ICANN Transcription
GNSO New gTLD Subsequent Procedures Working Group
Monday, 20 April 2020 at 15:00 UTC

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MICHELLE DESMYTER: Welcome, everyone. Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures Working Group call on the 20th of April, 2020.

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

As a friendly reminder to everyone, if you would please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise.

With this, I will hand the meeting over to Jeff Neuman. Please begin, Jeff.

JEFF NEUMAN: Thank you very much, Michelle. Welcome, everyone. Hopefully, you can hear me okay. This is Jeff Neuman, and this is the SubPro PDP call on April 20th. Today we will continue discussing the limited appeals challenge mechanisms and then hopefully move on to at least if not more of the remaining topics, which

include the post-delegation dispute resolution procedures, not to be confused with the PDDRP, which is in rights protection mechanism. We'll talk about that, not the RPM part but the non-PRM dispute processes. Then we'll talk, if we take time, on reserve names and different TLD types.

Before we do that, let ask to see if there are any updates to statements of interest, and then I'll just cover some administrative items. Any updates?

Okay. Not seeing any. First thing I wanted to do is just remind everyone that the first package for final review went out last Tuesday. So far I know we've gotten an e-mail from Justine with some comments on using the form. Thank you, Justine, for doing that. We've given until the end of the day tomorrow, I think, UTC time to get in your comments to that and then putting that in the proper format.

If I can ask—sorry, ICANN policy, just to put you on the spot—if you could just plug in the link of where you're going to put the comments so everybody can see them. I know we're putting them on e-mail but we're going to set up a master list of comments so that you could see that as well. So let's just give it a minute to do that.

Jim, go ahead.

JIM PRENDERGAST: Thanks, Jeff. Actually that was my question because I inferred from your e-mail this morning that comments would be posted at that link as they come in, but they weren't yet. So I just wanted to

confirm that that's where they would be, not someplace else. Thanks.

JEFF NEUMAN: Thanks. Emily has—thank you, Emily—just posted the comment of where the comments will be. Obviously, Justine's just came in. Please give a 24-hour turnaround time for ICANN policy to get that up on the wiki. As Emily says, she'll post the comments today.

Again, if we could get all of your comment in that form by the end of the day tomorrow, UTC time, that would be great. At some point later this week, we hope to release the second package of materials. Please do keep a lookout for that.

Also, I know that Anne has posted a couple messages on the list. I think it was on the list and not just to myself and the leadership team, but, in case not, Anne has asked if we could invite the Name Collision—NCAP group—Analysis Project—that's it—leaders, well, and anyone in the working group that wants to come to our call on name collisions. We've noticed that the day we scheduled it for, April 27th, may not be the most convenient time for the chairs, so we may reschedule that discussion on name collision at a time that'll be a little bit more convenient, perhaps, to at least the chairs of the NCAP group. Stay tuned for that. We'll let everyone know shortly.

I think that's all the administrative items. Why don't we go to the appeals? As that gets brought up on the screen, we spend a significant amount of time on the last call talking about certain types of evaluation challenges. We got most of the way through it.

We're spending a lot of time on this chart because this chart is referenced in a number of recommendations and implementation guidance that were given on the evaluation challenges and the objection appeals. We'll go back to the written document after we finish going through this chart. I just wanted to give everyone the context. This chart is going to be included with the draft final report.

We left off where we hadn't started yet on applicant support. Applicant support, as you all know, is a particular type of evaluation. We went through that section a few weeks ago. At the end of the day, if you are denied applicant support, you will still have the opportunity to reinstate your application as a non-applicant support TLD application, assuming you can get the rest of the funds in. So it's not you're going to be disqualified from the program but, that said, if you are determined not to have met the criteria for applicant support, you still might not be happy about that decision and you may want to challenge that evaluation.

The affected parties: obviously, the applicant. The applicant is the person or entity that we believe would have standing. Again, like we discussed on the last call, if there's an entity or panel that is in place to evaluate the supports, then someone other than one who had discretion to make the decision will have to serve as the arbiter of the challenge. Of course, if the applicant does convince a panel that the decision as clearly erroneous—we'll talk about the standard in a couple minutes—then they would be eligible to receive funding for the applicant support.

We discussed the option previously of whether there was any room for standing for any other party that could challenge. Let's

say there was someone else in a contention set that was created, and the decision that we came to was that, no, the applicant support decision was not something that should be challengeable by anyone other than the applicant. So it didn't make sense as much as maybe someone in the contention set would like to have every avenue to challenge other entities in a contention set. It just didn't seem to make sense to give that party standing in this type of evaluation decision.

Let me just stop here and see if there's any comments. Maxim says, "ICANN does not seem to contract persons, so it has to be an organization."

I think, Maxim, that the panel for applicant support was a number of individuals, if I'm not mistaken. I don't think it was an entity, but I don't know anything about how they were contracted, if they were contracted. I think the principle is pretty clear: you don't want any person that had input into the ultimate decision to be the one that's presiding over the challenge.

With that, let me go to Justine and Christopher. Justine, please go ahead.

JUSTINE CHEW: Thank you, Jeff. I recall also that the SARP (Support Applicant Review Panel) was made up of five individuals, and they were selected based on regional dispersion, based on the ICANN regions. As to the actual process, I think there was a call for expressions of interest, and then there was a review and so forth.

But what I wanted to say is that we probably should make a note that, if, in the next round, we're going to rely on the same mechanism of SARP, then there might need to be consideration for enlarging the panels—the number of panelists—because, in the last round, you had the five panelists, and they all partook in the decision and evaluation. So, if you have alternative panelists, you're looking at the five same people who made the decision to review their decision. Thanks.

JEFF NEUMAN: Thanks, Justine. That's a good point: the panels that are constituted need to have the ability to hear these types of appeals. If that means having extra panelists, then they need to do so. We might want to put a note in there, in the applicant support section, that … Well, I'm not sure if it'd be in the applicant support section or here—we'll figure out the right place for it—to make sure—I guess it's the applicant support section—to make sure that a panel, however they constitute the panel, needs to have some person or persons that are dedicated to hearing challenges that may not be involved in the actual decision. As Maxim puts it, they either standby, ready panelists or something like that.

Christopher, go ahead.

CHRISTOPHER WILKINSON: Good afternoon, everybody. Jeff, I'm giving some thought to this issue, and I'm not yet prepared to go into it in any detail. The main point I would make at this stage is that, as far as I understand, in 2012 applicant support, which by

and large was very little, granted, was limited to a discount on the application fee per se. I think one needs to take a broader view of this in the context of its financial evaluation of the viability of the application. I think a discount on the application fee provides very little leverage, neither for ICANN nor for the applicant, to ensure the financial success of the application. This needs further review. I'd refer this forward to a future date. Thank you.

JEFF NEUMAN: Thanks, Christopher. If you want to just take a look at the applicant support section itself, the applicant support section does have a number of other recommendations for additional elements other than financial support of the application, including legal help, writing the application, legal help in general, consultants, backend providers—all that kind of stuff. So that's where we cover all of that. If you have other things that you think were left out, please do let us know.

CHRISTOPHER WILKINSON: Okay. I think the whole issue of third-party funding has been left out so far.

JEFF NEUMAN: Okay. Let's then go to the next one, which is the RSP pre-evaluation. Now, this is very similar to the technical and operational evaluation we talked about, which is Row #--where is it?—12, I think. Yeah, Row #12. Essentially, the RSP pre-evaluation is the technical and operational evaluation just done prior to an applicant actually submitting an application for a TLD

string. So it should be no surprise that, if an RSP fails, it's not going to be happy.

However, the difference is that there's no requirement for an RSP to be pre-evaluated. Therefore, if the RSP fails the pre-evaluation, then it will not be, obviously, pre-evaluated, and obviously the RSP would not be thrilled with getting that lack of that designation.

So what we discussed was having a challenge mechanism for an RSP where the registry services provider could file this challenge and, if it succeeds, if could then be designated as pre-evaluated. I think that makes a lot of sense. Again, as with applicant support, the RSP pre-evaluation we didn't think would or should create any kind of challenge mechanism from any sort of third party. That's a private matter between the RSP, ICANN, and the evaluators.

Any questions on that?

Okay. I want to go then to—oh, Jim. Go ahead.

JIM PRENDERGAST: Sorry. Double-unmuting. Sorry about that. I'm curious. Do we anticipate ICANN using a third party to do the evaluation for the RSP pre-evaluation program?

JEFF NEUMAN: I think we had a couple discussions way back on whether ICANN could do any of this itself or whether it had to farm out all of the evaluations. I don't think we decided to make any sort of decision on that—that that's really something for ICANN—but I think you

and I both, knowing ICANN's history, would likely outsource something like this. But who knows if they're building this in? But we can probably assume that the same party that does the technical and operational evaluation during the regular application period probably would be the same as [what does it here].

JIM PRENDERGAST: Right. Let me play this out for one second. ICANN outsources it to a third party. A third party deems a registry operators as not qualifying. Given that there's going to be a ton of applicants that probably go through a pre- … How many parties do we think are out there that are capable of doing this type of evaluation if in fact it does go to an appeal? Or are we just talking about such a small number of cases that it won't matter? I'm just making sure we got a bench for the appeal process of technical evaluators as opposed to the one that ICANN as chose to do the primary evaluation.

JEFF NEUMAN: Thanks, Jim. I know, in the last round, they've hired two firms to do technical and operational and then hired a third one to make sure of consistency between the two firms. So they actually ended up hiring three entities.

JIM PRENDERGAST: Okay.

JEFF NEUMAN: Now, look, that's totally up to the discretion of ICANN based on what it thinks it's going to get in.

JIM PRENDERGAST: All right. I forgot there were three. I thought there were only two.

JEFF NEUMAN: I think there were two that did the actual evaluations, and the third was more of the consistency check. One of the firms, like KPMG, I think, applied for TLDs, so they obviously couldn't review their own. So they may have had that third one act as the second one to just check.

Christopher, go ahead.

CHRISTOPHER WILKINSON: Thank you again, Jeff. Very briefly, my understanding is that the existing RSP market is really rather concentrated. The technical aspects of making this evaluation are quite specific and not common. In that context, I would say that, prima facie, there's considerable scope in the choice of evaluators for conflict of interest. I think ICANN will be aware of that, but we should be conscious that there is the existing model that leaves it open to a certain amount of conflict of interest, unless we're very careful. Thank you.

JEFF NEUMAN: We're going to talk about conflict of interest. It mostly arises out of the objections and appeals. But we do, in other places, talk about

conflict of interest and making sure that evaluators and others do not have any conflicts. So, as you said, ICANN does take that into consideration in their approval of vendors.

Let's go to objections, the next tab. Conflicts will come up again, as you will see. It's the last one, but we'll go in order here and then talk about conflicts after. Each of these objections can have elements of conflicts with the arbiters. Just keep that in mind. We'll save those discussions on conflicts until after we talk about all the individual types of objections and appeals from these objections.

Paul, go ahead.

PAUL MCGRADY: Thanks. Jeff, can we go back to the evaluation procedures for a second? There was one that I wanted to revisit before we move to the next tab, and that is the background screening. We had left that with that people that had standing would be the applicant and members of a contention set. We had left third parties in bracketed text. That was my suggestion. I have been ruminating on that, and I believe that, if the applicant and if the members of the contention set have standing, then the third-party thing can go away. I think that that might cause more mischief than it's worth. I think, if we had said no to members of the contention set but said yes to third parties generally, then maybe keeping it made sense. Since I suggested it, am I allowed to withdraw it, or does it just sit there? Thanks.

JEFF NEUMAN: I would be happy for you to withdraw it, but let's obviously ask others on the call. You were the one that suggested it, and that's why we have it bracketed. Let's see if anybody else on the call would object to removing that text.

I'm not seeing anyone with hands raised or anyone that disagrees, but Justine is asking the questions, "How would third parties put up a challenge?"

Justine, what I think Paul is saying is that third parties would not be able to challenge a successful applicant background screening unless that third party was also a member of the contention set. I should say it a different way. If you are a member of the contention set, you can challenge the background screening—a positive background screening—result of an applicant, but no one other than the members of the contention set can. Obviously, the applicant wouldn't challenge its own success, but a third party would not. Justine, go ahead.

JUSTINE CHEW: Thanks, Jeff. I understand where you and Paul are coming from, but I just wanted to be reminded of what might be the alternative recourse channel for a third party in such a situation if you do not allow the parties to challenge here. In the last round, we did have some—what was it?—filings to say that certain parties should not have past background screenings, but they did. So there was obviously a need for challenge. My point is, if we're not going to allow them to challenge via this mechanism, then where would they go? Thanks.

JEFF NEUMAN: The people that challenge the background checks were, for the most part … Well, any third party can make public comment, as Paul says. So you can always make comments and you can always have that considered by the evaluators and ICANN, but the bulk of the comments last time were filed by other members of the contention set.

Sorry. Just seeing if there's anything in chat. Anne is saying, "What is the ALAC wants to challenge?"

First of all, the backgrounds screening is all confidential, so it's not like applicants are going to see the financial background or the credit checks or the criminal checks of the applicant. I think at some point we need to take a step back and say, "Look, do we really need everybody being able to challenge everything?" If then ALAC wants to challenge based on any of the objection processes, they can certainly do that, but to allow any third party to make challenges to evaluation results, I think, would go a step too far.

For example, you have string similarity. You have DNS stability. You have financial evaluation registries services. Of none of those do we say a third party, except for the governments in a geographic, has the ability to challenge an evaluation result. I think that's the right result. I don't think, other than probably filing public comments, we should create a procedure for anyone and everyone to be able to file. I'm not sure, in this case, why the ALAC would be any different than the GNSO or the SSAC or any other organization that would in theory want to challenge anything.

Justine says, “It’s the history of cybersquatting behavior that I’m concerned with.”

Justine, you can always file things in the public comments, where that can be looked at by the evaluators. But, again, the evaluators are supposed to take that into consideration.

Christopher, and then I have Justine. Christopher, go ahead.

CHRISTOPHER WILKINSON: On this point, I fully sympathize is Jeff’s circumscription of what could or could not be contested by third parties. The problem is that, last time around, the combination of the vast volume and excessive volume of simultaneous applications and the ex post facto results [means] that there’s a serious lack of confidence in the evaluation process, per se. I think we need—I’ve spoken to this in other conference calls—a far more rigorous, timely, and resourced evaluation process which can produce defensible results that, by and large, succeed. Thank you. That’s not my impression of what we’ve got at present. Thank you.

JEFF NEUMAN: Thanks, Christopher. Justine, go ahead.

JUSTINE CHEW: Thanks. Look, I’m happy to concede to Paul’s withdrawal of the reference to third parties here. I just want a little bit more time to

think about the consequences of that, but I'm sure it can be addressed elsewhere. Thanks. So you can just carry on.

JEFF NEUMAN: Okay. Thanks, Justine. Let's go to objections. I think these are more straightforward than the evaluation ones because, in each of these objections, you have two parties, or at least two parties, and you'll have a clear winner and a clear loser. I think "loser" is not the right word: you'll have a clear prevailing party and a clear not-prevailing party.

In a string confusion objection, we can have three different types of parties. Always an applicant will be a party to the objection. It will always be the challenged party. Then you can either have an existing TLD operating challenge to the applicant, or you can have another applicant that challenges the original applicant. So, if an existing TLD objector challenges an applicant, the existing TLD objector—remember—is saying that the applicant's applied-for string is confusingly similar with a TLD that already exists. So, if there's a finding in favor of the existing TLD objector, then the applicant's application is thrown out. However, if you have another applicant challenge an applicant, then the result of the string confusion objection would not be that the applicant's application is thrown out but rather than the applicant's application is put into the same contention set. So each of those is going to have different ramifications.

So, if an applicant loses, the string confusion to an existing TLD objector, then they will want to appeal because their application is thrown out. If they appeal and they succeed, then the application

would be reinstated. If it's a determination that it is confusingly similar to another application, then the applicant could appeal. If it appeals and wins, the application would be removed from the contention set. Hopefully, that makes sense.

Let's go through the applicants, as we did. The applicant would obviously have standing if it loses the objection. Who would bear the cost? For all these appeals, we say it's a loser-pays model. We'll talk a little bit more about the independent objector and the ALAC a little bit further down. But, for the string confusion, it's a loser-pays model. If an existing TLD objector challenges, and the existing TLD objector loses, which means that the application is allowed to proceed, the existing TLD objector can appeal. If it wins the appeal, the application would not proceed. If another application files an objection and loses the objection and decided to appeal and is successful on appeal, then the string would be put into the contention set. It sounds much more confusing just talking about it without a chart in front of you, but, given that the chart is in front of you, hopefully it makes sense.

Let me just see if there's any questions on the string confusion before we get to the Notes column.

All right. Let's scroll over to the Notes column, which I see is on the screen. It's really, really small. What we wanted to talk about is when these appeals needed to be filed. What we had said originally was that the proposal must be filed within 15 days of notice of the objection decision, but others proposed saying, well, maybe you should have 15 days to just signal whether you intend to file an appeal and then have another 15 days to actually pay

and file the appeal, which seemed to get a lot of support on the list.

Let me just see if there's any thoughts on that particular proposal because it appears throughout each of the different types of objection appeals. Any thoughts? Anyone prefer the bracketed language versus the original? I think, from looking at the list, it seemed like more people supported the bracketed language, but I want to leave it open for discussion.

We have at least Justine saying a +1 for the bracketed. I'm going to go with my gut then, since people aren't speaking, to just say: let's go with the 15 days to signal the intent of appeal and 15 more days to pay and file.

Jamie says, "That's good, too." And Paul. Okay, good. And others as well.

So let's go with the bracketed language for each of them. My guess is that, for each of these appeals, they'll probably ask, like was done in the case of objections last time, for each party to put the fees in upfront and then refund the fees to the winner.

Jamie says, "It also gives an opportunity for dialogue between the parties." That's a good point.

Moving to the next type of objection—this is the legal rights objection—in a legal rights objection, a trademark owner is saying that they have legal rights in the string and that, if they succeed in a legal rights objection, the application is thrown out because it infringes on the rights of that third-party trademark owner. If that is the objection result, then an applicant could appeal to have the

application reinstated. If the objection does not succeed—the applicant actually won the objection—then the original objector can then appeal if it so desires. If the objector then wins on appeal, then the application would be thrown out. It does not proceed. The loser pays again, and same thing with the 15 days to signal intent of the appeal, and 15 days then to pay and file.

Thoughts on that one? I think the appeals—at least these types of appeals; these two—are pretty straightforward. I think, of the limited public interest objection, some of it is straightforward. Some of it we're going to have to talk about because of who is allowed to file an objection. Same thing with the community objections. So one at a time.

If we go to the limited public interest objection, remember, that could be filed by any third party—the objection itself—or it could be filed by the independent objector.

Let's talk about a third-party objector first because that's the easier case. If there's a third-party objector and the applicant loses—because that's the first line; Line 8—then the applicant would have standing to appeal. If it appeals, this is what it's appealing: a determination that the applied-for string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law. That was the same standard as 2012. If the applicant wins on appeal, its application is reinstated. If a third party objects and a third party loses, then the third party could appeal. If it wins the appeal, then the application would be thrown out. Again, it's loser-pays. So that part of it is straightforward. Same thing with the 15 days—notice of intent—and the 15 days then to actually appeal.

Now we get to the harder one, which is the independent objector. Unlike the previous types of objections that we've been talking about, this one allows an objection to be filed by the independent objector. We had a number of conversations about whether the independent objector whose objections are paid for by ICANN should have standing to file an appeal, and, if so, who pays the cost if the independent objector loses? Because we still have a loser-pays model.

For this one, what we said—it should be in the notes; I don't know if you can see it in the Zoom room—here was—similar, I think, to the ALAC—that each of those entities are given a—I'm looking at the note here … So the independent objector is given a budget. If the independent objector can appeal within its budget, then it's fine if it's a loser-pays model. The difficulty is if it doesn't have the budget. What we're saying is that the independent objector must have an adequate budget to pay for an unsuccessful appeal. So it needs to consider that when deciding whether or not to appeal if it loses the initial objection.

Now, another difficult case is the ALAC. The ALAC is considered a third-party objector in this case, except that ICANN agreed in 2012 to pay the ALAC's objection fees. If the ALAC loses its objection, what we state in here is that it should still have standing to appeal, but, if it loses the appeal, there should not be ICANN reimbursement of the ALAC. Now, I don't know how that would work in reality because it's not like the ALAC raises its own funds to do this type of thing.

So we need to talk about this. Do we just say something similar to the independent objector, where we say the ALAC should get a

budget for objections and appeals and, if it's got the budget, it could file the appeals and, if it doesn't have the budget, then it can't?

Justine is saying, "It's obvious [inaudible] the ALAC would not be able to appeal without a budget from ICANN."

I'm going to go to—I like the bake sale idea—Christopher and then Paul.

CHRISTOPHER WILKINSON: Thank you. I don't have to take time, but I would like to ask the staff to post a note about what really these costs and fees are in dollar terms, presumably, because I'm prima facie a little bit concerned that the vast differences in resources in different parts of the world will introduce a degree of discrimination which is not prima facie intended and furthermore that, in certain cases, as far as I can see from the past, the costs were really quite considerable. So I'd just like an [adminoir] from the staff as to what are the costs and fees that we're talking about here. Thank you.

JEFF NEUMAN: I think all ICANN could do to respond to that is to tell you what the costs were for 2012, which we all think were too high. We'll get to recommendations after this chart as to try to keep the cost down. The legal rights objection, I think, was $25,000. The public interest objections and the community objections were over $100,000 and, in some cases, over $200,000. We understand that's very expensive, and we're making recommendations for them to keep

costs down, including by introducing a quick-look process, which, again, we'll talk about after this chart. But I don't know if staff could provide any further guidance on the costs without knowing about each of these processes in detail, but certainly it is a comment and a recommendation that we will have: it was way too much the last time, and the cost needs to be brought down.

Paul, go ahead.

PAUL MCGRADY: Thanks. I have a question about the ALAC thing, but, before we do that, we say loser pays. Do we make it clear somewhere that that means the arbitrator's fees as opposed to the loser paying the other side's attorney's fees? I just want to make sure that we aren't saying something that were not saying.

With regards to the question of the ALAC, does the ICANN Board have to approve the ALAC filings before they go in? I didn't think so, but, if we're going to put the ICANN Board on the hook for ALAC paying if they lose, then it seems like there would need to be some sort of approval mechanism. Do we tie this issue to the ICANN Board approving an appeal? I don't know how they could possibly do that in 15 days. I'm trying to find some way for the ALAC process to be meaningful because a right without funding is not really much of a right. As I jokingly commented, it's not like ALAC does bake sales or fundraisers, so I think we do have to find some mechanism for this to be meaningful. Thanks.

JEFF NEUMAN: I think the comment on loser-pays/what they pay is important. We can just take the language from the guidebook. We shorthanded it here in this chart, but you're right: it is not attorneys' fees. It's only the actual fees charged by the third-party arbiter. So we will make that more clear. I think that's a good point.

The second thing is that we need to be careful here because … So, no, the ICANN Board did not approve, nor did it have to approve, any of the ALAC filings for the objections. There were no appeals, obviously, because this is a new thing. I understand what you're saying, Paul—a right without any funding is not a right at all—but I think the opposite is, if you have unlimited funding, then … Well, first of all, ICANN could never give unlimited funding to anyone because it would run out of funding, and we wouldn't that result either. So, as with the independent objector—I think the words here are a little misleading in the parentheses because it could be read two ways—what we're saying is not that the IO must have an adequate budget to pay for [inaudible] unsuccessful appeal for as many appeals as it wants to. What we're saying is that ICANN is going to give the IO a budget, and it's up to the IO how the independent objector spends the budget—once the money runs out, it runs out—not that the IO must have adequate funding to pay for any appeal it wants to pay for. That's not what we're saying. So we need to clarify that.

We could do the same thing with the ALAC and say, "Okay, ALAC. You get a $2 million budget (or whatever it is). You can use it however you want between objections and appeals, but, once that money runs out, that's it."

I'm just looking at the chat. Paul is saying, "So the IO is funded but the ALAC isn't?"

No, no, no. Paul, what we're saying is that ICANN will set a budget for the independent objector and say, "You have X million dollars budget. You can spend that how you see fit. ALAC, you have X million dollar budget. You can spend that how you see fit." Whether it's the same or not is up to the discretion of ICANN, and I'm sure the community will discuss this.

Let me go to Jamie and Anne.

JAMIE BAXTER: Thanks, Jeff. I think we need to dig into this loser-pays thing a lot further because what you just said isn't actually 100% accurate about that it recoups the costs of the evaluators because it's important to point out that—again, I'm only speaking of community objections here—there was an upfront $5,000 fee that everybody had to pay, both to file and to respond but, in the loser-pays model, even though that was an expense of the evaluator to put everybody in the system, that money that the winner paid to file and to participate in the objection never got reimbursed. So it's a little misleading. I think it's a flawed description. I would certainly advocate for the filings fees also being paid by the loser and being returned to the other party because the loser-pays just doesn't make a whole lots of sense if you're not actually paying for everything, in my opinion. Hopefully, I've explained that correctly. Thanks.

JEFF NEUMAN: Thanks, Jamie. You're correct: there was an administrative fee for—I'm not sure if it was all of them—community and limited public interests. I can't recall the others. There was an administrative fee, and that administrative fee was not returned.

Let's put that one to the side. Compared to the rest of the fees, that was smaller. But you're right: it was not refunded. Let's get through this particular objection and the community one, and then we'll talk just nail down whether that administrative fee should or should not be returned to the winner.

Anne, go ahead.

ANNE AIKMAN-SCALESE: Two short comments. There wouldn't be any way to have the ICANN Board approve whether or not the ALAC is going to file a limited public interest objection because that's outside the scope of ICANN's mission. There are content issues there.

The second point is just that I don't think it needs to be too complicated that ALAC should submit a budget for the funds that it needs to file the objection. That budget would have a line item for appeal if necessary. If it's not appealed, return the money to ICANN. That was all.

JEFF NEUMAN: Thanks. I don't think anyone is suggesting that the ICANN Board review the appeals. I agree. I think it puts ICANN into an advocacy position—approving the appeals language—which I agree would be outside its scope. I don't think anyone is saying that.

In the last round, just to answer Paul's question, ALAC filed a couple of objections, and ICANN paid the fees. So the invoice was just sent to ICANN, I guess, that wired the money in to the evaluators. That money was then paid to the winner if … Well the ALAC did not prevail on its objection, so the applicants were reimbursed for that.

Justine says, "No approval from [ICANN.]" Right. ALAC just gets funding from ICANN Org. "We don't receive funds. We just get ICANN Org to make the payment." That's right.

I think where we are with both the independent objector and then ALAC is that each of them will be assigned a budget by ICANN. If they have money in their budget to file appeals, they'll have to decide what objections they file and whether they have the budget to file any appeals. I think that's the same for both the independent objector and the ALAC.

Paul, go ahead.

PAUL MCGRADY: Thanks. I'm just trying to understand how it works. Justine, thank you for your comment in the chat. Right now, ALAC just has the ability to file an objection, and ICANN just pays it, right? So I guess, if that's the mechanism, then I don't know what the concern is about loser-pays because if loser-pays is part of the appeals mechanism, which is part of the you-can-file-an-objection mechanism, then why wouldn't ICANN just pay? So, from our point of view, we would just say the loser pays, and then there would be a recommendation that ICANN and the ALAC work out

how many objections and appeals they're prepared to cover for ALAC. I don't know that it's necessarily our business. We would just say that's between ICANN and ALAC, right?

Am I misunderstanding? What am I missing? Why wouldn't what we already do automatically extend to what we're recommending here? Thanks.

JEFF NEUMAN: In 2012, because the ICANN funding of ALAC was approved fairly last minute—I don't know if it was approved prior to the round opening up or it was something that was approved afterwards, but it was very last-minute—ICANN didn't have any kind of budget for the ALAC. They just said, "We'll pay." So the ALAC … It did have a budget for the independent objector and says, "This is your total budget." I think that's what we're saying now: ICANN should give a budget to the independent objector and to the ALAC and then—you're right—it's between them how they work out what objections and what appeals are filed. When I say it's between them, I don't mean that it's the Board approving anything but just that ALAC has a budget, the independent objector has got a budget, and they can't go beyond that budget. So, essentially, Paul, it is loser pays. We'll talk about what they pay in a second.

Community objection, I think, is similar in the sense that you have an application, you have a community objector (in this case), and you could have the independent objector, and you could have the ALAC. I don't see this as any different from the limited public interest objection, so I think everything would be the same. I mean, the ramifications are different. If a community objects to an

application, it means that the community does not believe that the applicant represents the community, nor does it believe that the community would support even an open application. So, if the community objects to an applicant, and the community prevails, the applicant's application is thrown out. If the applicant appeals and wins, the application is reinstated.

Now, it sounds confusing in the sense that this is not about a community priority evaluation. A community can challenge an applicant regardless of whether an applicant is applying for community status or not. Does that make sense? So it's something very different than appealing the community priority evaluation. And the same issues with the independent objector and the ALAC that we just talked about. Hopefully, this chart made sense. Again, we're going to make sure that it says the same things as then limited public interest in terms of who pays.

Anne, go ahead.

ANNE AIKMAN-SCALESE: I'm sorry. I just had to step back for a minute to where we were talking about the ALAC budgeting process. I just want to get a clarification on the procedure. They wouldn't know what budget was appropriate until the applications were in and they had determined what they intended to file on. So I'm assuming that we're not saying ICANN should just determine a fixed budget for ALAC and say, "Here it is. Stick to it." It seems like we'd have to have the applications in, and ALAC would have to let ICANN know what they were intending to challenge.

JEFF NEUMAN: Thanks, Anne. I'm not sure that's … I mean, that could be how that happens, or it could be that ICANN says … I don't think we're making a recommendation on that. I think that is a separate discussion between the ALAC and ICANN. I don't think we need to object ourselves into what that budget is or when that determination is. I think we just should, as a PDP, recommend that a budget is created and that both the independent objector and ALAC stick to the budget. I don't think we should inject ourselves—but maybe others disagree-into the when and how much.

Does anyone disagree with that?

Anne, your hand is still up. Did you want to respond to that?

ANNE AIKMAN-SCALESE: If that number is determined without reference to the number of objections that the ALAC would intend to file and appeal, then you either have too much or too little money in the budget. But are you saying there'd be a dialogue between them after the applications are filed? I'm not sure if you're saying there would be a meaningful dialogue that occurs rather than just ICANN saying, "Okay, ALAC. You have X dollars." It could be too much or it could be too little.

JEFF NEUMAN: Again, I'm not commenting on when that discussion or how that is determined. I don't think we should. I think that's directly between ICANN and the ALAC. I understand the comments you're making.

I'm just trying to be neutral here and just say that I don't think it's … There's pros and cons to any approach you take. You said—you're right—it may be too much or too little, but then, in theory, the ALAC could say, "Well, I want to file 500 of them, so give me a budget of $100 million." Obviously, that would be way too much. So I think, again, it's probably going to be between the ALAC and ICANN has to how they figure out what that budget is.

ANNE AIKMAN-SCALESE: Yeah. Okay. Well, ALAC is happy. That'll work.

JEFF NEUMAN: I don't know if the ALAC is happy. They'll let us know. They'll let us know during comments, I guess, if they're not or if they are. Hopefully, they'll let us know.

ANNE AIKMAN-SCALESE: Okay. Thanks, Jeff.

JEFF NEUMAN: Sure. Let's go to the next one then, which is the conflicts, right? Yeah. For conflicts, this is a different sort of beast, if you will. Each dispute provider has its own process on how to deal with conflicts. At the beginning of the process, each party could file something if it believed there was a conflict of interest. The provider would then consider that and then make a decision. And that would be that. If there was conflict—I don't think there was ever one found—then they would assign other panelists to it. Or I'm not sure what would

have been done, but they never found it. So people wanted to have an appeal of that, so we would need to discuss who an arbiter of that appeal would be because, if the provider is conflicted, you don't want the provider, who has already decided it wasn't conflicted, to make the decision yet again. So the question is, who would make that decision? Then we'll talk about the "when" because the when is also a little different than the other examples.

On what has been suggested in terms of the "who," the only thing that is really mentioned as an idea during discussions was that it could be panel compromised of, like the SARP, community members to just be around to hear these types of appeals. Or we could just be happy saying it's whoever ICANN Org designates. Those are two ideas.

Do we have any thoughts on that? Again, the more third-party panelists, unless it's volunteers, is going to just raise the costs of these types of proceedings.

Silence. Should we say that there should be a committee constituted by ICANN? Or should we pump that issue to the implementation review team? We should say something, other than "who."

If we don't get any ideas, I'm going to put in that we'll punt this issue to the implementation review team, which is fine.

All right. So we'll put that in there.

The next question is the "when." This is one of those where we had a number of discussions where we thought, if there's going to

be an appeal of a conflict-of-interest decision, that should be heard and decided before the rest of the objection is heard.

Let me go through an example. If you have, let's say, a legal rights objection, the trademark owner files the objection. The trademark owner says, "Wait a minute. I think there's a conflict here. I think, for whatever reason, whoever was picked to do it was conflicted." Let's say WIPO is the provider. WIPO says, "No, we don't determine that there's a conflict." This would be the point in time in which the trademark objector would have 15 days to file an appeal over the conflict-of-interest decision. If it chooses to appeal that decision, then the rest of the objection is put on hold until the outcome of the appeal is decided. It's called an interlocutory appeal. That is what we have discussed in the past.

The other difference is that this type of appeal would be heard what we call de novo, which means from the beginning, or like new/from new, instead of the standard for appeals for the other ones, which are clearly erroneous. So it's a higher standard of review for the appealing objection decisions than would be for a conflict-of-interest decision.

Paul had his hand up. I don't know if I just answered his question or whether there's still a question there.

PAUL MCGRADY: Jeff, hey. It actually relates back to the other issue of who the appeals panelists should be in the event of a conflict of interest. We very quickly moved to that we're going to put it to the IRT, which may be the right outcome, but I feel that we were all put on

the spot and we might want to think about that. I know the goal is to get all this completely done, but is there any time on the list for that? Or is the IRT really the only option? If it's not the only option, maybe we bracket it. If nobody raises any good ideas in the next couple of days, maybe the brackets come off. Thanks.

JEFF NEUMAN: Fair enough, Paul. I was just trying to fill the [silence] because nobody was speaking, but, obviously, to the extent that the group can make a decision on who, prior to us finishing the draft final report, then, yeah, we can substitute that new thing in there. But, as a placeholder, I think, we should put this in.

Let's go to the written document now, away from the chart. Once we walk through these, it should make more sense then. We've covered essentially all of the recommendations up through the implementation guidance. We just talked about the … Well, I want to make sure we cover this one. Rationale 7, just to, again, restate—this is on Page … Let me just see here. Page 86. So, for Rationale 7 … All right. I guess that's on Page 87 of the … I don't know why it's different when it's posted than on my screen, but okay. It's up on the screen: Implementation Guidance Rationale 7. I just want to make sure everyone is on the same page, where parties can mutually agree on whether there is a single panelist or a three-person panel.

Anne, go ahead.

ANNE AIKMAN-SCALESE: Jeff, I wanted to back and ask a question regarding the standard. In relation to the conflict of interest, you mentioned, I think quite accurately, that the standard of review is de novo, and then you said that the standard review with respect to everything else besides this is "clearly erroneous." But there were other, more specific standards discussed as to how we define "clearly erroneous" because it just doesn't give enough detail for panelists when they're deciding whether they have to reverse something or not reverse it. I think I submitted more detailed language related to appeals that occur, I think, in the 9th Circuit or then 6th Circuit that might be helpful. So whatever happened to how that standard is defined and providing more detail for the panelist to make a decision on appeal than just the words "clearly erroneous?"

JEFF NEUMAN: It's a good question. If you look at Footnote 84 and 85, that's where the two standards are set out. I think that might be the language you give us. I'm not sure. I can't remember exactly where that language came from. If you want to review that and let us know if you have comments on that standard, that's where we put it. And that is Implementation Guidance Rationale 8.

ANNE AIKMAN-SCALESE: Okay. Thank you very much.

JEFF NEUMAN: Sure. So you just covered Rationale 8, which is good. Rationale 9 is the cost, which we talked about in the chart. Rationale 10 is also in the chart. Rationale 11 is where we say that the limited

challenge appeal process must be designed in a manner that does not cause excessive, unnecessary costs or delays in the application process as described in the implementation guidance below.

The first one is: A designated timeframe should be established in which challenges and appeals may be filed. We actually put that into the chart. Now that we've established it, we can refer to that.

The second one, which is the second Rationale 11, is: The limited challenge appeal mechanism should include a quick-look step at the beginning of the process to identify and eliminate frivolous challenges and appeals.

My question is, based on the discussion that we've had, should this be a recommendation as opposed to just an implementation guidance? Now, again, implementation guidance is not saying it's optional. It's saying it really should be put in place unless there's some good reason not to. But this one seemed to me—because of the amount of time that we talked about it and how important some viewed it—that it should rise to a level of a recommendation. But I do want to check that with you all.

Jamie, go ahead.

JAMIE BAXTER: Thanks. I think, from my perspective, a quick-look here would certainly focus on those with standing. What I think the chart lays out in very clear terms is who's eligible, which would eliminate a lot of the frivolous challenges and appeals. So I kind of feel like

the chart covers that part, but there may be other interpretation of "frivolous" that others have as well. Thanks.

JEFF NEUMAN: Thanks, Jamie. The quick-look was not just to make sure there was standing but to make sure that a claim was actually stated. So, standing is a part of it, but, if it just looks frivolous at the outset and doesn't have evidence, or whatever it is, but standing is just one part of it.

There were other things described. There was a quick-look process in at least one of the types of objections—it may have been two of the—in the guidebook. I think we all talked about extending that to all the different types.

Paul is saying he's not a fan of the quick-look. Okay. Paul, can you just expand. We had a lot comments in support of it, so this is a new one. Go ahead.

PAUL MCGRADY: Sure. I'm not just trying to be a contrarian. If people are spending the money on an appeal, they're going to want that looked at. They're not going to want a knee-jerk reaction from a close-minded panelist. We're talking about some pretty rarified air already, which is that a party has spent a ton of money on a challenge and then they think that there's some fact that, for whatever reason, just didn't make its way to the panelist, or the panelist made a mistake on some arcane area of the law. Essentially what the appeals process is is a request for reconsideration—[kind of]. It's not like it's going out to a real third

party. Most of these challenges are going to be going to Bob down the hall, right? So we already have all this inertia to keep the initial decision the way it is.

So I guess I'm concerned that this quick-look mechanism will be used as a club to clear out complaints so that TLDs can get delegated. So I think it's fine as implementation guidance. I kind of wish it wasn't there, but implementation guidance isn't the same thing as a recommendation. It just has lesser weight, and the IRT can do with it what it wants, I think. There's different tiers here. So promoting it to a recommendation? I don't know. I don't want to. How about that for a concise legal argument? Thanks.

JEFF NEUMAN: I think it's fine. I think, at the end of the day, it is an implementation guidance, so it's my question as to whether this should be a recommendation. Since no one is coming up with supporting that, I think it's fine to just leave it as implementation guidance.

JAMIE BAXTER: Jeff, it's Jamie.

JEFF NEUMAN: Jamie, go ahead.

JAMIE BAXTER: Thanks. Circling back, though, I think what is important here is that there are some objections that require standing. If you don't

even have standing, nothing else that you write in the objection even matters. That's why I was, again, I was focused on the quick-look—to just establish standing—because, if somebody doesn't have standing, then there's no reason to waste anybody's time on anything going forward. So that's where I saw the quick-look as being of value. Again, it eliminates all the frivolous things that may come after that. So that's why I felt it was important for that purpose. Thanks.

JEFF NEUMAN: Thanks, Jamie. That clears it up. Thanks.

Let's go to the next one. This is important, too: that we say that it's only one single round of challenge appeal. That's the first part. If an applicant wins the appeal or the challenge, then there'll be no second appeal or second challenge. Or, the other way around is, if the applicant loses the appeal, that's it. It then ends and then no more appeals will be permitted. We're not saying anything, of course, about a reconsideration or the bylaw provisions. That's whatever. We're staying away from that. If a party wants to file a reconsideration/independent review/anything under the bylaws, it's certainly free to do so or not do so.

The last part of this is talking about the interlocutory approach: you should appeal of the conflict-of-interest determination prior to the objection being heard. That's what we just talked about.

Anne has a comment. Go ahead.

ANNE AIKMAN-SCALESE: With respect to quick-look, I understand why it makes Paul a little uncomfortable, but I think there's probably too much public comment down the road on the whole quick-look mechanism. It's probably there to stay, so I'm not sure it's anything we can go back and address further.

With respect to "clearly erroneous" and the standard of review, the footnote that you referred to me does not in fact take into account the comments I have made about how nebulous it was and how hard it was to decide. It does look like a judicial standard that's used in certain courts, but what it says is that the standard is whether this panel is firmly convinced that, with the ruling, somebody made a mistake. That's not just a very objective way to look at something that's clearly erroneous. It also says the ruling stands unless it's implausible in light of all the evidence. I don't think those are very good measures for panelists.

What I had suggested in the past—I put it in then chat—is that you'd be better to look at whether the panel, when it made the first decision, failed to follow the appropriate procedures or they failed to consider or solicit necessary material evidence or information. I would like to get those standards incorporated into that "clearly erroneous" definition footnote because the footnote that's in there is way too vague and subject to a lot of subjective overturning of appeals.

JEFF NEUMAN: Thanks, Anne. Let's put that an action item: for us to go back, find that e-mail, and see if we can put that into the footnote.

ANNE AIKMAN-SCALESE: Thank you.

JEFF NEUMAN: I think this is a good place to stop. I think we're done with this section. We still have the post-delegation dispute resolution procedures. Again, that was not the PDDRP, which is the rights protection mechanism, but just a general way to refer to the PICDRP and the registration restrictions dispute resolution procedure. We will start there on Thursday. If—let me just check—someone could post the time for the call. I see Anne is posting more on the standards, so we'll capture that information. But, if someone could capture the time of the call on Thursday and put into the chat—it'll be Thursday, April 23rd, at 20:00 UTC, for 90 minutes—that would be great. We'll do the post-delegation dispute resolution procedures, followed by what we were supposed to do today, which I think were the different TLDs, reserve names, and we'll just keep moving on. We're going to adjust the workplan accordingly, so just keep checking that link for the workplan. If you don't have that link, just check the wiki. You should be able to find it.

Thanks, everyone. We'll talk to you on Thursday.

MICHELLE DESMTYER: Thank you, Jeff, and thank you, everyone. The meeting has been adjourned. Enjoy the remainder of your day.

[END OF TRANSCRIPTION]