinson says "I think there should be a general absolute priority for single applicants."

So we're not going that far at this point to give any kind of priority to single applicants, but I do want to draw attention to the fact that we are trying to come up with other potential solutions where you don't necessarily have to go to an auction of last resort which could include things like creating joint ventures or creating some sort of joint bids or providing other options than going to an auction of last resort.

In addition, we're trying to, by doing a field bid auction, the theory is that—again, it's theory, so we have no way of knowing, but the theory is that the price that's paid for strings if you take a second highest sealed bid in general should be lower than a bid up kind of auction, which historically has been the case with the auctioning off of other types of public resources.

So that is, again, some other mitigation that we're talking about. So let me just read Paul's comments. "See no studies indicating that there will be more or less reputational harm by ICANN

stockpiling even more millions of dollars in its auctions by banning private auctions.”

Kathy, welcome to the call. Okay, so let’s go to these options and see if we can go through this and come up with some sort of solution. Option one that was presented—both of these deal with sealed bid auctions. It’s really just the timing of when the sealed bids are submitted.

So the first option is submission of a bid at application submission. Once the contention sets are established, only the application with the highest bid is evaluated. If we were to go to this mechanism, this would require significant changes to the processing of applications from the way that it was carried out in 2012. And there were a couple of e-mails several months ago now that talked about all the things that might need to be changed if we went with this option.

Option two—and we’ll talk about the pros and cons of each one—is the submission of a bid prior to reveal day but where the contention sets are established, applicants are only provided the number of applications in their contention set but not the applying entities. After all the bids are submitted, the identity of the entities in the contention sets would be revealed, and applicants could participate in various forms of private resolution, perhaps even private auction. We’ll talk about that.

The assumption is that all applications are evaluated as well as other application procedures. So this would be the same process as 2012 except for the fact that you’d be submitting your bid only

with the knowledge of how many applicants there were and not who those applicants were in the contention set.

Both of these options, the identities of the contention set members are not revealed at the time of bid submission, which is assumed to greatly reduce the ability of applicants to participate in private auctions. However, submitting with less information also makes it more difficult for applicants to bid strategically as was discussed on a few of our calls when we were addressing this option.

You could also layer some other elements on top of either or both of these. You can add terms and conditions that bar private auctions, and you can add provisions to a registry agreement that introduce punitive measures if the registry was found to have taken part in private auctions.

So with all of that in mind, a strawman-type proposal which again just for discussion purposes here would be to add terms and conditions to the module five where the terms and conditions exist for submitting an application, that states that you should not submit an application for the purpose of financially benefiting from the resolution of contention sets, shall not participate in the resolution of contention sets where nonwinning applicants receive financial benefit to lose, the above rules should not prohibit applicants from creating partnerships or other forms of joint ventures that would allow two or more applicants within a contention set to jointly run and/or operate the applied for string if that joint venture ultimately is otherwise qualified to operate and administer the registry in accordance with the—it should say rules—set out in the then current applicant guidebook.

We wouldn't need to change any elements of the application evaluation or objection processes. Applicants would be permitted to resolve contention sets as laid out in the terms and conditions. Auctions of last resort are strictly a single round via a sealed bid and there'd be a PIC or some other contractual [inaudible] incorporated into the registry agreement to capture the requirements from those terms and conditions, including potential punitive measures which could include the potential loss of the registry as well as a bar on participation in future rounds both for individuals involved as well as for the organization and any of its affiliates. So a pretty strict penalty which hopefully would provide a disincentive to try to get around rules.

Okay, so what would this achieve from a positive perspective? We think it would reduce the benefits of colluding in the form of a private auction, reduce bidding wars, reduce profiteering and speculative application, it gains efficiency in contention set resolution as a result of a simplified auction process. It doesn't necessarily encourage new entrants, but it can reduce the likelihood of speculative applications which in turn makes it easier for applicant support that are seeking to run a registry.

It also does allow for some creativity in private resolution by partnerships or joint ventures, and it does address the board guidance that was given to us via a letter by Cherine in 2017 or 2018, whenever that was submitted.

We think there's an additional benefit of providing applicants of a contention set far greater information to bid strategically. We don't think there's a real impact on transparency, predictability and efficiency beyond the auction process. And again, the operative

word here is it reduces. It's not going to eliminate—there's going to be creative and unscrupulous applicants that will find a way, I'm sure, to circumvent the rules, but we're trying to have the rules as a deterrent on the front end and then factual provisions that provide some sort of teeth on the backend if we find out later that they've circumvented those rules.

So if we try to set a threshold of 100% success, we would never find any kind of solution to address any of the concerns. So our goal is not 100% solving the situation but hopefully we've made some progress in mitigation. So I know there's a lot there, and let me just start by looking at the chat. And please do get in the queue, let us know what you think, what's good, what's bad. Paul already states this is draconian, includes a registry death penalty, an applicant death penalty.

Donna says we need to be careful not to scare off potential new entrants by making the rules complicated. Donna, I don't think the rules here would be complicated. It would be no private auctions, but we still would encourage, just like the last time, private resolution in the form of either mutual agreements, joint ventures and other things.

So I'm not sure that that's any more complicated than saying to applicants, oh, by the way, you can also participate in these private auctions, here's how they work, and getting into all those details. But I'd be curious to see, to hear, how can we make this less complicated? And Paul, the question for you is, what other penalties or how else can we deter the unwanted behavior?

So with that, I'll go to Paul, then Donna. Paul.

PAUL MCGRADY: Thanks. Jeff, I'll address your question first, and then I'll ask my question that I had raised my hand for.

One, I don't think registry death or future applicant and future round death penalty makes any sense. It's not related to the nature of the groupthink crime of private auctions.

So there are all kinds of other penalties, delays in launch, financial penalties, a black mark on your record that hurts you later if you get in trouble with Compliance. There's all kinds of things other than let's chop off their heads. So I think we definitely need to take a look at that set of penalties there. That seems pretty over the top.

Secondly, my question is here as I look at it, I guess when I look at this, I just think it ensures that no smaller entities ever get a registry again, because if I were a big giant company, and I wanted to make sure that I got it, I would just bid \$1 billion. And then the second next one—

JEFF NEUMAN: I'm not sure if I'm the one who got disconnected or if it's Paul. Okay, we lost Paul.

PAUL MCGRADY: Am I back?

JEFF NEUMAN: Yes. You just got back.

PAUL MCGRADY: So my question is—and hopefully I'll get a time credit here because I'm running out of time—if I'm a great, big entity and when I want a TLD, what keeps me from just bidding \$1 billion and then I get it for the second highest price? Say, that's \$10 million.

So I win every single time and I get it for whatever the second highest price is. If there's another giant company that bids \$999 million and I decide I really didn't want it for \$1 less than \$1 billion, then I just don't sign my registry agreement.

So again, if the goal here is to introduce competition into the marketplace, I think this is just making sure that only big companies get registries in the future. I don't think we're accomplishing that. So how do we deal with that problem? Because that seems like a giant elephant of a problem. Thanks.

JEFF NEUMAN: Thanks, Paul. Good question. But also keep in mind that you were required to put 10% of your maximum bid down when you participated in this auction of last resort. So if you were to bid \$1 billion, for every one, you'd have to put down \$100 million for each one. So that would be probably a good financial barrier to doing something like that.

Go ahead, Donna, and then I see Elaine.

NONNA AUSTIN:

Thanks, Jeff. I'm not sure I can remember the point I was going to make. To Paul's point about it will be those that are most wealthy that will walk away with a TLD, I think that's true if we go down the sealed auction bid and that's submitted at the time that you submit the applicant. I think that will be the result if we do it that way.

So I think we do need to try to find a balance here, but we need to be careful that we're not making—and Jeff, I take your point that you don't think this is very complicated, but I think when somebody is looking at this for the first time, they'll think this is just too hard. I don't understand what most of this means. So I don't think it's worth the effort.

So we need to be careful that we're not creating an extremely complicated process that again is just the insiders that know how to play the game and have the success. I guess that's what I was getting to with making things so complicated. New entrants that come into this aren't going to understand that we've been talking about this for four years. So the cleaner and simpler we can make this, I think the better.

JEFF NEUMAN:

Yeah. Certainly. If we can make this much more simple, all for it. I think that's right. Though I'm not sure, again, it's the insiders now that know about the private auctions. So I think there's always going to be some level of insider baseball. Elaine, go ahead.

ELAINE PRUIS:

Thanks, Jeff. First, I want to say that I think this is an excellent attempt at incorporating the best ideas and addressing the

grievous concerns. You can see that you tried to pull in everybody's thoughts and attempt to address those. So thank you for trying.

I do like Paul's idea of having a financial penalty and not a death penalty. That makes better sense to me. I can see way too many opportunities to game that. You could complain that every single applicant financially benefitted and tie them up for years.

So I think if we go ahead with this, we need to really carefully think out the Ts and Cs, enforcement, what's the actual language, who does the evaluation of the complaint, who executes on these consequences.

And then in order to prevent billion-dollar companies from winning every single one, you could simply just have them put into escrow whatever their bid amount is, and ultimately, you're going to end up with the maximum amount of money anybody's willing to pay for a TLD.

Finally, I have a question in option one, which I know this proposal is basically trying to move past option one and give us another thing to consider, but in option one, I'm wondering where you have in parentheses this would require significant changes to the processing of applications as carried out in the 2012 round, I think that means because only the top bidder would be evaluated, that would create incredible inefficiencies in the evaluation process. I'm wondering, wouldn't it be easier to just deal with the changes in the evaluation process than come up with some Ts and Cs that are really hard to enforce and easy to game? Thanks.

JEFF NEUMAN:

Yeah. Thanks, Elaine. When we kind of scoped out that option, we came up with a document—actually, I think it was your colleagues. I think it might have been Jessica that did a kind of—I think it was a Visio diagram, but essentially, you have all these things about if it's only the one with the highest bid that's evaluated, then you get into the question of, okay, but what about objections? So what if you object to all of them, or what if you only object to the first bidder but not the other bidders. Plus, you then also need to look at whether—you still have to do the community evaluation one first before you actually then did the evaluation if there's a community application in there. And then it came down to a couple of comments and there was just a lot of contingencies.

It wasn't impossible, sure, and there were ways to do it, but it really did create a number of complications that it would have been—to kind of look at Donna's or address Donna's comment, it would make things a lot more complicated, not for the—it would certainly create efficiencies around evaluation, no doubt, and in fact, ICANN could refund in theory much more money to the other applicants that aren't reviewed, but there were a number of different contingencies around public comments, objections, other types of evaluations, string similarity evaluation, all that other stuff would still have to be done.

I don't know if ICANN—if Steve, Julie or Emily have those documents, that document handy, but that was the reason why or that was the explanation for the more complications and significant changes. So if we can pull that up, we'll try to find it and just show you, Elaine, just so we can see it.

Elaine, I don't know if you want to respond to that or if—yeah, go ahead.

ELAINE PRUIS:

I do remember the document. Jessica is really great at process diagrams. And I think it would be easier to figure out a different process than to implement regulations that would be really hard to, first off, identify who's actually benefiting from private resolution, second, if you've got like four, five participants, what if two of them somehow or other figure out how to financially benefit from their private resolution and the winner doesn't know? It comes out later the rule that we have in here basically says if anybody in the private resolution contention set benefits, then the winner loses the registry.

So I just think dealing with a process is much easier than creating new regulation and all new compliance arm and figuring out how to prevent all the gaming that would occur. Thanks.

JEFF NEUMAN:

Thanks, Elaine. Definitely both of these options have certain advantages and disadvantages. Donna said that option one is inherently unfair and biased towards those with the big flush funds. The other thing is that with option one, there's no ability to do kind of joint ventures or mutually agreeable solutions because you would right away pick the "winner," and I don't think they would have any incentive to do anything other than to just go through the application or the rest of the evaluation process. Paul, go ahead.

PAUL MCGRADY:

Thanks. One quick reaction to something that Elaine said and then another thought. Elaine suggested that the way to get around the big company always prevailing is to require the full bid amount be put into deposit, but of course, that has the exact opposite effect because it would inherently eliminate small- to medium-sized businesses who can't necessarily set aside millions of dollars into a deposit that does nothing. That'll simply take people out of the mix. It'll take them out before they even apply because their lawyers are going to have to say things like, well, you know, there's no guarantee in ICANN that you're going to get this. So what's your bid amount? \$3 million? \$5 million? \$10 million in order to put in an application? Whether it's option one or two, you're going to have to take \$3-10 million out of your system and set it aside, and it's going to sit there for who knows how long. People just won't apply. They'll walk away from ICANN and the ICANN process. And hopefully doesn't result in ICANN getting a competitor.

The second issue is that this has your bid going in before you know who else is in the contention set. If I'm a .brand and I put my application in and my bid's due before the contention set's revealed, and it turns out then that there's a reveal and somebody else has applied for a mark and they're going to use it for online gambling, that might make my bid go up. But I can't know that and I can't bank on the idea that ICANN has a coherent trademark rights mechanism that's not going to—and so money is the only way to ensure that your mark won't end up in somebody else's hands.

So again, going in blind with a bid, yeah, that might keep some private auction people from getting some money I guess. I don't know. But it certainly hurts brands in a big way. Thanks.

JEFF NEUMAN: Okay. Kathy, go ahead, and then I'll read some chat.

KATHY KLEIMAN: Hi everybody. Jeff, I wanted to second what I'm hearing from some people, that this is a really nice summary of our lengthy discussions, and they were really lengthy and involved discussions on the issues.

I think you've done a good job summarizing it, and of course, the terms and conditions is something we can talk about. But I just wanted to point especially to option one and two, and I remember long discussions about this and some of the concerns about option one resulting in—I believe it was Donna, and if I'm not correct, please tell me, but I believe it was Donna suggesting option two as changing the timing of submitting the bids. So I think putting this out for public comment is really ripe now because of the enormous amount of time we've all invested in this. Thank you.

JEFF NEUMAN: Thanks, Kathy. Whatever we come up with will absolutely be put out for public comment. But it'd be great to, if we could, rather than just present options, it would be to present a recommendation, if we have one. That would be preferable so

then we're giving a concrete proposal that the community can respond to. So to the extent that we can come up with something, that would be great. Obviously, if we're still stuck between a couple of different options, then we'll have to make do and put that out. But hopefully, we can come up with at least part of a concrete proposal and potentially have some of the details that could be options and put that out. So hopefully that makes sense. Hopefully, we can have a recommendation on the bigger items, and then the smaller items like what should the penalties be, although that's not a small thing at the end of the day, but if we agree let's say as a concept that, yes, we should have terms and conditions that prohibit this, I'd rather put out to public comment, ask what the penalty should be, than put everything out as options. Hopefully that makes sense.

Looking at the chat. Justine says, "A reminder of the multiplier in bidding for applicants in need should not be lost." Yes, Justine, we're still discussing that. That has not necessarily been agreed yet, but yes, if we do have that multiplier in there for those that quality into the applicant support program, then that'll have to be factored in.

Paul states, "We need to solve the giant guy always wins problem, the blind brand problem and the death penalty problem." Of those, I think the death penalty problem is probably the easiest one to solve, because we could come up with other punitive measures.

Elain says, "Paul, does—" Let's see. So an option in the proposal that we've made, which I guess is sort of an option three, you would know how many bidders there were. Actually, you pretty much know everybody and it's the same process, you just have

this terms and conditions prohibition. So it would be a sealed bid, but the sealed bid would be at the end of the process in option three, or this proposal. Steve, did I get that right? That in this proposal—I'm just trying to remember—that you would submit the sealed bids but it's only after—it's at the same time as you would have done the mechanism of last resort. Yeah, okay, so Steve says that's right.

So under this proposal, you would not be submitting your sealed bid blind in the sense of you would know who you're competing against. So displayed was that complicated flowchart there. That's an excellent flowchart, it just shows how complicated the process becomes here. Look at all these endpoints and decision points and things that come back into play, and all of this, you could read this again at your leisure, but this was the issue with option one from a process perspective if we did the sealed bid at the very beginning and only evaluated the winner of the sealed bid.

Let's go back. Paul, if we've solved the blind problem and we've solved—well, not solved yet but we can get to a solution on the penalties, what was the first? You listed three problems. So you had the death penalty which we can address with different sanctions, we addressed the blind part, and then giant guy always wins.

I see this proposal as no different than the way it is today in terms of if we all agree that an auction—aside from community priority—is the best way to allocate TLDs as a last resort in the contention set, I think we're always going to have the giant guy always wins problem. But we won't have portfolio applicants that are able to leverage funds from one auction into another. That can be helped

with the timing of when the sealed bids are so that you're doing multiple at once as opposed to one today, one tomorrow so that you can keep using funds, moving funds around. Paul, go ahead.

PAUL MCGRADY:

Thanks. On the issue of the giant guy always winning, what we were pushing for—the royal we—what I was pushing for earlier in this process is for creativity rather than [inaudible] being the only way to win. And the ability to work together as applicants and form joint ventures and come up with new ideas and all of those things.

But if we're going to get our heads chopped off or ICANN's going to fine us for being creative, and ultimately what we're doing here is preserving ICANN's ability to gather these dollars, then that's going to chill all that. What's the difference when we say no private auctions if one party says, well, hey, we both bid for it, nobody wants to send a bazillion dollars to ICANN to sit on forever, and let's both contribute 40% of the money to run it for five years and get it up and going and we'll go get a third-party investor [inaudible] the other 20 and then we'll resubmit the applicant entity, the new joint venture to go through the evaluation process and off we go. Well, both parties have contributed money, so is that a private auction? Where do all the lines get drawn on this? Especially with this axe hanging over us all of death or a financial penalty that's so big it's essentially death. There's no room for creativity in this model.

So I don't think we all agree that the auction of last resort is the best approach here, and if that is the premise upon which all this rests, I think it's a faulty premise. I think the best approach is

creativity in the marketplace and innovation, not necessarily everybody getting together to ensure that all this money ends up in ICANN's coffers. Thanks.

JEFF NEUMAN:

Thanks, Paul. We are trying to encourage joint ventures, we are trying to encourage mutual agreement. I don't think it would be a bad outcome to say, yes, you applicant, you put in 40% of the startup cost, we'll put 40% of the startup costs in, and we'll run it for a few years and then we might have to take other investors.

I think that is allowed here. And if we don't make it explicit, we should. I'm just reading the proposal again, but yes, this was meant to encourage joint ventures and other types of—yeah, okay. So it says in the terms and conditions in the third sub-bullet point, so the first main bullet under proposal says “Add terms and conditions warning applicants that ...” And then the third sub-bullet says “the above rules shall not prohibit partnerships or other forms of joint ventures.”

Now, that's stated in a very negative way. We can state it in a much more positive way to say that this type of thing is encouraged. Maybe that's a better way to do it so that we're not — yeah, so Paul, right, creativity right now is in the warning section.

So take your point, and if we did that in a much more positive light basically saying that financially benefitting—what we're trying to say there is that the creation of a joint venture is not—we don't consider that applying for the purpose of financially benefitting. We consider that as something that's to be encouraged, so we

could put that in a separate section. Paul says we need to build out an entire section on JV and other creative solutions. That's fine. Like I said, we can state it in a much more positive, affirmative way. Donna, go ahead.

NONNA AUSTIN:

Thanks, Jeff. Coming back to something that Justine put in chat, we're having conversation here about the big buy always wins and portfolio applicants can decide to lose one auction so that they can get another string that they'd prefer, which is the experience from the last round. But to Justine's point about the applicants and the multiplier, is there—I guess what I'm concerned about too is that this program is supposed to increase competition and innovation, so how do we find a path for new entrants? Not to protect them in any way from other applicants but perhaps give them a bit of a leg up.

And I wonder if at the time that the contention set is made, ICANN understands that there is a string that has five applicants but only one of those applicant support, this is the only string that they've submitted an application for. Is there some way to give that applicant priority and the others can get a refund or something? To meet that criteria for increased competition.

So it just kind of struck me, with all this conversation about big guy always wins and portfolio applicants are going to spread their costs and make it easier for them, but I wonder if there's a way, if you know that there's a single applicant who ends up being in a contention set with four or five big players, they're not going to win. We know that. They'll get pushed out. So, is there some way

to give some kind of priority to that application that ICANN can evaluate? And if it's got legs, if ICANN thinks it's a good business model or whatever, it might survive, then does it get some kind of priority? I know this is bringing something new into this conversation, but it struck me that I think Justine might have been trying to bring this in for some time already. Thanks.

JEFF NEUMAN:

Yeah. Thank you, Donna. So, is it possible? Absolutely, we can do something like that. I just want to go back though from—we did put that out as a potential option way back when we were even just starting these discussions. That did not seem to have support other than from those seeking applicant support. But it was not—I think it was introduced during the time we were discussing should there be any kind of prohibition on filing multiple applications, and then we did talk about the notion of priority, but it didn't see mat the time to get enough support to be disadvantaged simply because you either got a TLD in the last round or that you're applying f or a couple of TLDs and this one.

But again, it's absolutely possible, and if that idea gets legs again, sure. But let's see. I'm going to go to Jim and then I'll catch up on the chat.

JIM PRENDERGAST:

Thanks, Jeff. I'm resisting the temptation to dive into the details of this because I know we're still digesting it for the first pass, but I would say generally speaking, I'm supportive of the direction that this is going. Of course, there's going to have to be details that are

worked out as far as some of the issues that Paul has raised as far as allowing joint ventures and the creativity, but I think we can work through that over time. So I kind of like what I see here, especially option two, but I do think we do need as a group a little more time to digest this. And I don't think it's your intention to wrap this up in the next hour, because I don't think we'd be able to do that. But I do think there's something real we can work with going forward. Thanks.

JEFF NEUMAN: If only it could be resolved in the next hour, that would be great. But no, this is one of those where we'd be happy if we get a clear direction forward. Let me just ask one question, Jim. When you said option two, do you mean that option two or do you mean this new proposal that's sort of an option three? I just made a lot of sense to myself and nobody else. There we go.

JIM PRENDERGAST: No, this new proposal is all I'm talking about.

JEFF NEUMAN: Okay. Cool. Thanks. Let me go to the chat while others are thinking and may want to get into the queue, because there's been a lot of things posted, which is great. Justine says the At-Large asked for consideration for an applicant which gets applicant support to get priority in a contention set. Yeah, so I'm going to separate that out because that is a separate discussion. I think that it's important, but I want to keep this discussion focused on a direction of the majority of cases where we're not going to have, in

theory, applicants getting applicant support. But then when we talk about applicant support, certainly talk again about the multiplier and how it gets—or some other form of priority, but for now, let's just get the base case done, or at least a direction, and then we'll certainly come back to the applicant support as we go back to that whole topic of applicant support.

Alan says we're not getting that far with only rehashing old, so something new is good. Yeah, something new is good, Alan, but sometimes the things that are suggested are actually rehashing things from a couple of years ago. But I certainly encourage, if it's helping us move forward in a direction, absolutely.

Rubens states a business model analysis is pretty much a beauty pageant. Alan's saying a multiplier of the largest number of applications in a contention set divided by your number. Okay, there's many ways to do formulas. Don't want to get too much into the weeds at this point. Martin says "I recall where there was concern during previous discussion regarding the business model analysis and that these would be subjective."

Yes, we did present the beauty model. Yeah, it's a terrible way to put it, but we did present that as an option way back when we asked the questions in CC2, community comment number two, and that did not get—it was equally divided, those in favor and those against.

Yes, we've already discussed option two of two, that's why we created this proposal for three. Martin says there were also discussion to minimize contention sets whereby applicants could amend the string. Yes, but that's very limited at this point, and we

talked about that during the objections, advice, application changes discussion. So all of that's still in play.

Donna says, "To Jeff's last point, we still need to find a solution to a situation where there's not a new entrant in the contention set." Right, so even if we did go with some sort of priority for a new entrant, we still need the base case of just what do we do.

With that, let me go to Jim and then Christopher. Jim.

JIM PRENDERGAST: Sorry. It's an old hand.

JEFF NEUMAN: Okay. Let's not go to Jim. Christopher, go ahead.

CHRISTOPHER WILKINSON: Thank you. Just a few quick comments on what has gone before. Vis-à-vis Alan's point, if you guys have been discussing this for four years, I must confess I've abstained because I've been discussing other things with you, and this is the best we can do in terms of identifying a consensus. Then I'm beginning to think that my original prejudices against having auctions at all are being broadly confirmed. I don't see how you'd reach agreement on the basis of what we've got before us, and it's a pity.

Secondly, regarding business models, the evaluators have got to evaluate the business models, whatever, whether they're one offs or parts of a contention set. So I don't see the relevance of Rubens' concern about evaluation of business models. As a

matter of semantics, I don't think we want to pursue this concept of beauty pageants, but as a practical matter, I would be in favor of professional evaluation by an evaluation panel of the whole of the contention set first, including the respective business models, and including—and I come back to Justine's point—I don't agree with kicking applicant support into touch or down the street. There should be priorities. We have views in favor of priorities for single applicants, and I'm not alone. We have views in favor of priorities for applicant support and other concepts. Somebody's got to do that, and if those priorities are respected, it might evacuate a large part of the problem.

Regarding the big guys, it is quite clear to my mind that the facilitation of portfolio investments in this industry by vertical integration and by the 2012 round are seriously compromising the validity of what we're doing. I don't want to take any more time on that, but there is a degree of gaming that resulted in those portfolios which I'd appreciate. I don't want to go on any further because I think you've got other people in the queue.

JEFF NEUMAN: Thanks. Let me go to Donna and then I'll come back to the chat.

NONNA AUSTIN: Thanks, Jeff. I have a question regarding your proposal. This is a new proposal but I just have a question with relation to the auctions of last resort are strictly a single round and via sealed bid. At what point would that happen? If the applicants can't reach any agreement.

So what if that in a second proposal, the sealed bid would be submitted prior to reveal day? So you know you're in a contention set but you don't know who with. So the sealed bid is to be submitted at that point, and then the rest of the process can follow. And if you need to go to that auction of last resort, that's when you pull that sealed bid back, that's when you go back to that.

So why can't you have proposal two with these terms and conditions but the process is different because that auction of last resort, sealed bid, is actually put in before you know who you're in a contention set with. Am I missing something here?

JEFF NEUMAN:

No. Option two is, yes, you would not know who you're dealing with and you're submitting your sealed bid prior—you might know the number of applicants but you won't know who.

We thought on the last call that we heard a number of people saying that they didn't like that because it didn't enable them to think strategically about who they were bidding against. So that's why in this new proposal, it is like option two except you're not submitting the sealed bid until the very end when you know that you haven't resolved anything by mutual agreement.

So that's the difference between the option two and this new proposal, because in the new proposal, there's much more time to do these private auctions and other things, and that's why you would add terms and conditions saying it's prohibited.

So you're not missing anything. The reason we created a proposal or one of the reasons we created a proposal was we seem to get a lot of pushback to the whole notion of submitting sealed bids prior to knowing who you were bidding against.

But again, it'd be great to get direction from the group. If we read too much into that, let us know.

NONNA AUSTIN:

I'm not sure when that last conversation was, but that wasn't my take of what came out of that. But again, everyone remembers what they remember. I just think—so one of my concerns is if you do that sealed bid later, what you have is five or six applicants that have been talking to one another and they may not be having a genuine conversation about joint venues or joint ventures or whatever. Maybe it's gathering intelligence to understand how much the person is willing to pay and how much they really want from it.

So you end up with a situation where some who were not genuine going into that conversation now have new information that they can use against other applicants. So if you keep that sealed bid as the very first step, then you take some of that away. So you've already identified before you had those conversations how much you're willing to pay for that TLD. And then that makes the conversations underneath genuine because you're either going to participate, if you want to go into a joint venture, or not. And if you want to hold out for the auction—which people could do in 2012—I'm just a little bit worried that by putting it later in the process, the

intelligence gathering is going to work against some. Anyway. Thanks.

JEFF NEUMAN: Yeah. Thanks, Donna. Absolutely. And I think just go back to my notes, the other thing that some people said is that if the “auction of last resort” is not held for three or four years after you originally submitted your bid, there were people that said that it may be a much different value than when you initially did your sealed bid. That was the other reason.

But again, those are two very viable options. And I see Kathy says, well, can we see both options? Well, all these options are still under discussion. It would be great if we could try to start framing the conversation as what can you live with.

KATHY KLEIMAN: Did we just lose Jeff?

JEFF NEUMAN: Concerns that most people could live with. Oh, people lost—sorry. I don't know what happened with my phone audio. I'm still talking. Sorry about that. So what I was saying is we have to examine this from, what can we live with? And what could everyone live with? It may not be an ideal situation. Every one of the options has pros and cons, but if we can find one that we all can live with, that would be great.

So Jim's saying preference from day one is option one, but in the spirit of compromise can get around option two, not ideal for the reasons Donna pointed out. Justine says, "To clarify, with all proposals, there isn't room for JVs—" No, with option one, there is no room for a joint venture. Option two and the proposal would both allow and we can actually encourage creative solutions rather than putting it in the Ts and Cs warning. So two and the proposed three would allow that and could encourage it.

Eline says, so option two with Ts and Cs for no private auction? Is that what donna—Yes, I think that's what Donna suggested. Hopefully Donna can clarify. Donna is saying "I can't live with option one." And Paul saying, "I don't think we are at the 'live with' stage yet. We need to build out JV creative section first."

That's true, Paul, but I'd like us to try to focus-like as Donna is saying, "I can't live with option one," if you know that already, that's something I think that's important to know. No matter how we change option one, what Donna is saying is she couldn't live with it. And Paul, you're basically saying that too.

And Steve, as Steve says, the allowance for joint ventures is actually discussed in greater detail in the applicant change request section. That's true too and we already went over that a number of weeks ago, so we're not getting rid of that. Alexander, go ahead. I see his hand has gone down. Do we still have Alex on the phone?

TERRI AGNEW: I no longer see Alex connected.

JEFF NEUMAN: He may have tried to unmute and—can you let us know if he comes back on?

TERRI AGNEW: I sure will, Jeff.

JEFF NEUMAN: Thanks. Elaine, go ahead.

ELAINE PRUIS: Thanks. I just want to be sure I heard this correctly. Option two without private auctions, the only difference between that and the new proposal—because we have T&Cs that prevent private auction—is the timing of the bid submission? So option two has less information, the bid goes in earlier, the new proposal, you have all the information, bid goes in later. Is that right?

JEFF NEUMAN: Yeah. If we did option two with the same terms and conditions, the only difference would be the submission of the bid, the timing.

ELAINE PRUIS: So what's the benefit of submitting the bid earlier or later? Why is two better than three or vice versa?

JEFF NEUMAN:

Donna explained why there are people supporting bids earlier in the process, because the theory is you're essentially presenting the true value of what that string means to you as a bidder because you don't know who you're bidding against and in theory you're not going to overbid. But the issues that were discussed by—I think it was Kristine Dorrain on those set of calls were a couple.

One is that submitting the bid earlier doesn't enable you to have complete information about who you're bidding against and doesn't enable you to bid strategically. For example, you may bid differently if you're a new [inaudible] against a much larger company than you would for a smaller company.

Kristine also pointed out that if auctions occurred serially, not all at the same time, then if you lost a previous auction, if you could submit a bid later on, you might be able to then put more focus on that second or third string because you lost the first one or on the second one and now you really want a string.

But of course, the downside of that timing of submitting it later on is that you can, in theory, game the system or gain more intelligence of what others are willing to pay and sort of use that to your advantage. But the disadvantage of submitting the bid right away is that by the time the auction's held, which could be three, four years later in theory, it may not be worth the same amount as it was when you initially submitted that bid.

So you've got to weigh those. Donna, go ahead.

NONNA AUSTIN:

Yeah. Thanks, Jeff. Some of what Kristine was talking about was specifically in response to option one where the proposal is that the bid is set at the time that you submit your application, because you don't ever know at that point whether you're in a contention set or not. So that seemed unrealistic.

With option two, what you're talking about is that the sealed bid would go in once you understood that there was a contention set, and how many people were in that set with you. So you've got a little bit more information. So I think Kristine was originally talking about concerns with option one.

Elaine, you asked whether the idea of private auction had come out from option two, and I'm still—in my mind when I suggested option two, private auctions were still a possibility as part of that because we have this other problem where people were concerned that if it's auction of last resort, all the money goes to ICANN, and that's still a concern for some people.

So in my mind, I'm still not convinced that private auction comes out of option two. In my mind, I think it's still on the table. But I know in other minds, it's already come out. But one of the concerns is—and Paul has spoken to these quite a bit—is that all the money goes back to ICANN if it's not a private auction.

So if we do the sealed bid for option one, all the money goes to ICANN. And in option two, if you submit the sealed bid, you only come back to that if you can't resolve the contention set among those that are in the contention set. And one of the options that could still be available to them is private auctions. So in my mind, that's still not off the table. Thanks.

JEFF NEUMAN: Yeah, I think that's right, Donna, that the timing of the sealed bid is not off the table. Okay, Alan, go ahead.

ALAN GREENBERG: One thing that we haven't discussed at all is if you have any situation where the bids are put in earlier than the actual auction time—and both option one and two are like that, but certainly option two is—you have a situation where it may well be that by the time the auction comes around, the bidder is not really prepared to pay that amount for whatever reason, either because of other things they've already bid on or simply their financial situation has changed, or they no longer consider that application to be worth that amount. How do we handle that? Do they have an opportunity to withdraw before the actual auction? Certainly, we can't allow a situation where someone wins an auction then can't pay. So somehow, we need [inaudible] for that.

JEFF NEUMAN: Yeah, Alan, there's always an offramp. If ICANN announces the auction, let's say you haven't worked everything out, then yeah, you can just withdraw.

ALAN GREENBERG: Okay.

JEFF NEUMAN: You wouldn't be able to change your bid but you'd be able to withdraw.

ALAN GREENBERG: Okay.

JEFF NEUMAN: So it sounds like—I'm hoping I'm reading this correctly—that if we work to get option two better worded, encourage the creativity, it sounds like we're down to the timing of the submission of the sealed bid, which is good. If that's the main issue, then that's great, but I also want to talk about some of the other aspects as well.

Let me just read here. Paul's saying, "We can at least try to perfect option two, option one seems like a nonstarter. Option one just guarantees ICANN gets even more money to sit on."

Donna says—right, so this is about pulling out. "If you don't want to pay that price you submitted the bid on, the new proposal's preferable to option two, you have more info at the time of bidding and profiteering is prohibited." So what I think we're talking about now, Elaine, is we would still prohibit the private auctions in option two, so it's kind of like a [two prime] or a derivative of option two.

I think what we're talking now is the only difference between the proposal and option two is the timing of the submission. So we would also prohibit the profiteering in this new version of option two.

So let's see. There's a plus one to Jim. Anne says, "So a party could be paid to withdraw. And parties can negotiate agreements as to who is withdrawing on which competing application, i.e. horse trading will work in some cases, right?"

Well, we're not saying you could pay people to withdraw. We're saying you can do creative solutions like joint ventures. And of course, the devil's in the detail of how we distinguish between a joint venture or mutual agreement and paying someone off. That will require much more details in implementation. But in theory, we're not saying you could pay someone off. We're saying you can negotiate an agreement to jointly operate the TLD in some fashion. But not the horse trading.

Donna is saying, can we scroll down to the new proposal? Yes. Justine says, "Sounds like we might just be listing prohibitions or what is permissible." Yes, you could take either one of those two approaches: either this is what's permitted and anything else is not, or this is what's not permitted and anything else is."

Steve says that one of the issues raised with option two is that contention set composition may be impacted by string confusion objections. Right. So it would be basically if it turns out that the string confusion objection and it ends up being that now there's another string in your contention set that wasn't there before, I guess that third bidder—or let's say there were only two in contention before and now there's a third, the new third one would know who the other two were and then that bidder would have more complete information than the first two that submitted the sealed bids at the time of when it knew it was in a contention set. That make sense?

Okay, I don't see Alan's hand, so Paul, go ahead.

PAUL MCGRADY:

Thanks. I don't think there's a binary. I don't think it has to be, "Here's everything that's prohibited, everything else is okay," or "Here's everything that's acceptable, everything else is prohibited," because we don't know the universe of either of those two things.

We could say, here are some things that are acceptable, here are a few examples, but the guiding principle is X. I think that's how you do it. I heard you say something, Jeff, that makes me super nervous, which is, yeah, there's lots of details here to work out on what kinds of things you can do while you're in option two and coming up on your sealed bid date or whatever, that will have to be dealt with in implementation.

I think we have to deal with what those things are now. If there's any possibility of option two coming out as a consensus recommendation from this group, this is not something we can punt to an implementation team. Everything else got built out besides that. Let's not not build it out. Thanks.

JEFF NEUMAN:

Thanks, Paul. I didn't necessarily mean build it out during an implementation team. I meant like let's solidify the direction in which we want to go and then we can solidify details. Does that make sense? If we're all happy with this direction, then as much of the details we can work out, that would be good because we need to know that we're going in the right direction.

Okay, anybody else have any comments? Okay, so if we're going in this direction of option two, can I just get a feeling from the group? What are people thinking? So we know Donna's preference of having the bid submission at the time of—just before it's all revealed, but you would know how many parties there were in the contention set. Does anyone else have strong views one way or the other?

So it seems like we're heading down an option two modified without allowing private auctions. At least going in that direction. Donna made it clear her preference on timing of the submission of bid—sorry, not bid, just before reveal day but knowing the number of contenders. Does anyone else have strong feelings one way or the other in terms of timing for the submission of a sealed bid? I want to hear from maybe people who haven't spoken yet. Even if you want to put it in the chat. Just generally want to hear what people are thinking.

So Paul, is this a new hand?

PAUL MCGRADY:

Yes, it's a question which is, what is the fear of having the sealed bids go in after you know who's in the contention set? Help me understand why we would want this to be blind. Thanks.

JEFF NEUMAN:

Yeah. For that, Donna, can I ask? Please go ahead, Donna.

NONNA AUSTIN:

Thanks, Jeff. Paul, one of my concerns is that I think what we're trying to do here is to push the applicants into trying to resolve the contention set themselves either through a joint venture or some other mechanism. And I still think private auctions should be on the table, but it seems like that's coming out. And my concern is that if it ends up in an auction of last resort and the bid is submitted at that time, the applicants then have more information about their competition. So they could be having those conversations saying that they're trying to resolve the contention set via joint venture or whatever, but all they're really doing is gathering information so that whatever bid they put in, they know it's going to win them the TLD at the end of the day. So that's really my concern, is that it's kind of unfair because now you've got more information, and if you're one of the bigger players that has more money, then you can make sure that your bid is going to win the day. So that's my concern with the timing of the sealed bid, is if it goes to auction of last resort, they now each—well, some that may not have been genuine in their attempt to resolve the contention set now have the information they need to know what to submit for the bid. So the smaller guy's going to lose out.

JEFF NEUMAN:

Thanks, Donna, for the explanation. Paul says thanks, lots to think about. Jim asked the question, "But they wouldn't know the identity of the bidders?" So under option two, you would only know how many, you wouldn't know who they were. But also, there's the possibility of a third—let's say there are only two, there's a possibility of additional members of the contention set after a string confusion objection, that new player then would know both

the number and the identity. So you sort of have one new player having more information than the other two had when it submitted its bid.

Donna, how would you address that last problem? Let me go to Kathy and then I'll go to Donna.

KATHY KLEIMAN:

Thanks, Jeff. As I said in the chat, I agree with where Donna and Justine are going on this, that the bid should be submitted before reveal day. Makes sense, and that's option two. And that was of course also in option one, which was the option I supported originally.

But the contention set changes, Jeff, let's flesh it out for a second. If I understand correctly, string contentions as you mentioned earlier in the conversation will be narrow. How likely is it that string contention that's [inaudible]—and if I recall correctly, it's really two brand names, Delta Faucets, Delta Airlines, so that the string is going to change to add some kind of descriptor on it. If this is correct, how likely is it that that will wind up in any kind of existing contention set? I think it would probably be unique. So if we want to flesh this out, is this really going to be a problem? Thanks.

JEFF NEUMAN:

It's not only with brands, it could be anyone that was not found to be similar in a string similarity evaluation but later is found to be similar as part of a string confusion objection. That's where this problem would come into play. So Donna, the issue is that let's say you have two applications that are in the same contention set

as a result of string similarity evaluation. Turns out that a third one gets added after someone files a successful string confusion objection because now even though that third application which wasn't similar in the string similarity evaluation turns out it is similar enough after the objection is ruled on.

So the party that was found to now be similar, the third party, didn't file an initial bid because it wasn't in a contention set initially. Now it's in a contention set and now you have to ask them to submit their bid. But now they know the other two bidders so they have more information than the original two had when they submitted their sealed bid. Is that a problem? So does that make sense, Donna?

NONNA AUSTIN:

Yeah. I understand the problem. I think this only happened one or two times in 2012. I don't think it was a big problem. So I think if it does happen, then maybe all three applicants have the opportunity to resubmit the sealed bid. Obviously, applicants one and two, their bids aren't known, so I think just for expediency—and understanding that we think it's unlikely to be a huge problem—as Rubens said he doesn't see it as a problem—that there's an opportunity that this is a new contention set with new players who can submit now. I think that's the best you can do.

JEFF NEUMAN:

Thanks, Donna. That sounds like a good solution. So in the rare case—and it happened with shop and shopping. I'm not sure how many—it may have happened last time with some plurals and

singulars, but now we're clarifying the rules on that, so that shouldn't happen again. So I think that makes sense. So if that happens, then all of the bidders can at that point submit new sealed bids if they want to. They don't have to. They could keep their old bid.

I think that's actually a good one. Alexander, go ahead.

ALEXANDER SCHUBERT: Sorry. Last time, my phone dropped me out and then I couldn't dial back in because now it said there's a password needed and I did not have this with me because I'm on my mobile phone.

So what I wanted to say some ten minutes ago is exactly pertaining what we're talking now about, is my suggestion, option two, why having the first review day? Why not asking everyone to submit a bid from the get go, like in option one, so you apply and during the application, before the application window closes, you have to submit a bid, but otherwise, you handle it like an option two, you just don't have the first review day because everyone has already submitted their bids. And then all the contention set problem is no problem at all because the bids are already in.

So essentially, option two, but everyone has to submit their bit right at the beginning during the application.

JEFF NEUMAN: Thanks, Alexander. That's sort of closer to—yeah. We did talk about that and I don't know if Donna or anyone else wants to

address, but there was a feeling that people wanted to know how many bidders they were up against [inaudible] some information.

ALEXANDER SCHUBERT: If I can relate to this, of course, that's the issue. Of course, the big portfolio applicants would like to know how many of their strings are in contention and their funds that are not unlimited, how can they be allocated? And so on and so forth. So if we want to support singular applicants and we want to not support big portfolio applicants or big companies applying for dozens or hundreds of strings, then it would be beneficial if they do not know which string is in contention or not, but they have to assign their funds from the get go. That would help singular applicants because they have only one application, they know how much it's worth and they can submit their bid right before the application window closes, but a portfolio applicant or a big brand that applies for 25 strings would of course like to know who else is in the game. Understandable.

JEFF NEUMAN: Thanks, Alexander. Donna's hand went up, and Justine, so I think they're going to want to address this. Let me just quickly—we have to have a reveal day because obviously, all of the applications have to be revealed so that people can do objections and public comments and everything. So it's not an option to never have a reveal day. You have to do that. Donna, go ahead, and then Justine.

NONNA AUSTIN:

Thanks, Jeff, and thanks, Alexander. I do have some sympathy for what you're saying, but I think my original concern with option one is that you have no information on which to base your amount of the value of the TLD on. At least if you wait until reveal day and you know how many applicants are in the contention set with you, because you may—in most cases, the applicant is not going to end up in the contention set, although maybe the strings are getting smaller so that's more likely in the next round. We just don't know.

So why put applicants through the angst of having to decide how much a string means to them at the time of submitting an application? And bearing in mind that new applicants, if they come into this, they're going to look at the data that's out there and think, really, is it going to cost me \$20 million to get this string? And that might have a chilling effect on them.

But if you understand how many are in the contention set with you, then you can make a judgment or decide the value based on a little bit more information that you have in front of you. So I think in my mind, that's what I was concerned about, and we had that conversation with [Monty Khan] way back when, and this is something we discussed with him. We have to have something to base the value on, and I think it's unreasonable to have 1200 applicants going through the angst of deciding how much the value of the TLD is to them when maybe it's only 200 of those applicants that need to go through that process. So that was my concern with having to do it at the time that you submit your application.

JEFF NEUMAN: Thanks, Donna. You said it better than I could have, so thanks. Justine, go ahead.

JUSTINE CHEW: Thank you, Jeff. I completely agree with what Donna has said, and also, going back to the little guys, the single applicants and the ASP folks, you're asking them to then put forward another pot of resources of which they have little already, because unless you're going to say you're exempted or you're away from having to put a deposit against your bid, you're immediately disadvantaging those guys. Thanks.

JEFF NEUMAN: Yeah, Justine, great point. If we're going to ask an escrow or some sort of putting aside 10% of the bid, whether or not you're in a contention set, I think that that does have an inadvertent chilling effect. Martin, and then I'm going to read some chat.

MARTIN SUTTON: Thanks, Jeff. This is a question. It just occurred to me when we were talking about the additional applicant falling into the contention set. So just thinking about a contention set of three applicants at whatever stage, all together, or if one of those has joined up later on after an objection for similarity, can this still allow for instance two applicants that want to do something together and be more creative to join forces after the bids have been submitted, presumably, and then they know who they're up against where they can join forces? But if the third applicant in this case doesn't want to participate in that manner, could the two that

want to cooperate join forces and for instance aggregate their bids and adjust it in a way that would help perhaps even those that may be the smaller players combine their resources with somebody else that they want to be set up a joint venture to do something with? Or are we saying that this way through, there isn't a route really to accomplish that in that scenario?

JEFF NEUMAN:

It would be different depending on the timing of the submission of the sealed bid. If you do it at the time—as Donna was suggesting—then no, the only way you could do a joint venture is to convince all of the applicants to either withdraw in favor of this joint venture or one of those parties would have to win the sealed bid auction.

If you did the sealed bid at the time of at the very end, then of course, two of the applicants can then pool their resources or do whatever, and then submit a higher sealed bid. But under the first scenario, you'd have to basically convince all of the applicants to join the joint venture. You can't just combine bids. Yeah, that wouldn't be in there. Alexander, then Donna.

ALEXANDER SCHUBERT: We have just heard the concern that if you have to submit your bid before the application window closes, that you also have to come up already with your deposit, and that would be a problem for a smaller applicant. But actually, you would not have to come up with [inaudible] deposit at time of application. You could submit your bid at the time of application, then once the application

window has closed, ICANN knows all the bits and they can know or the system can know automatically which bits are in direct contention. So they can ask all those applicants who are in contention before they reveal who it is to make a deposit of their bid. If they do it, they stay in. If they don't do it, they cannot continue.

This way, you would still make your bid before the application window closes, but you will only have to submit a deposit when the application system detects that you are in contention. Thank you.

JEFF NEUMAN:

Thanks, Alexander. That's a good point. That is another way you could do it. Donna.

NONNA AUSTIN:

Thanks, Jeff. Just to Martin's question, if a joint venture is agreed, so you have two applicants or three applicants that decide that they're ready to go forward with a joint application, do they need to resubmit an application, or do they morph under one of the applicants?

JEFF NEUMAN:

They could—I think we talked about this in connection with the changes, so they would have to submit the changed information as part of their change request. It'd be subject to all of the new evaluation. If there were material changes, they would have to open themselves up to public comment and objections, all that

stuff. So in theory, they could be asked to submit a new bid, if that's what you're trying to get at. I suppose that could happen, but I think that would be a little bit unfair for the third—

NONNA AUSTIN:

Jeff, that's not where I was going. What they could do if they agree to a joint venture—and obviously, they've disclosed amongst themselves about what their sealed bid was—they can choose which sealed bid they want to keep. If the fourth or fifth party in the contention set is holding out, they can choose which sealed bid they want to go forward with of the three that they have submitted.

JEFF NEUMAN:

That's true. Yes. I think that could happen. Paul, then Alan, and then I want to try to wrap this up because we're getting to the end of the two hours. So thanks. Paul, go ahead.

PAUL MCGRADY:

Thanks. I'm reacting to what Alexander said. So the scenario would go like this for someone who applied for their .brand. They'd apply for a .brand, and before the reveal day, they have to put in their sealed bid with a deposit. Say, if their sealed bid was \$3 million, and they then—so they put in a \$300,000, 10% deposit, reveal day comes, and it's a bad actor who they definitely do not want to have access to their .brand. They then, in order to even file the trademark rights mechanism, they have to put in the full \$3 million into an escrow or wherever it goes to be held indefinitely while all that works itself out.

This seems like it's designed to exclude brands and smaller actors. So Alexander, I appreciate the idea, but I do think we still have a lot of work to do on this before we are done. Thanks.

JEFF NEUMAN: Yeah. Thanks. I think what Alexander was saying is that it would just be the 10% which is the same as what ICANN required last time, but obviously, you'd only put the 10% in once reveal day came.

ALEXANDER SCHUMER: Can I shortly—

JEFF NEUMAN: Yeah, Alexander, quick response and then Alan, and then I'll close it up because this is a good discussion but—go ahead, Alexander, and then Alan.

ALEXANDER SCHUMER: In the current option two, there would be an initial reveal day only for the string. Those who are in contention would have to submit a bid and obviously, they'd have to also submit the deposit, but that's what you have to do if you bid, you have to submit the deposit.

In the option that I offered, you still have to only submit your deposit if you're in contention. You just execute your bid before the application window closes. So the tweak that I introduced would not be worse for anybody than the original option two. The

original option two is [in any way a little bit bad] for everybody because after review day, they will have to put in a deposit, and that hurts. Thank you.

JEFF NEUMAN: Yeah. Thanks, Alexander. Let me go to Alan and then I'll wrap it up.

ALAN GREENBERG: Thank you very much. Two things. Number one, I'm not sure why we need deposits. If you can withdraw, then why do we really need deposits? At the time of the reveal date. Now, I can see why you need a deposit—a deposit even just immediately prior to auction time doesn't really guarantee you'll be able to produce the rest. But I'm not sure why we need deposits and what the benefit is. That's number one.

And number two, your statement that if two of the parties decide to go into a joint venture, I'm not sure why you can't or shouldn't be able to combine their two bids. So I know we're at the end of the meeting so I'm not quite sure there's time to fully investigate that.

JEFF NEUMAN: We're going to continue this discussion for a little bit on the next call as well, but Alan, it was not to demonstrate that you can pay, although that is a benefit. It was more from the perspective of stopping large bidders from just saying "I'm going to bid \$1 billion on each one" and then forcing everybody out by revealing that

they—it was an effort to address that kind of concern of the big players just—

ALAN GREENBERG: But presumably, if they pay the \$1 billion, fine, if they don't pay the \$1 billion—

JEFF NEUMAN: No, but they'll put 10% down. So it's a huge deterrent. We'll continue the discussion on Thursday, but we're going to start the discussion on Thursday's call by talking about GAC advice, early warnings. Please read the proposal Paul had, read the section again that we'll send around from the last time that we talked about the clean section without any of the redlines that were there last time, and then also, if you can, read the GAC comments on that, which I haven't yet read, but that'll be on point. And then we'll also get to, when we have time, just a wrap up of this session and answer other questions.

So if someone could please—sorry, Kathy, your hand's up.

KATHY KLEIMAN: Just a quick request that everything that you just listed, could that all be in an e-mail? Paul's proposal, everything, so we don't have to go searching through our emails. Thanks.

JEFF NEUMAN: Yes. We'll put that when we send out the agenda. So later on today. We'll make sure all of it's in there.

So if someone could put the time of the next call on Thursday. Okay, 03:00, so that's going to be late Wednesday night for some, early Thursday morning or mid Thursday for others.

Thank you, everyone. This was a great call, lots of progress made. Very interesting. So thanks, everyone, and talk to you all on Thursday.

CHERYL LANGDON-ORR: Bye for now.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. Please remember to disconnect all remaining lines and have a nice rest of your day.

[END OF TRANSCRIPTION]