ICANN Transcription
GNSO New gTLD Subsequent Procedures Working Group
Thursday, 05 November 2020 at 03:00 UTC

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ANDREA GLANDON: Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures PDP meeting being held on Thursday, the 5th of November at 03:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you are only on the audio bridge, could you please let yourselves be known now? Thank you. Hearing no names, I would like to remind all participants 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 multistakeholder process are to comply with the Expected Standards of Behavior. With this, I will turn it over to our co-Chair, Jeff Neuman. Please begin.

JEFF NEUMAN: Thank you very much. Welcome, everyone. It's a little light attendance but we're getting some additional people on, which is good. And I know we're also dealing with IGF week so I know that people are attending that and some have some different hours this

week. So we'll do the best we can. Jim Prendergast is saying, "IGF weeks." Okay. Thankfully, that for me is not something I have to attend so I'll leave that to you smarter people to do.

Okay. So today's topics are—we're going to talk about application fees and the base Registry Agreement. But before we do that, let me just ask if there are any updates to any Statements of Interest? Okay, I am not seeing any, which is good.

Actually, as the topic 15 is coming up, I just want to re-emphasize that there are some questions and things that were put on the list. There'll be a couple more that are added from the last call. So I do want to just issue sort of a last call on comments on the predictability questions on the—now I'm trying to do this off the top of my head—so there's predictability questions, there's a question on systems, which is sort of related to predictability. And I'm sure there's a few others that are out there so please do give some responses so we can summarize, and then give you a proposed path forward on those issues.

Also a reminder that we do now have a small team that's been set up for working on the issues we discussed last time on auctions. I think there's five or six people that are signed up. If there's anyone that's interested that hasn't yet signed up, please do let us know within the next 24 hours because I believe that we're trying to arrange for a call and get that work started. So if you have an interest, please do send that to myself. Actually, better to send it to Steve, Emily, or Julie, but if you send it to me or Cheryl, then we will forward it on. Any questions, comments before we go forward?

Okay. So let's bring up the Application Fees, and if someone could be so kind. I don't know if Steve is doing this. Nope. Julie's here too. Great. So if someone could post the links or the link to this section in the chat so that people can follow along. Thank you, Steve. Okay, great. So I'm going to actually probably be looking at my version. So if I'm missing someone that raises their hand, I'm just going to ask if someone from ICANN or Cheryl could just let me know that I'm missing someone that's in the queue. Okay.

On the Application Fees section, there are a few issues that came up. So I would just like, with all these calls, we're going to point out the issues that Leadership has flagged for discussion and we're expecting everyone to have read all of these comments and to come prepared. So if there are any comments that we skipped that you want to discuss, please do let us know. Okay.

So the first one is just to point out that there was a comment that was from the Internet DotTrademark Organisation Limited, which is a question about IDN variants, and essentially the fees for IDN variants, and whether they would be the same or not. That is one of the topics that we put into our report as one that we thought should be referred to the IDN group that's right now being chartered at the GNSO Council level. So our recommendation is just to note it and just to, again, point out that this issue is being dealt with. It was the subject of a—I want to say the comment but it's actually a paper put out probably a couple years ago now by ICANN, and so that now is being put into the charter. Hopefully, if the GNSO Council accepts it, it'll be in the charter for the new working group that is set up to discuss this issue along with others.

Okay. The next one that Leadership wants to point out is on line 13. I thought this one was a good comment from the perspective of something that we may want to clarify. I'm trying to remember if it's the first line or the second line, but it relates to the definition of what the cost recovery period is. So while it may be a little bit clearer with respect to this next subsequent around, the proposal, the recommendation is that each round have its own cost recovery period, which will be used to determine the fees for that round, of course, subject to a fee floor, if that's implemented.

Katrin noted that we don't really define when that cost recovery period begins and/or ends. And so the question is do we, as a working group, want to provide some more guidance around that, or leave that to an IRT? If we want to provide guidance, Dotzon did present some language in here which says that they would just reword in Implementation Guidance 15.5 to basically define the cost recovery period as the period that arose between the last and forthcoming application round. So any thoughts on that? I guess it's a two-part question. One is, should we provide that clarity, and if so, does what Dotzon—does that work, or do we want to play a little bit with the wording? Okay. Just so you know, this is an interactive call. Okay. Thanks.

Christa saying, "It needs to consider expenses that go beyond one round, i.e. the systems." So, Christa, if I'm reading your comment, what you're saying is that perhaps instead of ICANN doing all of the cost recovery for the systems in the next subsequent round, that they may perhaps come up with a way to space that out over a set of rounds, which may, at the end of the day, not put all the cost in round one. Am I reading that as a correct note? Or are you

just saying for updates to systems then that would need to be considered for the next? Okay. Yeah. So I think that's an interesting point. So it's not a fixed period. For the first or next round, we may want some note that basically indicates that either as implementation guidance or, yeah, I guess it would be implementation guidance. It's sort of an acknowledgement that—it's our understanding ICANN will be developing new systems, and rather than front load all of the expenses for the cost recovery period for the next subsequent round that they may want to space that out or allocate that in some sort of way towards future rounds as well.

Justine is asking about asset depreciation. Yes, sort of. That's one way of looking at it another way is not necessarily based on the depreciation value but just based on an understanding that if we believe a system is going to hold up for a period of 10 years—and we think we're going to do three or four rounds—then perhaps that's something that we recover over a period of time. Yeah. Cheryl said, "Right. Amortized over several rounds."

Avri has got a comment. So, Avri, go ahead.

AVRI DORIA: Thanks. I wanted to ask questions about consideration such as not necessarily all applications will have finished being processed by the time one of these mini rounds is completed. There will also be notions of the legal reserve for the court cases and such. So a little bit of concern in this that the short definition of a round, especially since I think there's a notion that the next procedure or the next round would start before all of the work necessarily as the

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previous one was done. So I just wanted to bring that up, those two things up as a possible issue. Thanks.

JEFF NEUMAN: Yeah. Thanks, Avri. We'll sort of get into that a little bit more when we do get into the Board comments as well. I can't remember if it's in the Board's and/or the ICANN Org comments, but I do remember the topic of closure certainly does come up. It's obviously a difficult issue to work through and perhaps it's something that we just provide. Our guidance is that cost recovery should be—and I think we do say this anyway—it should be based on that particular round, and that in this next subsequent round consideration be given to amortizing or to spreading out the costs of the development of the systems over multiple rounds and not just this next round. I think we can then just leave it to ICANN or/and the IRT to figure out some way to do this. From a cost recovery perspective, it does add some complexity as Donna mentions. So, Donna, when you say it's a concern, is that a concern over just figuring out the cost recovery, or are you talking more about the kind of overlapping round type issue, which is more of a different topic that we'll get to in subsequent meeting? Go ahead, Donna.

DONNA AUSTIN: Yeah. Thanks, Jeff. Donna Austin from GoDaddy registry. In my mind, it adds complexity to the process. Putting aside when we close off a round, but what's the judgment on how much of the system setup cost do you bring forward to a subsequent round? In my mind, it would have to be a percentage, right? So, if it costs

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ICANN $10 million for this round to set up the application systems, whatever they require, so we're saying for the next round we'll bring forward $5 million of those costs and will spread them in the next round. I'm just concerned. It becomes more complex.

And the other thing I'm worried about as well is I expect—I don't know for sure, none of us do—that given they spend 10 years between processes that there will be quite a number of applicants come forward in this next round. And with that in mind, I would think ICANN has a better chance of recouping costs through that process. What I'm concerned about is when you go into the subsequent, subsequent round, numbers of applicants are likely to fall off. Some of that might depend on what's the gap between the subsequent round and subsequent, subsequent round. I seem to be confusing this even more, but hopefully you get the idea. I think the best chance of recouping those upfront costs in a cost recovery fashion is just to do it all in that subsequent round, and then what happens in the subsequent, subsequent round is the application fee is very likely to come down because you don't have those setup costs. But I also think that it's likely that the number of applications will probably reduce as well. So I guess I'm worried about that complexity about how do you decide how much of the setup costs are you going to bring forward into another round and have that amount added to the cost recovery for that subsequent, subsequent round. I probably made it more complex.

JEFF NEUMAN: No. Thanks, Donna. I think you explained it in the complex manner that it is. Of course, accountants do this all the time. As Phil, I think, put it in there about capex costs, and it is possible

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that even if you allocate and say, "Okay, well, we're going to allocate 50% of the costs in this first round or first next round." If the applications exceed the estimate then you're going to recover a lot more of those costs anyway. You'll recover more than the 50%.

I think we're kind of safest at this point because we're not experts in all of these and we don't know how much things are going to cost, and then it's possible to just put in there maybe not even as strong as implementation guidance, but just say that ICANN may want to, if possible, spread out the costs so that it's not all front loaded, but not put it as something as strong as an implementation guidance. Because again, we're not we're not really the experts in that area and ICANN is going to have to do the research on how much this is going to cost. So we could put a comment in there, kind of, but not as strong as an implementation guidance.

Does that sound like a middle way to go about this? Christa is saying plus one to the comment. Cheryl, plus one. Justine, okay. Hopefully, Steve or Julie captured that. I think that it's a good discussion. But we still haven't defined the cost recovery period. And again, if I'm going back just a couple of minutes, I think it's fine.

It's pretty much like ICANN needs to use its best judgment, right? I mean, leave it. We have to trust them at some point to do certain things and I think providing general guidance of its intent—and your cost recovery is intended to be on a per round basis for that round, and we do talk about excess and if there's excess or

there's less—sorry, I'm blanking on words here—then that could be made up on the next subsequent round. Jim, go ahead.

JIM PRENDERGAST: Yeah. Thanks, Jeff. The one thing I would caution about defining what the costs are for this round is the experience that we've seen in the 2012 round is that anytime we do ask for what the costs have been for this round, the answer we've gotten from ICANN senior management is the costs are ongoing, there continues to be risk, and sort of that pool of funds that they're winnowing down is still open and available. So that's just something to keep in mind as we're trying to formulate the language around this. Thanks.

JEFF NEUMAN: Yeah. Thanks, Jim. It's a great point. We're going to get to this again. A couple of comments down. Actually, during the Leadership call, we discussed a proposal that we might want to make on something like that or that's related to that. So I'll throw that in as a little teaser until we get there, but we'll touch that again in just a few minutes.

Okay. There are a couple of comments which the Leadership has noted, not really necessarily action items that we felt out of this, but just noting it to go forward. So that would include the INTA comment, the Global Brand Owner and Consumer Protection Coalition, which is a mouthful, Article 19. Let me see. Scroll down a little bit more here. And InfoNetworks, that actually relates to a comment that we'll discuss down below so we'll hold off on that one.

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Then for new information, the first two comments we sort of note as not really creating action items for us but interesting comments, and then we get to the Registry comments and Christa's comments. Christa is on the call so maybe if we have questions, Christa can respond. The first one, which I think is in both the Registry and Christa's comment is the notion of—our recommendation, essentially, is to make sure that—and we'll talk a little bit more about this one, too—is that refunds are given back to the applicants. But what is proposed here by the Registries and Christa is that before we do that refund, we actually think about, if there's more than a thousand dollars in excess fees per application that we think about taking that first thousand dollars from the excess and applying it towards the Recommendation 15.9, which essentially states that there were four groupings of potential areas where excess funds could be spent. So that I thought was something that I wanted to ask if the working group wants to discuss this as a new proposal or to just move on, but I thought it was an interesting one repeated both by Registries and Christa. Anyone with thoughts on that?

Marc Trachtenberg says, "Won't we not know whether there is an excess for some time after the round as there could be potential disputes or litigation later, which would normally be paid for from application fees?" For the moment, Marc, we'll come back to that but let's put that one aside and just make the assumption now that there is excess.

Oh, sorry. Christa is clarifying, so I may have misunderstood the proposal. Christa says, "It wasn't meant to take $1,000 out but if it was less than $1,000." Okay. Sorry. We did misinterpret it. So,

what you're saying is if the excess turns out to be less than $1,000 per application that rather than refunding the money, it goes to one of those causes. Is that correct, Christa? Go ahead, Christa.

CHRISTA TAYLOR: Yeah. Sorry. I was trying to raise my hand quickly there. Yeah, that's the intent. The bottom line is where it cost so much money and so much effort that it kind of exceeds the amount of the refund. So I just pulled the $1,000 out of thin air. It might be $500 or whatever it is, but the intent is there. So the admin cost and all the rest of it don't exceed the actual amount of refund. That's it.

JEFF NEUMAN: Gotcha. Thank you for clarifying. We can do one of two things. Christa, you said you sort of pulled that number, 1,000, out of thin air. Rather than us kind of pulling a number out, could we say if there's some amount that's deemed de minimis by ICANN or some amount where it would be more of a burden administratively to issue refunds or credits—and we'll talk about that in a second— then rather than doing the refunds or credits, it then goes to one of these purposes in 15.9? Or do we think we should provide more guidance than that?

CHRISTA TAYLOR: No. I think that's the intent. I didn't figure the right words to use.

JEFF NEUMAN:	Okay. I see Donna agrees with that. Is there anyone else that has an opinion one way or the other on this? I know there's not a huge amount of participants but it'd be great if people on the chat say, "This sounds good." Heather is agreeing. "It sounds practical and not wasteful."

Well, I'm not seeing any objection. So when we turn this around, we'll put something like that in the language and it'll be, of course, in sort of a red line format or pointed out as a change. And if others have an issue, I suppose we'll find out at that point in time. But it does sound like a good logical proposal. Okay. Thank you, Christa, for straightening that out because we did read that wrong.

The other comment I want to pull out of the Registries that Leadership certainly thought was worthy of at least bringing up at the working group level is that we don't provide any guidance on how applicant support fees are determined. So we provide this formula for the determination of the floor. We provide a bunch of information on determination of the application fee itself, but we do not give any guidance on what percentage discount would be for applied towards applicant support.

So on the Leadership call, we could leave that to the IRT or we can just rely on the principle that was applied in the 2012 round. So whatever that discount was—and I can't remember off the top of my head what that was—we can say to the IRT that "Start with this as a baseline." If there's any reason why that percentage needs to be altered then the IRT can then work on that.

Donna is saying, "We don't provide what the overall budget is." Yeah, that's definitely true. I don't think we can. Because the last

time the Board actually made a resolution that it would spend $2 million on it and it was what it was, that wasn't really determined by the bottom of process, so I don't know. Go ahead, Donna. Sorry. I see your hand.

DONNA AUSTIN: Thanks, Jeff. I understand the challenges we have with dealing with not knowing with any certainty how many applications, etc. But what if we did it on the basis of the budget would be 10 times the application fee or something like that so it's associated with the application fee itself? And then if the funding going towards the applicant support is maybe 75% or 85% of the application fee, maybe we could do it that way. I mean, that's just one suggestion of how we could come up with at least a little bit of a frame of what we're dealing with. So, let's think about it in terms of what's our expectation with applicant support. Are we thinking that 10 applications would be good or 20 applications would be good? If we think it's 20, if we say we'll multiply that by the application fee and that's the budget? Just one way that we can possibly deal with it. Thanks.

JEFF NEUMAN: Yeah. Again, this would sort of be a comment. I don't think it would even be as strong as implementation guidance because we don't know the availability of funds and whether the ICANN Board would even have an interest in taking money out of the reserve or providing a loan from the reserve into the new gTLD. There's a lot of decisions that need to be made by ICANN. You said 10 times the application fee, so you're saying like, if the application fee, for

argument's sake, was the same as the last time, 185, that will be 1.8 million. Is that what your formula was? Sorry. I'm trying to understand.

DONNA AUSTIN: Yeah, Jeff. That's right. But that doesn't necessarily mean that you could only support 10 applicants through the support program. So it could be 75%, which might give you 11 or 12 applicants. I haven't done the math, but it's just a kind of indicative thing.

And the other thing is—and I don't think we discussed this and maybe it's out of scope—but maybe the Applicant Support Program could be subsidized by the program itself so that ICANN is not looking for additional funds, that that has the potential to push up the application fee.

JEFF NEUMAN: Yeah. I think that may be one of the areas we put in for excess fees. I'm trying to remember now, but maybe not. Maybe I'm misremembering that. Oh, cool. Okay. Thanks, Christa. Thanks, whoever just pulled that up. We do recommend the creation of a specific implementation, either work track or team, dealing exclusively with the Applicant Support Program. So, absent additional information, can we just say that—again, kind of just saying that we have the 2012 program as a guideline for the new IRT to work with and just recommend that they start from that as a baseline and work from there, as opposed to just doing everything from scratch? Does that make sense? All right. I'll let people think about that for a little bit and perhaps—oh, Paul. Go ahead.

PAUL MCGRADY: Thanks, Jeff. I think you're getting to the heart of it, right, which is the reason why this sounds so complex tonight is that we're trying the Implementation Team now. And I think that we can really keep this at a much higher level point than to the baseline from the last round as a place to start and take our foot off the gas on some of, how do we deal with the weeds. This is, from my point of view, classic Implementation Review Team stuff. So I think that's right, Jeff. We just sort of point backwards on this, give enough guidance to the IRT for it to make sense, and then we can declare victory tonight. Thanks.

JEFF NEUMAN: Yeah. Thanks, Paul. Okay, good. Donna said, "It would be good if we can frame expectations about how many Applicant Support applications would be considered good." We kind of punted on this one in our recommendation/implementation guidance where we introduced some metrics. We talked about it in the last call, but there were certainly metrics that we wanted developed by the IRT so we sort of punted that.

                       Justine is asking the question, "Can we find out how the 47,000 was derived?" We can look into that. Yes. There probably is an explanation somewhere of it. It may be something simple of taking 185,000 and dividing it by four and sort of rounding. Or is it three? Anyway, I'm not good at math at this time of day for me. But yeah, we'll look at that.

Okay. The next thing I wanted to point out was touch on this a tiny bit, but Christa put it in her comment, actually. Sorry. It was sort of mentioned I think in the Registry comments as well. Instead of an actual refund issued to the applicants when there's excess fees, for those applicants which do go on to become registries, do we make it an option of ICANN—instead of refunding the money but providing in a credit towards future registry fees, which may or may not be appreciated by ICANN. I know that accountants love to not issue refunds and would rather do credits towards future services. I assume it would be similar to nonprofit but I'm not 100% sure of that. So I thought that was an interesting comment. Again, it's perhaps one that we mentioned as an option, either a refund or a credit towards future payments. There's going to be a number of applicants that don't move on for whatever reason to contract phase and don't have future registry fees. Sorry. I'm reading Paul's comment. So for those, the only option really would be refunds. But it does sound like a good idea to just put it as anytime we say refund, it's a refund or credit towards future services or future fees, if applicable.

Then I think ICANN, either Org asks this later on or the Board, but it basically says, "Well, what if we can't find the applicant? They're no longer around." And in that case, if there's no entity to refund something to, it's like any organization that has to issue refunds to someone who's not claiming it. If the organization doesn't exist then that's a refund that doesn't get issued. Donna, go ahead.

DONNA AUSTIN: Thanks, Jeff. I understand that if you can't find a recipient then the money comes back, but maybe the question is that a little bit

further about where does that money go? If there's an excess $50,000, does ICANN put that back into the pot, or do they use it for something else? In my mind, it seems it would make sense to go towards the four things that were just pulled up a little while ago, an awareness campaign, things like that. So, I think it might be two things, right? If you can't find the recipient, okay, so we get the money back. But then what do you do with the money? Because it's still excess fees, and by right, it should not go back into ICANN's operating budget. Maybe it should be going somewhere else.

JEFF NEUMAN: Yeah. Thanks, Donna. I think that makes a lot of sense. And I think that we do indicate that it goes towards one of those four or towards the things mentioned in 15.9.

Cheryl says, "Could be supportive to the New gTLD Program." I think 15.9, really, the four things in there are just that. Or five things. Sorry. Yeah, the last one is sort of a catch-all which basically says any other purpose that benefits the New gTLD Programs. So cool.

Just to see if Julie and Steve have that. So it's basically a couple things. Number one is—and I think it's an ICANN Org comment later on—but it's where there's a refund issued. Well, a couple things. Number one is we changed the "refund" to be "refund or credit towards future fees where applicable." The second thing is if you can't find that entity or there's no entity to claim that refund or credit then it would go towards one of the purposes set forth in 15.9. Even though 15.9 technically only applies to where there's a

floor, I think, or there's not a floor—I'm trying to remember—but I think the point is that we can still in the event … Yeah, there is a floor. Okay. So I think what we can say is we could still say that in the event there's refund and there's no one to claim that refund, it should be applied towards one of the five things listed in 15.9. I think that will be understood, whether there is or is not a floor. Paul, go ahead.

PAUL MCGRADY: Thanks, Jeff. Super dumb question. Why are we building something like this? Why wouldn't the unfindable refund just go to the Secretary of State of California like all other unfindable refunds in California, and they go through the normal processes of how the government handles it? Do we really need to build the system? Thanks.

JEFF NEUMAN: Thanks. Right, Paul. That is kind of the default. Absent other arrangements being made, that is the technical default for a nonprofit for an entity in California. But you can always create a different default as the terms and conditions of the program. So I would think we would rather have money spent towards the New gTLD Program than put it towards the Secretary of State of California, I would think.

Marc, I'm not sure it's complicated. I think that ICANN issues a call out for the refunds when it's ready to do it. And if there is no entity that comes forward for the refund and/or credit, it puts the money into the pool of money that is for those things in 15.9. I don't think

that's really complicated. But maybe I'm missing something. Yeah. Marc's right. It's not like it pays the Secretary of State, but I do think that if it's unclaimed for a period of time then it can go to the state's budget. But I don't think this is complex. The reason we're addressing it is because ICANN Org did ask the question.

Okay. Let's move down. This was an interesting one. There's a comment from the government of France, I think, or the GAC member from France, which said, "We go out of our way to talk about the fees being established in a transparent manner but we never say anything about the floor itself being developed in a clear and transparent manner." The comment in there from Leadership is, "We believe that the transparency was meant to apply towards not just the fee," but we don't say that. So I think our recommendation is that we just apply the transparency towards both the establishment of the fee, as well as the establishment of the floor. I think it makes sense.

Okay. Then let's go to—let's see. Where is it? Sorry. I scrolled too quick. Okay. I think we're on the ICANN Board comments. Yes. Essentially, one of the questions there or the points that they make is why are we essentially issuing refunds? Because ICANN Org is a not-for-profit organization, why wouldn't we just automatically allow ICANN to just put the fees back into support of the New gTLD Program? So the Board is asking us to more carefully think about it. I note that. I don't know if this is something that we want to reconsider, but I think that I just want to note it unless anyone has any comments.

Okay. Then the second thing on there is that because there's a lack of a definition of what a closure is or the closing of a round,

how do we know? And this was raised—I think Marc put it in the chat a little bit earlier, which I said would come up. The question is then, how do we actually implement refunds if we don't know when a round is closing or things like that?

The comments from Leadership on this was a couple comments. Number one is you can always pay out refunds and on a sliding scale. So it's not like you're waiting to the very end to issue all of the refunds. The other part of this one is that, remember, in the 2012 round there were three essential components. There was the recovering historical cost, there was the recovery of the development cost of the systems and things. Sorry, that's part of the historical costs. The second thing is actually the cost of evaluations and all of that, and the third was this contingency component. With the first two components, ICANN should know or have a pretty good idea up front once it receives all the applications in. Plus or minus a little bit, ICANN should know whether it has achieved the cost recovery for the historical cost and whether it's got enough money or excess for the second component, which is the evaluation cost. So it should know that fairly early on. It's not that complicated of an exercise. The part that's the unknown is the contingency component. So the proposal from Leadership is that perhaps—obviously, we still need to come up with a drop-dead definition of when the rounds definitely closed, but until then there could be milestones to start refunding the excess fees or crediting excess fees from the first two components.

So to give an example, the contingency was what? Each was about a third I think. So if it was 185,000, it was approximately

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60,000 each one. I might have that wrong but I know the contingency fee was 60,000 per application. You'll know whether 120,000 per application is enough to cover both the expected evaluation cost and the recovery from the historical cost. So there's no reason ICANN needs to wait until the "definite ending" to start refunding excess or crediting excess from those first two components, if there is an excess.

So perhaps the proposal that the IRT thinks about is that the refunds or excess is determined on sort of a milestone basis where the first two components that being of the historical cost and the expected evaluation cost, plus or minus a little bit, that could be refunded perhaps at a point much sooner than what the "end of the round" would be.

Marc is saying, "But we are making a number of changes to the evaluation process so how will ICANN know how much everything will cost this time? Also the changes we make could result in more litigation and disputes. So is it really that easy to determine?" That's why I said the plus or minus. So ICANN, when they do set the fees, is going to, in theory, have a good indication of at least the first component of cost recovery and should have, when it comes up with a budget, again, plus or minus some sort of percentage or a high or low case when it receives the funds if it's going to be able to support or have excess of the actual evaluation cost. So it's not a definitive amount but if they do their budgeting correctly, again, plus or minus some sort of standard deviation, they should have an indication. Christa is saying, "The theory makes sense."

What we can do is we can issue that guidance to the IRT to perhaps consider something like that as it looks more into the program, and then it becomes a little less important to define the absolute closing date of the round. It still is important for that last component of the contingency but perhaps not as important for those first two components.

Okay. The next things in there—and we'll put this out to the list so that you can see that and not just make an off-the-cuff kind of determination tonight, but it was something that Leadership had just brainstormed on as a possible way forward. The other things from ICANN Org that we wanted to point out—and we provide some responses to ICANN Org—ICANN Org had a comment in there that said that it wanted to have a uniform price for every application, regardless of whether they use a pre-evaluated RSP. I just don't think that's in line with our recommendations, and obviously we know that would be ICANN Org's preference because you want a less complex billing, but that just goes against the whole efficiency argument and the costs recovery argument of what we've been working with. So I don't think it's that complex, again. If someone checks off the "I will use a pre-evaluated RSP," the fee is X. If someone doesn't check that off and has their own solution that needs to be evaluated, then it's X plus Y. You don't need a finance degree to work that one out, I think.

Then there's a question about what historical costs are or what actual costs related to implementation. We put a response in there. Read that. Let us know if you think it makes sense, but we put one in there.

One that we did want to address during this call—and it happens to be just because of the way that we worded—the recommendation which is 15 point—sorry, I'm trying to remember which number it is now—4, I think. Yeah. So 15.4 is a little awkwardly worded in the way because we say that ICANN must implement the following implementation guidance, which is kind of strange because normally implementation guidance are "should" as opposed to "must". And so it's a little bit confusing by wrapping all the implementation guidance around a recommendation. So Leadership would propose, because we think, at a very minimum, 15.5, 15.6, and 15.7 are ones that we really meant must. 15.8 is more of a should. And you can go back after this call and review those, but our recommendation would be to put 15.5, 15.6, and 15.7 directly in recommendation 15.4 so that there's no confusion that we, as a working group, believe these three things 15.5, 15.6, and 15.7 must be implemented, and that only 15.8 really should be a implementation guidance.

Steve, because we're kind of running a little low on time, I'm going to leave that to everyone to look at after the call, if we can. There's no hands raised, so okay. All right. I think that's it for ICANN Org and for fees. Yep. All right.

Let's now jump, for this last half hour, to the agreement. We wanted to point out the good news on this—and you'll see that in the Leadership comments—that every constituency and stakeholder group at least from the GNSO, plus a bunch of other groups, either support the recommendations, the section completely or may not think it's ideal but are willing to support it or had no opinion. The one exception is the IPC. But even the IPC,

they only have a comment pretty much on one area and we'll go over that one area. So the good news there is that the section seemed to be, in general, the community pretty much supported it, which is good.

So of the comments that were raised, NABP does point out that for Category 1, we're talking about the safeguards for Category 1 that we recommend to be also applied towards future Category 1 strings those contractual provisions. NABP makes the observation that a number of the safeguards only involve the Registry putting provisions into its Registry/Registrar Agreement but don't actually require the Registry to enforce them. This is sort of indicative of a number of PICs that are in the agreement. So I'm only noting that as just a note from NABP. But then just say from a Leadership perspective, I think this is one of those things sort of like DNS abuse because it applies to the hundreds or thousands of existing TLDs. It's probably one of those issues that if it gets dealt with, it needs to be on a holistic manner and not just for new gTLDs going forward. So that was our initial kind of response to that. But I did see someone that had an open mic, so I didn't know if they wanted to make a comment here. Okay.

All right. So then the next item was a comment from—sorry, I can't see the left column on the one that's on the screen and I didn't pull up. Thanks. What we have here is the notion of potentially adding additional Compliance options. This one as well, like the other one before it, we think is one that would need to be on a more holistic basis because it involves, again, there's thousands of registries under the existing Registry Agreement. So to the extent that the community wants to address other potential enforcement options

like financial penalties or the like, that's not really something that Leadership views we should be working on, but more one that would need to be addressed in a holistic manner.

Okay. Then there were a few comments like the IPC and there may have been others down below. WIPO is another one. Yeah. So we have in our recommendations that ICANN—I'm paraphrasing here—essentially be more flexible to consider and more transparent in considering exemptions to the Registry Agreement to be able to negotiate contractual provisions, especially where there's innovative models being presented. We'll talk a little bit more about this further down, but the IPC and WIPO want to make it clear that there should not be any negotiated exemptions on RPMs or consensus policies. I'm paraphrasing WIPO's but RPMs, I think UDRP falls under consensus policy. So I think that's one thing they want to make sure that there is no flexibility on that. Is that something the working group wants to take up as an issue? Or just something we would note, and then it's ultimately the end of the day, it's up to ICANN what they decide to negotiate or not?

What about, in general, making a statement saying that the working group does not believe that a consensus policy should be the subject of individual negotiations? Is that something that would make sense? Is that something that's controversial? Anyone? Heather is asking for me to repeat. Should we, as a working group, make the statement that—we do have in there, there's a recommendation for flexibility but why don't we also say, provided that ICANN should not be individually negotiating anything that relates to consensus policies. Heather and Paul think that makes

sense. Anyone disagree with that? I think, in general, it's a bad idea to allow negotiations on those but it is sort of new—new that we haven't talked about this yet. All right, it makes sense. Donna says, "It makes sense." The question is, is that something that's so substantive that sort of goes against the notion of, we didn't put it out for public comment. I don't think it's that controversial. Paul, go ahead.

PAUL MCGRADY: I don't think it's controversial and I don't think it's so sensitive that we needed to put it out for public comment, because I don't think anybody anticipated that what we were saying by flexibility meant that we were going to allow people to bargain their way out of consensus policies. If people can bargain their way out of consensus policies, then a whole lot more than just this program collapses. So I don't think we're saying anything here that wasn't the baseline assumption. So I think we can put in that note to make it clear and not worry about whether or not we somehow sidestep public comment on the obvious. Thanks.

JEFF NEUMAN: Yeah. Thanks, Paul. Thank you for giving me the comfort there, too, because I think you're right and that was sort of my gut as well.

Justine asked the question, "I am having difficulty envisioning an example of non-consensus policy items for which an exemption can be negotiated." Justine, from a purely hypothetical standpoint, let's say that there's a nonprofit out there that wants to operate a

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TLD, but for whatever reason they're like ICANN, their insurance policies don't allow them to have indemnity clauses that are as broad as what ICANN wants in the Registry Agreement. In theory, perhaps that could be something that ICANN goes, "You know what, fine. We'll exempt you from that indemnity clause because of the unique circumstances." That's just a quick top-of-my-head kind of thing that, in theory, could come up. I know it's the argument ICANN makes as to why it doesn't want any indemnities. So it would not be unforeseeable that another not-for-profit could make that, in theory, same argument. I'm not saying ICANN should definitely agree to that, but that's the type of non-consensus policy item that someone could make an argument for. Donna, go ahead.

DONNA AUSTIN: Thanks, Jeff. Just to Justine's difficulty in envisaging an example. One thing that did come up after 2012 round is we had community TLDs that have added on to their Registry Agreement what they've agreed to in their application. And one of the community TLD registries wanted to make a change to what was in that—I think it's Spec 12 of the Registry Agreement—based on decisions that had been made by an advisory body that was set up for the community TLD but there was no process to change that. And ICANN actually insisted that this TLD go away and work with other community TLDs to come up with a process to change it. Certainly, in my mind, that was probably something that could have been negotiated individually between ICANN. And it wasn't so much the change to the Registry Agreement but there was no process that existed to do that. So that's maybe another one,

Justine, as a bit of an example. I'm not speaking about .jobs. No. This was a 2012 TLD.

JEFF NEUMAN: Thanks, Donna. To bring that into just how this could come up, right? Donna's example is one that came up after the agreement was already signed, but given the fact that there could be a number of years between submitting the application and then signing the agreement, that could just as easily happen in that time period between submitting your application and signing the contract. So you could see that same thing arising where there was an advisory body that said, "You know what, that may have been okay four years ago. But now that we're actually signing the Registry Agreement, can we change it to this because the standards have changed?" Things like that.

I think we have a path forward on that, I'm hoping. Then we go to the ALAC comment. At first, I didn't understand it but then I kind of worked it through and I hope I worked it through correctly. This is relating to the question of—and perhaps we can go to the other answers on this question, too—but it's the question of the addition of the contractual provision against ... not against but saying that a registry that commits or acts in a fraudulent manner is essentially breaching the contract. Again, huge paraphrasing. But whether that can be enforced, whether that's just put into the Registry Agreement itself or whether it's made a PIC, and therefore is implementable through the PICDRP, the insightful comment from the ALAC, which I knew but I didn't really think about until their comment, was—so the ALAC is saying that, "Look, I guess, the problem with the PICDRP is that the party that makes a complaint

to PICDRP has to demonstrate that there's been actual harm from the conduct of the registry." So if it's just a PIC, then that becomes a little bit more burdensome for the complainant to actually demonstrate that there's been harm before ICANN Compliance, either on its own or by constituting a third party panel, goes forward with the PICDRP. So if it's just in a Registry Agreement and not the PIC, then Compliance can enforce the provision without a complainant coming forward and demonstrating harm. We did post the question of whether we wanted to put this in the agreement itself or the PICDRP or potentially both, I guess.

Paul, the original idea, I think, way, way, way back was a PIC. But I think that the Draft Final Report just left it as an either/or. Can someone from ICANN double-check that for me? Perhaps this is a question that goes out to the list because it is kind of complex to work through.

Sorry, Steve, put 36. Is that the line we're on?

STEVE CHAN: I don't know why Zoom decides to take over my cursor once in a while. So when you see random numbers, it's most likely searching for a topic in the report. That's what that was. Or I could have left it more ambiguous and left you all wondering, but no, it's me searching for topic 36.

JEFF NEUMAN: Okay. Thanks. So we'll put this question out to the list. I thought it's a really good comment from the ALAC that I don't think we really thought through.

If we can then scroll down to the ICANN past Article 19. Keep going. I'm sorry. Go back up, I think, because we kind of skipped to the ALAC ... because we skipped down. Let's go back up. Sorry.

ICANN Org had a number of comments to the section when they went through this. The first thing which I think made sense, I think, which is really just a clarification but you all can kind of let us know if we got this wrong, but ICANN Org is saying that, "Look, if someone's going to request exemption to negotiate something, it really needs to provide a rationale." Leadership thought that is a good clarification. I don't think it really changes anything substantively. And, of course, ICANN is concerned that individually negotiating all of the agreements would take up a lot of time, resources, and could create disparities between a level playing field. To that, I think leadership just thought, "Look, we knew that going in. We can note it, but it's been discussed." And I think the working group thought it was important still to have that recommendation.

ICANN Org then asks the question of—I think there was a recommendation saying that ICANN needs to be clear and transparent about the process by which to allow modifications to the agreement, and ICANN Org wants more details on what wasn't clear. I think the response that we put in there was—this is mostly from myself and Cheryl, obviously, not from the ICANN Policy staff—but that, ICANN Org did say exemptions could be granted in the Applicant Guidebook or there could be negotiations but we're not really aware of any that were actually granted and there was no criteria that was put out as to when ICANN would or

wouldn't accept a modification to the agreement. And so therefore, that in and of itself was not clear.

On the fraud stuff, ICANN says that they think it's outside—well, they can go to court, and if the court determines that a registry has acted fraudulently then they would have no issue with terminating a registry or taking action against the registry because ICANN itself is not making the judgment that there's been fraud. Then they think it's outside their remit to actually make a judgment as to whether something was fraudulent or not. I think to that one, we're not saying, as a working group, they can't rely on a third party or they can't go to court to see if fraud was committed in some sort of declaratory judgment. So it's up to ICANN how it wants to or should enforce its agreement, but we don't think it would be outside ICANN's remit to allege that another party has tried to commit fraud against it. At least the Leadership wasn't able to really understand ICANN Org's comment that it would be outside anyone's remit to make a determination as to whether it believes it's been defrauded.

Now, of course, a registry can always challenge that under their Registry Agreement. There is a breach and there's a remedy and then there's also dispute resolution. So it's not as if ICANN's making this unilateral decision and then the Registry is automatically terminated. At least from my perspective, I read the comment over and I just didn't understand why ICANN Org or how any organization can think it's beyond their remit to allege that it's been defrauded or that the system it's setting up or an entity that it is licensing is committing fraud on to others. So the question is,

what does the working group think? Thanks, Cheryl. Karen, go ahead.

KAREN LENTZ: Thank you, Jeff. This is Karen Lentz from ICANN Org. I wanted to if I could go back to the exemption point and the questions on that one. Because the recommendation that says there needs to be a process to apply for and negotiate exemptions to certain provisions of the Registry Agreement. We kind of touched on it earlier with the examples about indemnification or they could affect the consensus policy or whatever. But I think if you look at what existed, there were certain specific instances where a Registry Agreement could have an exemption. Like if you were an IGO, there was a different provision that you could put in the agreement or there was a specific process for exemptions to the code of conduct, for example. I think one way to understand this recommendation is basically to keep those same types of exemption processes but make the process more efficient, etc. But it also refers to "certain provisions." Is the idea that there would be an identified set of provisions that could be sought an exemption from versus others that were more fundamental and could not? Or is it just sort of open-ended, like anybody who wants to propose an exemption or negotiate any provision can just send us a request with a rationale? Those are very different processes to try to build. So the questions around the exemption process and many agreements is kind of trying to get at, making sure we understand what's intended from the working group there. Thanks.

JEFF NEUMAN:	Thanks, Karen. Thank you for the clarification. I think that's good. The wording is a little awkward of certain provisions. I think once we exclude the consensus policies, I don't think that was intended to exclude any other provisions that could be requested or changes that could be requested. So if you look at the Applicant Guidebook, in Section 5.1, it does talk about that the applicant should indicate any notice of material changes that requests to the terms of the Registry Agreement. So it's already in there, that it was expected that there could be request for changes. But then there's nothing after that as far as how those were considered or any criteria. So part of our recommendation is that ICANN needs to be clear on when it does take in requests for material changes, how it goes about what the process is there.

So we're not setting the process for how that would work, but we're pretty much asking ICANN to tell us what that process is and to be clear and transparent about it. I think that's part of it and I think the certain provisions, we probably want to look at modifying that wording. It was not intended to just cover the provisions that already have the built-in exemption like the IGOs. It was intended for other provisions but not intended to negotiate consensus policies. Hopefully that helps. Thanks, Karen.

I know we're running up against time. I think the last part of this is the one—again, these are just responses from the Leadership team to ICANN, not anything we need to address. ICANN says that if it did adopt the recommendation to actually negotiate exemptions that could add complexity and it could create an unlevel playing field, or how would it apply to the 1,200 plus existing Registry Agreements, and would that now cause

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registries to come back and say, "Well, this party got an exemption so I should as well." It's beyond kind of our mandate to look at existing TLDs. But in theory, any change that we make to the agreement or really to the program, anyone from a past round can ask the question of, "Why are they allowed to do it and we're not?" We can note it but I don't think it's unique to this particular provision.

Okay. We are at the 90-minute. Let me just read Christa's comment. "It sounds like ICANN is suggesting that they do not have the process in place to identify fraud or deal with potential fraud. Hence, it's relying on external bodies to identify and determine its fraud." Christa, we're not saying that ICANN has to do it itself, but the weird part of this one is ICANN actually had a third party indicate in the feedback decision that they thought there was fraud and ICANN still didn't deal with it and basically found it powerless. It did send a letter to .feedback about something unrelated to the fraud issue but it didn't address the fraud issue. So we're not saying, Christa, that ICANN doesn't— they can rely on third parties, I think, if they want. We're not saying that they can't. We're just saying that where there is fraud, however that's determined, that should be a ground for a breach of contract, at a very minimum. Christa, you're right. No, don't apologize. That is what ICANN Org was arguing and that is sort of the response that we put into the draft. So you're right that that's what they were arguing.

Okay. We are up against the 90 minutes. So thank you, everyone. We got through all the material. The next call is 15:00 UTC on November 10th. That's what Cheryl has posted. A couple of issues

that we'll send out an e-mail on, but good progress. Thanks, everyone. We'll talk to everyone next week. Have a good weekend.

ANDREA GLANDON: Thank you. This concludes today's conference. Please remember to disconnect all lines and have a wonderful rest of your day.

CHERYL LANGDON-ORR: Bye for now.

[END OF TRANSCRIPTION]