ICANN Transcription
GNSO New gTLD Subsequent Procedures Working Group
Monday, 09 November 2020 at 15:00 UTC

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MICHELLE DESMYTER: Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures PDP Working Group call on Monday, the 9th of November 2020 at 15:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken via the Zoom room. If you are only on the audio bridge, if you would please let yourself be known now? 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 that speaking to avoid any background noise. As a reminder, those who partake in the ICANN multistakeholder process are to comply with the Expected Standards of Behavior. With this, I'll turn the meeting over to Jeff Neuman. Please begin, Jeff.

JEFF NEUMAN: Thank you very much, Michelle. Welcome, everyone. I know that there's lots going on this week and next week. We're heading into, I guess, a busy time before some end-of-the-year holidays so we are all so very busy. So let me just ask to see if there's any

updates to any Statements of Interest? Okay. No one in the chat, no hands are up. Okay.

So today's topics are going to be Objections, GAC Early Warning, and the Role of Application Comment. Just a reminder that there are a number of questions and other things that have been sent around via e-mail. There's a group that's been formed that's talking and hopefully doing some meeting on the auctions topic. So there's lots of work going on in the background. If you missed a meeting, please do try to catch up and if you have any comments on the meeting, please do send the comments on the list because we're not necessarily planning on covering all of these topics again. So if you missed it, it's important that you go back and review the notes, and if you have any questions, let us know. With that, let me just pause, see if there's any preliminary matters or anything anyone wants to add as any other business before we move forward. Okay. All right, let's go right into Objections then, which is Topic 31.

Great. It's actually up on the screen. Again, it's kind of small up on the screen so if you want to follow along, I'm delaying until someone puts the link into the chat. There you go. Thanks, Emily. So you might want to follow along in the document itself and hopefully you have read these because we're not going to go over every single comment. We're only going to go through some of the comments that Leadership has discussed and pulled out as ones that we should probably talk about. And even if we don't talk about them, there may be some notes in the Leadership column section that you might want to look at. And again, if you have any questions, let us know. I think there was a question that came up

after the last call and something that was written in the Leadership column, it is written in shorthand to help us guide the discussions. So I think the question that was sent was just sort of a clarification on what we had written and what we meant by what we wrote, but please do ask those questions.

Okay. So this topic is on objections. There was, again, like a lot of our subjects, which is good, a lot of broad agreement with most, if not all, of the recommendations and implementation guidance. There are some comments, though, that came in that do not support certain aspects or all of the outputs. Some of them are just noted, like the first one, which just calls for an option of a five-person panel, and then a second one, just on the fees, and there's a mention here of geographic indicators but we'll get to that topic or at least some more of those types of comments in the Geographic Names section.

So the first comment I really want to go to, if we can scroll down. Oops. Hold on. Did we go too far there? No. Okay. That's right. The ALAC comment. This is one that I know we have discussed on a number of occasions, but I thought it was just worth pointing out again to see if the working group has any different thoughts after the ALAC comments. But essentially, as you all probably remember that the ALAC is given a certain budget from ICANN to be able to file certain types of objections, including the community-based objection and the—oh my gosh, I'm totally forgetting the official name—but it's the morality and public order, that one. Why am I totally forgetting that name? Anyway, those two are the types of objections that the ALAC—thank you, Karen—limited public interest. So those are the two types of objections that the ALAC

was allowed to file as—I shouldn't say "was allowed to file"—I suppose they could file any objections they wanted to, but the only ones that were covered by ICANN were the limited public interest and community. So for limited public interest, there's not really a standing requirement for that. So their comment here is focused on the community-based objection, where, if you recall, there is a standing requirement to file a community-based objection, except for the Independent Objector. So the ALAC here is renewing their request to be able to bypass the standing requirement or to actually just automatically be given standing for community-based objections. Now, again, this is something we have discussed and this is something we have not accepted. And so let me just pause here to see if anyone wants to discuss this one any further, or if anyone thinks that we should reconsider this.

Kathy is asking, "What are the arguments in favor of it?" I think that there are some that are indicated here in the comment where it's basically the ALAC discusses how their consultation within the ALAC involves the five regions and that it's a stringent consultative process, and so it's not something that they take lightly. They cite to Implementation Guidance P, which is from the original GNSO policies that the ALAC is an established institution for purposes of filing a community objection. Then they talk about their involvement in the Empowered Community. So they believe that they should be equal in standing to the Independent Objector.

Okay. It doesn't seem like we have people on this call that wants to reopen this, but let me go to Paul McGrady, please.

PAUL MCGRADY: Thanks. So is it equal in standing as the Independent Objector for community objections only? Is that what the ask is? Thanks.

JEFF NEUMAN: Yeah. That is what the ask is because, remember, the ALAC is only funded for two types, the limited public interest and the community. For limited public interest, pretty much anyone has standing or there is not really a standing requirement for that one. So yes, it's only for the community based.

Michelle, do you see the comment from Christopher?

MICHELLE DESMYTER: I most certainly do. I'm dialing him now.

JEFF NEUMAN: Okay. Thank you. All right. I'm not seeing a huge interest in wanting to reopen this so we'll just keep that as noted. And then when we go to the new information, the IPC wanted to clarify Implementation Guidance 31.19 where it says, "In case of a String Confusion Objection filed by an objector who is in a contention set with applicants for the same string, it should be mandatory for each applicant to respond to the objection and to indicate whether or not it agrees with the objection." And to enforce it, basically, the IPC—and if you can, Paul or anyone else from the IPC, just jump in if I'm misinterpreting it—but essentially they're asking for like an automatic default or if there's a default by any one or more of the applicants—in other words, they don't respond—that those applications are automatically marked as ones to not proceed. So

this is something that's new and it's not something we've discussed before.

So let me pause there. Let me ask Paul if I got that right or if there's any further information he wants to provide. Sorry, Paul, to put you on the spot.

PAUL MCGRADY: Thanks, Jeff. The leader for the IPC in this space was Susan Payne, and I see that she's on. So I'm going to throw her directly under the bus and ask her to fill this question if she [can't type].

JEFF NEUMAN: Okay. Susan, are you in a position to be able to address this?

SUSAN PAYNE: No. I don't think I am. I don't think that I was the leader on this, I'm afraid.

JEFF NEUMAN: Okay. Is Flip on? Because I think he has the same, similar comment. No? I don't see Flip's name on here. All right, so then we'll just go on to the next one. Paul or Susan, if there's something that comes up maybe on the list then you can bring it up.

PAUL MCGRADY: Yeah. Sorry to interrupt. Susan, sorry to put you under the bus. I did leave the public comment but I have not been leading the RPMs group for the IPC, but the bottom line is that somebody within the IPC will read this and we'll answer your question on the list, Jeff. Sorry that we're [inaudible] on this, but I've not looked at this for a long time. Thanks.

JEFF NEUMAN: Okay. No problem. Let me, in the meantime, address—Anne's got a comment in chat, "Is it true that ALAC can go to the IO to ask for community objection?" Anne, I don't think there's a role for anyone, in theory, to go to the IO to ask for a type of objection. Certainly the Independent Objector has to base his or her objections on something that was filed in the public comment period. It's not that anyone who asks the Independent Objector to file anything, but certainly if the ALAC or, frankly, for that matter, anyone else were to file something in the public comment period, the Independent Objector can base their objection on that comment that's filed. Okay. Kathy, go ahead.

KATHRYN KLEIMAN: Yeah. Coming off mute. Can you hear me, Jeff?

JEFF NEUMAN: Kathy, a little bit of static or something, but we can hear you.

KATHRYN KLEIMAN: Probably. Sorry about the static, everybody. This is great. This is what comments are about and especially late stage comments. This is something I didn't understand, circling back to ALAC that they have funding to do limited public interest objections, which makes sense, and that they have funding to do community objections, which I guess I hadn't realized. But ALAC's almost never going to have standing to do a community objection because you have to prove that you represent the worldwide community in very discreet and significant way. So, there is a disconnect here. I'm not sure which should drive the standing requirements or the funding requirements but there is a key disconnect here. And I was wondering if somebody from ALAC wanted to speak to it or speak to anything they wanted to object to in the first round that, for whatever reason, they couldn't because of these rules that they got blocked on something. And for covering old ground then maybe somebody could just summarize that really quickly, but I agree.

JEFF NEUMAN: Yes. Kathy, this is old ground. So the ALAC is made up of organizations.

CHERYL LANGDON-ORR: No, it's not.

JEFF NEUMAN: Hold on. Let me just finish here. The ALAC has, as members of the At-Large Structures, some organization. So in theory, some of those organizations can bring their concerns to the ALAC and

potentially the ALAC could get behind if any of those structures do represent—sorry, the At-Large. I apologize. Not the ALAC but the At-Large. So in theory, if there was some mass community-based objection and one of the organizations was involved in the At-Large Structure, then perhaps there could be some sort of arrangement made there. The community-based objection is intended to be filed by the community to whom the application is directed, right? Now, I'm going to try to think of something that's not in the root. I don't know. Let's go back to one that is and pretend it's not, so if there's .med and the medical associations opposed it then the medical associations could file a community objection, presumably.

There was no agreement within Work Track 3. I think it was Work Track 3 originally. Basically, Work Track 3 did not want to duplicate the Independent Objector's role. So the Independent Objector has automatic standing and Work Track 3 didn't think that two groups needed automatic standing that if there was a community-based objection, it should either be filed by the community itself, meaning the community to whom the application is directed or the Independent Objector, but not the community Independent Objector and the ALAC. Sorry, Cheryl. Hopefully I changed it to the proper term.

Okay. So go back where we were. So we did the IPC. And Article 19 is just one you can read on your own, but it's more about just some fees and other stuff. So we've noted that because we do think we addressed it. The Board asks an interesting question of us. Whoops. We can go back. There you go. The Board basically states that it wanted us, the working group, to identify the purpose

of continuing the use of the Independent Objector role and the problems that the continued use of the Independent Objector is expected to solve.

This is a little bit difficult here for the working group and I want to bring it up just because if you were part of those discussions in Work Track 3 and then afterwards when the working group discussed it and before the Draft Final Report, you may remember that there was not necessarily universal agreement that we should keep the Independent Objector, and that it was kind of accepting sort of as a default what occurred in 2012. Of course, there wasn't consensus to get rid of the Independent Objector either. So where that that left us was, okay, it was in 2012. Not everyone can agree to keep it but certainly there's not a consensus to change it so we'll keep it. But now the Board is asking us to basically justify why we're keeping it, which of course is not easy for us to do.

So we're just noting it here for the group. It is something that we are not necessarily going to respond directly to the Board in terms of justifying it now. This is something we could think about doing and we'll ask this at a later point, but whether we want to respond to the Board in a letter to address their comments so they know that we've taken it into consideration, but on this one it may be difficult for us to address it other than the way I kind of presented it. Anne, go ahead.

ANNE AIKMAN-SCALESE: Thanks, Jeff.

JEFF NEUMAN: Oh. Anne, we had you there and then –

ANNE AIKMAN-SCALESE: I'm back.

JEFF NEUMAN: Yup. Okay. Thanks.

ANNE AIKMAN-SCALESE: The recent discussion regarding standing is the correct answer. I think it's pretty clear that when standing is going to be an issue but if you maintain a limited public interest objection, for example, standing is a big issue. So the IO has standing and that was not changed for our working group. Thanks.

JEFF NEUMAN: Yeah. Thanks, Anne. I think certainly with respect to limited public interest, I think that's right. Although I'm sure not everyone shares that view, but with respect to community, obviously, arguably, communities to whom applications are directed, they would have standing in community-based objections. I'm trying to just remember. I think those were the only two that the Independent Objector had standing, and I think the rationale for having standing in the community based was that not everyone pays attention to what's going on at ICANN, and therefore, the Independent Objector could step in for community because we don't want to necessarily delegate a community or a string that impacts a community without at least hearing from someone that

represents or could represent the interest of the community. Now, I know that that's controversial and not accepted by everyone, but certainly as a default, it's what happened in 2012.

ANNE AIKMAN-SCALESE: Just a follow-up comment on community.

JEFF NEUMAN: Sure.

ANNE AIKMAN-SCALESE: It's also just that, theoretically anyway, they're communities that just simply wouldn't have the resources.

JEFF NEUMAN: Yeah. That's right, Anne. I think in a letter what we could say is that the same justifications exist for these next rounds, as did in 2012. Although there are improvements that we have suggested in the process, certainly the justifications for the Independent Objector have not gone away. Paul, go ahead.

PAUL MCGRADY: Thanks. Can I suggest a less gracious response than that? Because I don't think that's the collective view of the working group. I think that the best we could say here is that some people in the working group feel that the justifications from the last round still exist. Others in the working group think that it was chaotic and was a big waste of money and a [failure]. Because we operate in a

consensus basis, we have to—and everybody agreed up front, the default would be 2012. Unless the consensus for change came, there's a lack of consensus to get rid of them, the IO. So therefore, we're just moving forward because that's the way ICANN works, not because everybody thinks that the justifications from 2012 remain. This was a hard fought topic. Not everybody believes that the 2012 justifications remain or that the outcomes were good. I know that's not a great way to say it, but the reality is that the reason why this IO remains in here is because we're constrained by the bottoms-up consensus model, and if we can't get to a consensus, the digit will slack a bit. Thanks.

JEFF NEUMAN: I got to take myself off mute. Thanks, Paul. Anne asked the question, "Are we responding to each individual Board comment in writing?" I think we're taking notes on these, certainly, and so that the Board can certainly review the notes. Whether we decide to send something to the Board is probably a topic for another day but not for now. We are, though, putting in notes on the Board comments and the Org comments because we just want to be thorough.

Okay. The next one, we noted a comment. Sorry. Actually, I don't want to skip. So, the ALAC has a comment here on a concern, I guess, here on whether there's sufficient or will be sufficient budget resources to have multiple Independent Objectors just to refresh the recollection. We had recommended that there be more than one Independent Objector because of the potential for conflicts and with two Independent Objectors or with multiple Independent Objectors then you could at least find the non-

conflicted Independent Objector to file. So the ALAC has some concerns about the budget and resources. And so that's something I think that is more for the Implementation Review Team and ICANN to consider how to find those resources and how to divide up funding or whatnot.

This is in response to the comment of whether we're going to write a Board letter. Avri helpfully states that "If the issues are covered in the Final Report then there's no need to send a letter unless we want to." Okay. Thanks, Avri.

Okay. On this one, the GAC brings up—or I should say some GAC members. So this is important. It's not GAC advice or it's not the full GAC but some GAC members are pointing out here the issue of geographic indicators. This is something, like I said above, we'll potentially address when we get to the topic on geographic names at the top level.

So let's move on then to ICANN Org. There's a lot of clarifications in this. I'll say it some sloppy wording that we use that we certainly can clear up and we will. So you can just read about that in the Leadership comments or just read their comments and you'll see it's pretty evident what we may need to fix.

Is there a way you can scroll to the Leadership so we can view that column? Thanks. I certainly have difficulty navigating this chart. I'm not sure if everyone else does. Okay.

I think these are all clarifications, and then there's just a proposed response to comment #4. There's also some comments here that are relevant to the Appeals section, which we previously talked

about where a decision made by ICANN is being appealed. So I don't think we need to cover these comments anymore. Unless there's any questions, let me just pause for a second before we go on to the Early Warnings.

Okay. Let me scroll down a little here. I think someone may have their microphone open. So if we can just check. Great.

All right. Then let's move on to Topic 30, so back one sheet. As you can imagine, we got a number of comments here from governments on this since this directly does affect them. The first the first thing I do want to note, though, is there is a fairly wide diversity of support on these recommendations from Registries, the BC, INTA, and the ALAC among a number of others, but there are some comments here. There are a number of comments that are focused on the GAC advice itself and what they need to provide when either GAC advice or an Early Warning are issued. You'll see comment here from the IPC that wants us to be more explicit in stating that the rationale must be based on national or international law, and must specify that national or international law. However, it will come as no surprise to anyone that if you scroll down, you'll see—I think it's France, the Swiss government, and the GAC basically say the opposite. If we're going to rely on the Bylaws, the Bylaws don't dictate what GAC advice needs to be based upon. And so I think all that comes out sort of as a wash. In other words, while the IPC wants us to be more explicit, others want us to be less. So I think for most of those, those are noted. But there are a couple things I do want to point out from in general just reading the GAC advice, the Swiss government, France—and I don't remember if there were others. So the rationale we used to

get rid of the presumption—there was a presumption in the Applicant Guidebook that if the GAC provided GAC consensus advice against an application, there was a strong presumption that that application would not proceed. We basically discussed this for a long time and decided that the best thing to do was to rely upon the new Bylaws that were amended in 2016, which provide the appropriate thresholds for the Board in accepting or rejecting GAC advice and the processes that need to be followed if more than 60% of the Board does not accept the specific GAC advice. So, the governments obviously are not in favor of getting rid of that presumption, but they're basically saying that, look, if you're relying on the Bylaws itself, the Bylaws do not provide the basis upon which GAC advice needs to be provided. So if you're getting rid of the presumption, which again they don't support based on the fact that the Bylaws cover it, then why wouldn't the Bylaws also cover sufficiently the notion of providing GAC advice? Hopefully someone can bring up the Bylaws. I see them up there.

Okay. So here's what the Bylaws state about GAC advice. It's in Section X. Although I can't remember what the actual section is above that but anyway, it's up on the screen. It says that "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the Board determines to take an action that is not consistent with GAC advice, it shall so inform the GAC Advisory Committee and state the reasons why it decided not to follow that advice. Any GAC advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a

vote of no less than 60% of the Board, and the GAC and the Board will then try, in good faith, to essentially find a mutually acceptable solution."

It does contain the terms public policy matters, which Becky points out in the chat. So if you look at our text, we talk about—sorry. Can you go back then to the topic? I think the GAC quotes it. If you scroll down to the GAC. Yeah, scroll down a little more. There we go.

CHERYL LANGDON-ORR: Jeff, just making sure we don't mix up GAC and individual governments.

JEFF NEUMAN: Right. Correct. We're on the GAC comments. Yep. This is line 20. Although this is repeated by individual governments as well. So we stayed in there. Sorry, I'm trying to figure out our language. We actually go a little bit further than that in our recommendations. I don't suppose we have the recommendations up for the Draft Final Report. Obviously, it's Section 30. Okay. We're scrolling to it. Okay.

This is top of page 134. It says that "The Working Group recommends that GAC Consensus Advice be limited to the scope set out in the applicable Bylaws provisions and elaborate on any 'interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.'" And then we state, "To the extent that the rationale for GAC Consensus Advice is based on public policy considerations,

well-founded"—this is the part that they have an issue with—"merits-based public policy reasons must be articulated."

Now, we have a footnote. If you go down to footnote 190 at the bottom of the page, we, I believe, site the Amazon IRP decision, which sort of goes into some detail on GAC advice. So what the GAC and some of the individual governments are saying is that this extra language here on international and national laws and the merits-based public policy, they're saying that should be removed because that basically is changing the nature of what GAC consistent advice can be. So it's basically arguing that we are sort of limiting what they may provide GAC consensus advice on. So I did want to throw that out to see if there was any additional discussion on that particular issue. Paul, go ahead.

PAUL MCGRADY: Thanks. I don't get it. How else do governments act? Don't they act on the basis of law? I guess I don't understand the pushback here. It just seems to me that the advice should be based on law instead of not law. Help me understand. What the IPC is looking for here is not improvement. It seems like an improvement to me. Thanks.

JEFF NEUMAN: Thanks, Paul. I see Donna says, "I don't see how we can change the Bylaws." I guess what the governments would say would be that it's not just law that they can provide advice on, that they could provide advice based on just policy, which may or may not be enshrined in the law itself. Paul, go ahead.

PAUL MCGRADY: I just wanted to respond to Donna's comment that this would somehow be a Bylaws change. It's not. It's a factor within a program that's meant to bring some predictability. If we say this is a Bylaws change because it constrains the GAC in some way, but it's also a Bylaws change by saying almost anything in this programming, including like having community-based applications and having a set of criteria that the GAC can comment on. The GAC could say, "That's a Bylaws change because what if we don't like your criteria for community-based applications, you're changing the Bylaws on those." It's not a Bylaws change, it's just another factor in the program. So I don't see it as a Bylaws change and I don't think a Bylaws change is necessary. Ultimately, if we put this in here and it goes to the Council, the Council adopts it, the Board adopts it because it's completely reasonable to say that government should act based on law instead of not on law, that the GAC can file an IRP, I guess. So do whatever get does if they don't like the Board action. I have yet to hear an explanation why not law is better than law. Thanks.

JEFF NEUMAN: Okay. I did see some hands, although they might have went down. Donna? Okay. Yes. Donna, please go ahead.

DONNA AUSTIN: Thanks, Jeff. Donna Austin from GoDaddy registry. I don't know whether we did this, but if we go back to 2012, I think the GAC Early Warning mechanism was particularly helpful to applicants.

The requirement that any Early Warning be and have some kind of national law or international law, that position that really, really mattered. My sense from a GAC Early Warning is that that ability to have dialogue with a government that had a problem with the string was really helpful for the applicant. But I think on the GAC consensus advice, when that came through after application has been submitted, I think that was certainly problematic. And I appreciate Paul getting to there because the GAC, when they initially objected to some of the strings, it was absent any rationale at all. I think we're aware of a couple of strings that were very sensitive but the advice wasn't based on anything that was tied back to an infringement to law or something like that. So, maybe there's a problem for us in putting the GAC consensus advice and the GAC Early Warning into one bucket. Because for me, with the GAC Early Warning, I actually agree that I don't think there's any reason for—and I don't think GAC Early Warning came through. I think it came through as individual government Early Warnings. I don't recall any actual GAC Early Warning. So I think there's a distinction here and I think I agree with Paul on the GAC consensus advice when it's provided after we know where the strings are and the GAC has problems with the strings. But I think the GAC Early Warning is actually quite separate from that. Thanks.

JEFF NEUMAN: Thanks, Donna. As I was reading this—and I've been looking for this for a while—I know that we require, we being the ICANN community, or the Board requires that the GAC when it provides advice now, to provide a rationale. I just don't know where that's

documented. Maybe that's something that I can ask Becky and Avri because if we put that language in about the providing the rationale—because it's not in the Bylaws themselves. I thought it might have been but it's sort of this practice that's been adopted. But it has to be, it should be documented somewhere because they do it every time and it's expected. If we get closer to wording this in a way that is consistent with what the GAC does now, because what they're arguing—oh sorry. I agree with Donna that there is definitely a distinction between Early Warning and GAC consensus advice. So we're talking now about GAC consensus advice. What the GAC is saying, what we say as a working group is, look, the Bylaws are good enough for the threshold by which the Board would need to reject GAC consensus advice. That's in the Bylaws and that's what we say is our rationale for getting rid of the presumption. But we're sort of being then a little bit inconsistent because the Bylaws specify what can be the subject of GAC advice and we then modify that further. So the GAC is saying, "Well, if you modify that part of the Bylaws then for the program," as Paul said, "then why can't you just modify or accept the modification to the program of the strong presumption?" And so I just want to make sure we're being consistent. Christopher, go ahead.

CHRISTOPHER WILKINSON: Hi, good evening. Thank you. Jeff, it's quite difficult to follow the discussion because of sound quality and the extraordinarily small print on the screen, which you can't read. But on the discussion, look, Early Warning of applications for geographical name is not about GAC advice. It's about initiating a

bilateral dialogue between the interested parties in the country concerned and the applicant. I don't think the reference to the Bylaws in this context is particularly helpful. In my view, this Early Warning is the absolute minimum that is politically and morally acceptable as a participant in Work Track 5. We'll recall, personally, I think the protection of geographical name should be much, much stronger. Thank you.

JEFF NEUMAN: Okay. Thanks, Christopher. Is anyone else having problems with the sound quality? I just want to check to make sure. All right, I'm not seeing any. Oh, for some speakers. Okay.

I just posted on there, someone had pointed out to me. In Section 12.3 of the Bylaws, it does say that "Each Advisory Committee shall determine its own rules." I'm skipping. "Provided that each Advisory Committee shall ensure that the advice provided to the Board by such Advisory Committee is communicated in a clear and unambiguous written statement, including the rationale for such advice."

So if we had put that language in, we could cite to the Bylaws. But the language we put in is actually from the Amazon IRP case. So the question is, are we okay with the way the language is currently in the report? Well, there's three options. One, just leave the language as is. Second option is to clarify it or add some language as suggested by the IPC. Or the third option is to rather than state the merit-based wording that we used is to just go to Section 12.3 and state it the way that 12.3 states it, and then we can move on. I see those as the three options.

Anyone have any comments? All right. If not, we do need to move on but at this point, we can take the discussion to the list. But absent any real strong views, one way or the other, we'll just leave the language as it exists.

Okay. Can we scroll down to the ICANN Org language? Yeah. Okay. Is there a Board language? No? Okay. Yeah. The Board just stated, we noted that they will work together with the GAC to try to get as much or to encourage the issuing of advice prior to finalizing the Guidebook.

All right, so then if we skip to the ICANN Org language, this is some language I think we need to fix, which is just ensuring that there's consistency. So when we say GAC advice, we substitute GAC consensus advice. So we need to fix that. And I think there's a question here, which I'm not sure we want to tackle, but it asked the question of what happens when the GAC submits non-consensus advice? How is the Board or how should ICANN Org—presumably the Board—handle that? They do ask for clarifications. Actually, the first part they ask is, are applicants allowed to amend their applications if they amended because of non-consensus advice? And I think the answer there is yes. It will be allowed to make changes. Obviously, that goes out for public comment and everything else. But then the second part is, they'd like some criteria as to how to address it. And then finally, they want us to try to be clearer in the process with deadlines in response to GAC Early Warnings and GAC consensus advice. So let me go back to the chat, because I think there was some things in there. Actually, Susan, you're in the chat. I think your comment is in there and you might want to go over it.

SUSAN PAYNE: Yeah. Thanks, Jeff. Sorry. I was trying to find the section you were speaking on. I was a bit late. If you look at 12.2(a)(1), that talks in the Bylaws about the interaction between ICANN's policies and laws and international agreements, particularly where they affect public policy issues. I think that's what we had in mind when we were trying to make the recommendations. Indeed, what the IPC probably had in mind when they was suggesting a strengthening. I don't think we're seeking to constrain the role or the ability of the GAC to give advice, but it's intended to reference back to what the Bylaws do say.

JEFF NEUMAN: Thanks, Susan. Though the Bylaws (a)(1) say "or" so it says "Laws and international agreements or where they may affect public policy issues." So it's not an end, right? It doesn't say there has to be laws that they based their advice on. It can just be public policy considerations.

I think the safest way to go is that we should think about, if we do think about changing this, is to make it just closer to what the Bylaws state. But I do also want to get to some of the comments.

Donna says, "Does the GAC actually have the ability to provide non-consensus advice?" The GAC does issue a communiqué and not every part of that is GAC consensus advice. The GAC does have the power to provide its thoughts—I'm trying to use a different word than advice—and they do. And I think this is a question for ICANN, not just on this New gTLD Program, but

probably for a lot of things that what does the Board do with all of the material that's in the GAC communiqué in the sections prior to the GAC, the formal advice. So yes, it's not advice. It's an opinion and it doesn't trigger the Bylaws process, but that doesn't mean that the Board can't consider it. So I guess what ICANN Org is saying, first of all, are applicants allowed to make changes to their application the registry voluntary commitment in response to what the GAC says in its communiqué—let's say it's not a formal advice—and the answer is yes. They just have to provide for any change to an application. They applicant needs to provide its rationale and it goes to a public comment period, etc.

Okay. Paul is asking, "Go back to ICANN Org."

I think on the process and deadlines for application for responses to GAC Early Warnings and/or GAC consensus advice—and when we say GAC Early Warnings, I think it was Donna that said it right that it was generally one or more governments that filed that—even though we call it GAC Early Warnings, it's not generally filed by the GAC. Karen, go ahead.

KAREN LENTZ: Thank you, Jeff. This is Karen Lentz from ICANN. The term non-consensus advice may be a little confusing but I think what it's trying to get at is in Module 3 of the 2012 Guidebook, there were these different paths. So, in the event of GAC consensus advice, there was one expectation. And then we have the Early Warning that has its own status, but there was this category of the GAC advice or that there are concerns about X and that was supposed to trigger a dialogue with the Board and the GAC. So the question

I think is, is the working group recommending particular actions that are expected in the event that the GAC were to issues statements like that? Thanks.

JEFF NEUMAN: Okay. Thanks. That's really helpful, Karen. I think we should take that question to the list so we can think about that. So what we'll do is document that question and send it around. I think that that context is really helpful.

I'll note that, Christopher, your hand's been up. I think it's an old hand but I just think it just wasn't taken down. But, Paul, go ahead. And if, Christopher, you do want to be in the queue, let me know.

PAUL MCGRADY: Thanks. It makes sense for it to go to the list. But at the same time, I do want to urge caution that we don't enshrine yet a third method of GAC interference with applications. The GAC Early Warning, which is the government, is mislabeled. It really shouldn't be GAC Early Warning. It should be a member of the GAC Early Warning. But there it is. It's probably too late to fix the definition or the title. And then we've got GAC consensus advice and that seems fuzzy. If we start going down the road of, if we bake into this, what do we do with every various things that GAC may utter. It's going to get super messy. So I hope while discussing the question, which was narrow, should an applicant be allowed to make a change based upon the consensus of GAC on happiness, and it seems like the answer to that is yes, but I

don't have to go start creating all kinds of sub GAC advice categories. It's too late and that's going to get weird. Thanks.

JEFF NEUMAN: Thanks, Paul. I definitely see your point. If I were to look at it from the other side, though, I would say I'd rather us specify how that fuzzy statement is treated than the Board being presented with that fuzzy statement and on its own deciding what to do. It's an interesting balance. So we'll take it to the list and discuss it. If we can provide guidance, great. If we choose not to, that's fine too.

Okay. Let's move on then to the final topic for today, which is the Role of Application Comment. This one is, again, all the recommendations are supported by the Registries, the BC, INTA, some individuals, and then there are some that supported it or said it's not ideal but still supporting it, and then a bunch that just don't have an opinion. But there are some that do not support certain aspects. And the first one is one that we are all familiar with because we've talked about this, though I don't think we've necessarily resolved, and this is a comment from Jamie Baxter. In fact, this does come up in other comments, too. And we started discussing this actually during the public comment period because we knew that this was going to come up, and this was that there is a public comment period in general for all applications. In 2012, though, whether intentionally or not, there was this separate comment period for community-based applications that were going into CPE or Community Priority Evaluation. We've talked many times about the fact that this second type of comment period was left open the entire time. And so it was in fact a couple years between when some filed comments in that special

comment period. We have been clear in the recommendations that we need to set a definitive time period for comments for those applications that are going to be subject to CPE. The part we haven't decided yet is whether that comment period must be aligned and the same amount of time as the normal public comment period. So, all comments regarding applications need to be filed during that main public comment period. That's the question. Jamie, go ahead, please.

JAMIE BAXTER: Thanks, Jeff. I think if we go back to the top of this call when we were talking about the Independent Objector and the fact that the only way they would act on a community objection is if there was substantial enough comment from the application comment period, I don't see how we can move this application comment period to any other time because it needs to be aligned with when the objections actually happened. So I really think that's a horrible idea. I think it needs to be the one period at the beginning that was outlined in the 2012 Guidebook for the reasons that just make perfect sense. Thanks.

JEFF NEUMAN: Thanks, Jamie. I think that's supported. If we scroll down, I want to say it was the ALAC but I'm not 100% sure. Yes. Okay. It was the ALAC. If we go back to the discussions we had several weeks ago, it did seem like the working group was leaning towards merging those two comment periods or actually just making sure that there's one comment period and that you had to include any comments that you want it to be taken into consideration during

CPE, whether you support or object to the community application or the designation of that application as a community application.

Now, I will note that not only were their comments against communities that were late, but there were also comments of support that were late. So if we do combine them, we're saying that letters of support also must be in with the application or during that public comment period itself.

Jamie is saying, "To be clear, there were never two application comment periods. They just never closed the main one off. Therefore, when applications were going through Community Priority Evaluation, since the comment period was left open, the people that supported or objected put comments in to that ever open period."

Like I said, I think we were heading towards having that single comment period. I went back to the Applicant Guidebook section on the public comment period, and it did say that ICANN was going to leave open the comment period. Not exactly sure why it doesn't really specify a rationale as to why they were going to leave it open, but it does say that they're going to leave it open. So they did act in accordance with the Guidebook.

So let me ask again. Are there any objections to having us specify that there only is one comment period and that all comments must be submitted during that comment period if they want it considered by the evaluators for any type of evaluation, whether that's an initial evaluation on something technical or whether it's CPE or whether it's anything else? Did anyone object to us issuing

that as a recommendation? Because again that's where it seemed like we were heading.

KATHRYN KLEIMAN: Jeff, I have a question. This is Kathy.

JEFF NEUMAN: Sure. Go ahead, Kathy.

KATHRYN KLEIMAN: I could misunderstand this, but it's my understanding that in the CPE process, there may be new information that's provided along the way, including a report by the evaluators of some independent research that they've done. I thought we had talked that that might also have some ability to go out for public comment or at least to receive comment. Certainly the applicant will be commenting, but could others comment as well? That would be a comment then that would take place after this period ends. So let me ask the broader question: is there information that could come in in a CP Evaluation that would be subject to public review? Thanks.

JEFF NEUMAN: Yeah. I think if I'm remembering our recommendations, I'm pretty sure what we said is that the applicant and those either offering letters of support and/or opposition could get clarified. Well, certainly the research will be provided to the applicant but the others could get clarifying questions to their submission. So, the short answer is no. There's not a general open public comment

period but there may be opportunities for those that have already submitted letters of support and/or opposition to provide clarification.

I think Emily or Julie, whoever's got the screen, is going to our recommendations on communities. No this is on public comments, right? Okay. Sorry. There's some comments in the chat. Kathy is that an old hand, or should I go to Anne?

KATHRYN KLEIMAN: Old hand, Jeff.

JEFF NEUMAN: Okay. Anne, go ahead.

ANNE AIKMAN-SCALESE: Thanks, Jeff. I think I always thought that if there's independent research when we did that policy work, and we stated that the evaluator would have to notify the applicant that they were going to rely on that independent research, I think I always assumed that we were talking about advice to the applicant that was public in nature. It might be very prejudicial to an applicant if they were not allowed to solicit additional public comment on independent research that the applicant disagrees with. You can put the applicant in a position of not being able to generate any new support for the application if that independent research is adverse.

JEFF NEUMAN: Well, we do see the applicant. Certainly the applicant can respond. But that's very different than saying it's open to anyone in the world that wants to respond.

ANNE AIKMAN-SCALESE: But are you now saying that the applicant can get other people to provide comments but that that's not public information? Because that seems vastly not transparent. In other words, if you're saying, well, the applicant can have other people file letters in support of them, but the public could not comment, that does not seem like a fair process. I mean, if third parties can comment on the independent research then third parties ought to be able to comment on it both ways.

JEFF NEUMAN: Emily put down to the sections. Emily, there's also a comment on the independent research question or if they rely on independent research, if you can find that recommendation.

Anne, what we're saying is clarifying questions generally go to the applicant. But in this case, we also said clarifying questions can go to those filing letters of support and/or those filing letters of opposition, but they don't go to the public. Clarifying questions, they don't go out to everyone in general. Now, whether it gets posted or not, that's something completely different. But that's not saying that public comments being solicited from everyone in the world. I think that might be really prejudicial to the applicant if you just opened up a worldwide global public comment period on clarifying questions that came out.

ANNE AIKMAN-SCALESE: Yeah, Jeff. Just to follow up. I'm not talking about clarifying questions per se. I'm talking about the provision that we did the policy work we did to probably check the applicant, where we said that if independent researchers developed and we narrowed the ability for the evaluator to seek independent research, and we said that if the evaluator intends to rely on it, the evaluator needs to notify the applicant that independent research. I think it's within 30 days before rendering a final decision. So I'm not talking about clarifying questions. I am talking about the new policy work we did on notifying the applicant of reliance on independent research.

JEFF NEUMAN: Right, right. Yes. That is provided to the applicant. Emily put the text into the chat—it's Recommendation 34.9—where the applicant itself is given 30 days to respond. But not it only goes to the applicant. It doesn't go to anyone else. Remember, it's evaluating the applicant. This is not a community-based objection. This is not multi-party proceeding. So yes, the applicant does get a chance to respond. And if the applicant wants to include information from third parties in its response, sure, but that's not an open public comment period.

ANNE AIKMAN-SCALESE: Okay. So you're saying that that document that goes to the applicant is not public.

JEFF NEUMAN: I don't think we've said one way or the other, whether that would be public eventually or not, but certainly this is intended to give the applicant a chance to respond. But this is not an open public comment period.

ANNE AIKMAN-SCALESE: And you're saying, though, that it's implied that the applicant can develop third party comment when it responds to that independent research. So it seems like either just the applicant can respond and no third party should be able to respond in support or against or that it should be public, and third parties can respond to the reliance on independent research.

JEFF NEUMAN: Sorry, Kathy. Yeah. Look, it is the applicant's response.

ANNE AIKMAN-SCALESE: My name is Anne.

JEFF NEUMAN: Oh I'm sorry. What did I say? I'm sorry. I was reading Kathy's comment, who agrees. Sorry, Anne. Compared to a lawyer, it's the party that submits the brief, but if the party wants to include an affidavit from a third party in its brief, it could do so. This is kind of a similar thing. It is the applicant that is responding, but if it wants to include a letter from a third party as an exhibit to their response, they can do that. We're not saying it's open.

ANNE AIKMAN-SCALESE: Excuse me. But if you're comparing to lawyers and proceedings that can be adverse, both sides get to supply evidence. So comparing to a lawyer doesn't really help in terms of the transparency of the process. You would take [inaudible] from both sides if you're talking about lawyers. Heaven forbid. I don't think that these details were actually worked out in policy work, and so it's good that they're being addressed now. But certainly when we were doing this work, my assumption was that that notification from the evaluator of intent to rely on independent research would be public and might solicit further comment.

JEFF NEUMAN: Okay. That was not my assumption, obviously. What we stated was that it would be provided to the applicant, and the applicant could respond. That's what we say. Let me go to Jamie, but obviously we can change that if people feel otherwise. Go ahead, Jamie.

JAMIE BAXTER: Thanks, Jeff. I think maybe it might help to sort of put in perspective why this is an important distinction going forward, and that is because it's important to understand that when application comment comes in, it has multiple implications. Some of those implications occur during objections. As we pointed out, the Independent Objector may get involved based on some of those public comments and file community objections. But those comments also will then be fed into the final CPE scoring, which happens during CPE, which, as we all know, doesn't happen until after objections are over. The point to all of this is creating a level

of fairness for all applicants so that there's only one period when comments come in, even though some of those comments don't get used until a later process. It's not the community applicant's fault that ICANN has decided to put community evaluation at the end of this process. That's just happens to be the way they decided to do it. So, why should the community applicants be subjected to a longer applicant comment period just because of a decision that ICANN made about process? That is the point to all of this. I think that the discussion that you're having, Anne, I don't know that I fully understand it, but I don't think it's on point to what this is trying to address. Thanks.

JEFF NEUMAN: Thanks, Jamie. Thanks, because I do think we need to pull it back. I think Jamie's point is the right one. Now, when we get to communities and CPE, we can potentially have that discussion again, Anne. But for this, I think we should just talk about the narrow point that Jamie is bringing up, which is that there should be one public comment period, and that public comment period is one in which it's the same for any of the evaluations and that it's not longer or shorter for any other type of evaluation. I think that's the limited recommendation here. I think there's some agreement with that. So we'll write up something on that, and then I will send that around to the group.

There's a question that's raised by the ALAC which states that—if we scroll down to line 15. Sorry, line 1. I skipped Flip's comment. So Flip has a comment where he says that "We support Recommendation 28.13 which pertains to submitting information about confidential information of an application." However, they

recommend adding that if such information is submitted, being confidential information, the applicant should be fully informed of the submitted information and be able to respond through the same mechanism. So this relates to third parties submitting confidential information during the comment period. And I think this is a good clarification.

Can we go to the recommendation for 28.13? Just so people can see it in front of them. It says, "ICANN must create a mechanism for third parties to submit information related to confidential portions of the application, which may not be appropriate to submit their public comment. At a minimum, ICANN must confirm receipt and that the information is being reviewed." What Flip adds to this—if we could scroll back—is that the applicant should have the ability to respond to that. We do talk about an applicant being able to respond to all public comments, which we'll get to in a little bit again, but if something is submitted confidentially to ICANN, we still think that the applicant should be able to respond to that confidential information. So I think that is a helpful clarification. The Leadership team discussed it and thinks that we'd like to include that in there because it's consistent with other areas.

Then the ALAC asks about what are the consequences of a commenter, it says during the public comment period, of a commenter found not to have disclosed the relationship with an applicant. So we say anyone who's making comments must disclose whether they have a financial or other interest in another application. But we don't say, "What's the penalty if it's not?" And do we want to put in a penalty, something like, the comments shall not be taken into consideration, something like that we could put

in there. Any thoughts on that? I think that would make the most sense. Paul, go ahead.

PAUL MCGRADY: Hey, Jeff. I'm sorry. I'm trying to do too many things at once. Who made this recommendation? Which one are we looking at?

JEFF NEUMAN: It is the recommendation from Flip and it relates to the fact that we have a recommendation in our report that says, "Third parties may submit comments to confidential portions of the application." And I think this was originally a recommendation from you, Paul. So that ICANN needs to acknowledge, because that wouldn't be submitted through the public comment period, necessarily, through the system. Then ICANN needs to acknowledge that it received that. What Flip is adding is, "By the way, the applicant should be able to respond to that."

PAUL MCGRADY: Sure. But you were tacking on something to Flip's recommendation about the third party comments not being considered. I don't see that in Flip's recommendation. That's where I got confused.

JEFF NEUMAN: Okay. The ALAC has asked a question. Sorry. You're right, two different ones. Sorry. The ALAC comment is that we say that anyone that submits a comment—sorry, forget what I said before

about confidential comments. But the ALAC is saying anyone that submits a comment, our recommendation is that they need to disclose if there's a relationship with another applicant when they file their comments. So the ALAC is saying, "Okay, well, what's the penalty if they don't disclose that?" Does that make sense, Paul?

PAUL MCGRADY: I guess the answer to that is that whoever's job it is to read the comment will decide how much value to give the comment based upon the commenter's inability to follow basic rules. But I don't know that we should be in the business of deciding up front what the penalty should be if somebody makes a mistake and it doesn't disclose a relationship, or even tactically doesn't disclose a relationship. This is a 600-page, 800-page document, right? So I would say that that should have an effect on the reader and whoever it is that gets the way the value of that comment. But throwing comments out up front, there's just too many scenarios where something could be done. Thanks.

JEFF NEUMAN: Okay. Good point. All right. That makes sense. So we'll just kind of note that one. The ALAC also has a comment about giving the applicant a reasonable time after the close of public comment period to address the comments that were received, which I think is our recommendation anyway. So that's noted.

Then finally, I want to just note a bunch of ICANN Org comments that really a lot of them are clarifications, implementation details,

but I don't think they bring up any kind of new policy. They talk about that it's difficult for them to validate who's submitting comments but we just talked about them using their reasonable efforts to confirm the identity of the applicant, which I think is similar language that's used, interestingly enough, in the Registrar Accreditation Agreement when registrars have to confirm the identity of a registrant. So I think we'll note those. But at the end of the day, I don't think there's anything for us to change. But I do think that there is some information that should be provided to the Implementation Review Team to consider these. Anne, is that a new hand? Sorry.

ANNE AIKMAN-SCALESE: Yes, Jeff. I just want to agree with your summary regarding the ICANN comments and the IRT. I would like to ask for setting a 30-second timer, in honor of Marilyn Cade, silence.

JEFF NEUMAN: Okay. Yeah. Thanks, Anne. After we finish this up, we'll do that 30 seconds. I think that's nice. Let me just ask if there are any last questions on this. Okay. So then, as Anne has said, let's just pause for a few seconds to remember Marilyn Cade who gave a lot to our community.

Okay. Thank you, everyone. We had a very productive call. If we can post—there we go. Michelle has posted the next meeting time for Thursday, November 12 at 20:00 UTC. Please do keep checking e-mail for questions. I agree with everything on the chat that Marilyn is certainly one of the pioneers of not just ICANN but

Internet governance as a whole. Yeah. So let's all just reflect on that and reflect on how precious life is. So with that, hopefully everyone will have a good beginning and middle of the week. We will talk to everyone on Thursday. Thanks.

MICHELLE DESMYTER: Thank you, Jeff. Thank you, everyone. The meeting has been adjourned.

[END OF TRANSCRIPTION]