

**ICANN
GNSO**
Policies for Contractual Conditions, Existing gTLDs
Policy Development Process (PDP) -Feb06

Rapporteur group A meeting

Tuesday October 24, at 11:00 EDT, 17:00 CEST.

Attendees:

Marilyn Cade CBUC - Group rapporteur
Avri Doria - Nominating committee - Temporary Task Force chair
Danny Younger - NCUC
David Maher - Registries C.
Ute Decker - IPC

Absent:

Jon Nevett - Registrar Constituency - apologies
Tony Homes - ISP
Greg Ruth - ISP
Mike Roberts - CBUC
Bret Fausett - ALAC liaison to GNSO Council

ICANN Staff

Liz Williams
Glen de Saint Gery Secretariat

This is the output of transcribing from an audio recording of the PDPFeb06 Working Group A meeting on Tuesday 24 October 2006. The transcription has not been corrected for language accuracy, nor for correctness of spelling, etc. and in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. This decision was made by the Rapporteur, in the interest of efficiency. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at:

<http://gns0-audio.icann.org/PDPFeb06-WGA-20061024.mp3>

Marilyn Cade: Hello?

Hello?

Man: I can hear you, Marilyn.

Marilyn Cade: Good, thank you.

They put - they should - they did put you back in, so we can go ahead and started.

I just want to, for the record do the statement again about the participation. We have Liz Williams and Glen Desaintgery. And we have Marilyn Cade. We have Ute Decker and we have Danny Younger. We have apologies from the registrar representative and from Jonathan Nevitt who is ex-officio member who gave me comments but has not able to be on the call. And we have not heard from David Maher or from Greg Ruth about whether they are going to be able to join us on the call or not. Mike Roberts has sent his apologies and we had been advised, I believe, that the chair, Avri Doria was not going to be able to be with us because she had a commitment on this day.

What I want to do is go through discuss the options, fine-tune them, get them down to a fewer number and then show support from the people who are on the call for the particular options.

I did send the cover note out that I just want to make a few points about. And that is that I did review the expert materials that had been

put together by the staff including the - some additional materials on the OECD and on the European Commission Website that were just embedded in some of the links.

I also read the material on the New Zealand Competition Website about the (dairy) industry as well as the electricity and telecom sectors.

And in general, I also read two OECD documents. One on the further evolution of ccTLDs and one on the status of gTLDs which is quite - I think it's about two-year-old document now.

And my summary of those, which is in my email that will be in the archive, basically notes that most agreements in adjacent markets do have limits in terms of years, some rebids allow for preferential rating, for a job well done that you would find, for instance in government procurements of commercially - commercial services that exist even when the services being rebid is a procure network such as a defense network or other government service, dominant players are often treated differently from new entrance and the termination of dominance is generally made by competition authorities, however there is often guidance from consultation with competition experts and economists.

Pricing guidelines are often part of the steps taken to ensure that competition can develop when dominance or market power exists in a marketplace.

The concept of market power and dominance are both explored typically by many of the regulatory authorities and regulatory experts and economists.

Sole source providers of elements that are needed by other parties to offer competitive services are often subject to requirements to share such data or information on a proprietary basis.

So taking that into account, I also went through a good number of ICANN's other existing documents including the original agreement with NSI that was negotiated and signed by ICANN and by (unintelligible) NSI. Now of course that company would be VeriSign.

And there are, I would call them covenants or agreements in many of the existing policies and practices that registry should not act as registrars.

There also are existing embedded in many of the contracts, sort of a framework of rules I would call them. They're necessarily consensus policies but they're sort of a framework of rules of how things should be treated, such as that registry data has to be escrowed, the terms and conditions under which what's included in registry data, et cetera.

Throughout the material that I reviewed, I would say that I did not see an assumption that the fact that the contracts were silent on traffic data means that the uses of traffic data are permitted. And in fact I think the chart that the staff provided in the Annex under Present Treatment of Traffic Data as an illustration of the fact that if traffic data is going to be used that it takes a permissive agreement.

I note that I - example that two of the registry agreements that have been negotiated with .com have spelled out the treatment of traffic data and provided restrictions on it.

So with that kind of as a background, I wanted to begin to walk through the options that have been drafted and take comments on them and also try to get them down to preferably one suggestion, but if necessary two options that are explored that can go into to report to the task force.

So I start on Page 5 of my document that I distributed. And - sorry - I start on Page 4, I beg your pardon, under B1A. And what I want to do is just walk through this, briefly discuss that it's needed and get a show of support.

In some cases where there are multiples options, we probably need to eliminate some of the options before we do a show of support.

But I'm...

Woman: Marilyn, before you get into that, can I just ask a couple of questions please?

Marilyn Cade: Of course.

Liz Williams: Firstly, again we've got written representation from the groups. And I just wondered if anyone had responded to you directly on your proposals already that we haven't seen on the list.

That's first question.

Second question was, I read through John's document today which shows the Group B's approach to how they're doing. Were you intending to submit text in a similar way that John has done it?

Marilyn Cade: I do. Yeah. But I want to get that down to no more than two options that the text is around. And...

Liz Williams: Okay.

Marilyn Cade: And to answer the question, John never gave me comments.

Liz Williams: Okay. That's fine. Because to my mind, at the moment, the Group B document is relatively useful to me in terms of drafting a final report because we need to remember where we need to get with this, which is a task force report. And there's a lot of material here for these (three) terms of reference that is very thing that would need significant boosting from other members of the - even the repertory group or indeed the broader members of the task force before it's in a state to be considered as a recommendation.

So do you think that you have enough to work with on that basis? I mean I know you're going to proceed with it now, but I'd hope that we'd hear from others on the group.

Danny Younger: Liz, this is Danny.

Liz Williams: Yup.

Danny Younger: I'm assuming that you may have had a chance to go through the formal (NCUC).

Liz Williams: Yeah, I did. Thank you very much. It was great. Thank you very much. I really appreciate it.

Danny Younger: Okay.

And I guess your first question, I did speak with Marilyn briefly this morning in anticipation of this call.

Liz Williams: Okay. Thank you.

Marilyn Cade: And, Liz, I think that one thing that the transcript helped with is the fact that dialogue that has taken place and has been made available to people who haven't been able to be on the calls I think can help to form the wrap around for taking more of a narrative approach which John has taken.

The task force still needs to discuss what put before them. And that will provide I think you and staff the opportunity to gather further comments from the other half, so to speak.

Liz Williams: Yup, good.

Marilyn Cade: Yeah.

Liz Williams: Okay. I just wanted to know what people's expectations about the timing because this is the last week that the repertory groups are meeting. And then on current estimation, we need to produce a draft task force report by the 7th of November.

So that means that all of next week, and I know, Marilyn, you're going to be at the ITF and all the others that are involved in that, and I imagine - I don't know when you're going to have drafting time, but I'm

just anxious that the 7th of November is a very aggressive “date” for a draft of a report to the task force if I don’t have further repertory inputs. So I’m just putting down on the table for everyone to consider.

Marilyn Cade: Yeah.

Avri Doria: This is Avri, I joined late.

Marilyn Cade: Oh, hi.

Avri Doria: Yeah. I had an impossible time getting into this damn phone call. But anyway...

Marilyn Cade: Uh-huh.

Avri Doria: ...frustration level is incredibly high.

But anyway, aren’t we supposed to have the write-up by the 27th and then those are gathered into the report. But I thought the write-ups had to be done by the 27th.

Liz Williams: Yeah.

((Crosstalk))

Liz Williams: But my point is, Avri, that Marilyn has done a great job of pulling together these (two) recommendations, but we haven’t had sufficient traffic or traction from the discussion and - or at least that I have seen. And I never assumed that I and the repository (unintelligible) discussion because they may be going on behind the scenes.

If that's the case, fantastic, but everything needs to be submitted to me by Friday.

Avri Doria: Everything as in what?

Liz Williams: As in the repertory group's material.

Marilyn Cade: And, Avri, you might have...

Avri Doria: Yes, I understand that.

Marilyn Cade: Yeah. Avri, you might have missed maybe when you were trying to get in, it's too bad it was that frustrating, but I really understand because you're probably dialing in from an international location. That can be so...

Avri Doria: Yeah.

Marilyn Cade: ...challenging.

Liz had asked whether I plan to redraft after this call into a similar format that John has taken.

Avri Doria: Yeah. I thought you guys were taking similar forms, I mean, so I thought John was sort of taking off from your form but it progressed a little perhaps. But...

Marilyn Cade: Right. And so, you know, John has one more call. This is our last call and so I did talk to John about after we go through the identification of

one or maybe two if we get into - if there's a split on the discussion that I would be writing it up similar to what John has done, and that means that the task force members are going to have to edit online. But we went through the fact that many of them are (trapped) and that I had gotten comments from John Nevitt by phone.

And Danny and I spoke briefly. And Danny also has submitted a larger (NCUC) report.

Avri Doria: Uh-huh.

Marilyn Cade: But the task force is still of course going to have to discuss what is put before them, right? And so that's the purpose of trying to get, thanks to you, Liz, so that you can prepare a draft report by November 7. Is that right?

Liz Williams: Right. But we have a phone call still scheduled...

Avri Doria: Yup.

Liz Williams: ...for the 2nd where the two separate reports can be...

Avri Doria: Yeah, the November 7 date is the one that we're working towards.

Liz Williams: Right.

Marilyn Cade: November 2.

Avri Doria: We have a meeting scheduled for the 2nd which is when the two repertory groups' reports will be available, but they won't then roll into

a final report. But we do have a meeting currently scheduled for the 2nd.

Liz Williams: That's right

Marilyn Cade: And I'm sorry, what time is that?

Avri Doria: Oh, I'll quickly refer it again to the mistress of all timings.

Liz Williams: It is at the (Normark) task force time which is (20 hours) in Europe...

Marilyn Cade: Right. So it's late...

Liz Williams: Yes.

Marilyn Cade: Right. So it's...

Liz Williams: Five - 2 o'clock I think in - let me look at...

Marilyn Cade: You know what, that's okay.

Avri Doria: It's 20:00. It's 20:00.

Marilyn Cade: Right, which means that it's 8:00 pm for us in Europe, right, Avri?

Avri Doria: Right. Oh you'll be in Europe, yes it 8:00 pm in Europe, Marilyn.

Marilyn Cade: Okay. Okay.

So...

Avri Doria: So that only ruins dinner; it doesn't interfere with the meeting.

Marilyn Cade: Fabulous.

Okay. So, Liz, are we - is there anything else you wanted to cover?

Glen Desaintgery: Liz, can I just make a suggestion that perhaps an email goes out to those that haven't participated in other discussion or immediate prior session just to remind them of our upcoming schedule and the requirement to get any type of written documentation?

Marilyn Cade: Liz?

Avri Doria: Hello. Did Liz disappear?

Glen Desaintgery: I think perhaps she did. I'm just concerned that the...

((Crosstalk))

Glen Desaintgery: ...registries are pretty much the subject of this...

Liz Williams: No, I'm here. Second of November is fine. And for the meeting in 7th is fine for me to release the report.

Marilyn Cade: There was a request - and it's maybe Glen - I mean it was basically a request going out that everybody has got to get their materials in.

Okay? So I'm going to start on Page 5 and - sorry, Page 4. I keep trying to start on Page 5.

And I think 1.A is actually, I hope, an easy decision even if it remains a split decision. And that is to examine whether or not there should be a policy guiding renewal and if so, what the elements of the policy should be.

So, one option is yes, there should be policies guiding renewal. And the other option is no.

So comments or thoughts before I take a straw poll on that?

No? Okay. Danny?

Danny Younger: Yeah, there should be a policy.

Marilyn Cade: Okay.

Ute?

Ute Decker: Yes.

Marilyn Cade: Okay.

And from John, yes. And from Marilyn, yes. And then we have a number of people who are not here to express their opinion.

And I haven't seen any email saying, no, so what I'm going to do is just document that and note that a number of people need to make comments on that.

So if yes, then we're going to continue to go down this trail.

The policy should include but not necessarily be limited to the timeframe and what the assumptions are regarding the rights of the registry.

Are there other areas that people think should be included in the policy guiding renewal?

Okay. Then on timeframe, one option - and I'm just going to call this Option 1 -- the policy regarding the timeframe for registry contracts should be limited to a standard timeframe for five years, and then there should be a rebid of all registry agreements.

That's Option 1.

An alternate -- and we'll call that - ignore my numbering and we'll call this 2 for a minute -- there should be a different standard term for non-sponsored TLDs than for sponsored TLDs.

Sponsored TLDs could have a term of seven years, and non-sponsored could have a term of five years.

Or there should be a standard term for all gTLD registries, but it could be a range of say four to seven years.

Liz Williams: Marilyn, can I just ask a point of clarification when you come to a break please?

Marilyn Cade: I just came to a break.

Liz Williams: (Unintelligible) me.

A couple of things. One is in the discussion under the new TLDs, a part is very similar to this, there was a discussion about commercially visible length which was approximately ten years.

That's (written). So are we being consistent here by speaking about five-year terms or not?

Then the second part of that is we talked about equitable treatment of registry. And I don't think that we've ever made -- and I'm just being cautious here -- a distinction between - differences between sponsored TLDs and non-sponsored TLDs.

And if you're arguing - if one - it's not you. If one is arguing for equitable predictable transparent treatment on registries, then why would you argue one way for one (unintelligible) and one way for another?

Marilyn Cade: Okay, so let me answer both questions.

In the discussion of PDP 05, there's been a discussion of commercial term. And I believe that discussion has included the idea that an initial term maybe one length and a subsequent extension maybe a different lengths.

So I believe we've talked about things like perhaps seven to ten years on the initial award and then a return to a regular period of every four to five years on the rebid.

So that's one thing to think about that - the second thing to think - let me answer your second question and then come back to commercially reasonable (term).

We actually do - sponsored TLDs differently. And we can do a quick glance at the table from Annex 3, the PDP (unintelligible) fictitious report and see already that sponsored TLDs are treated differently, and they had been consistently treated differently.

What changed historically was that at some point the staff began to treat non-sponsored TLDs such as .net like a sponsored TLD and then extended the terms that they negotiated individually with .net into the .com, another non-sponsored TLD.

But historically, we have treated sponsored TLDs differently.

So the final point I would make is we have discussed in PDP 05 that equitable does not mean equal. And in fact, the bylaw themselves and the ticket fence both say that you have to justify - I think the ticket fence says something like unless justified.

So, I don't think we're talking about anything other than examining what may be equitable treatment for different kinds of TLDs. That's what's on the table.

Danny Younger: Yeah.

Marilyn, I'd like to jump in for a minute.

Marilyn Cade: Please do it. Let me just finish one thing.

Liz Williams: And I'll jump in when you finished then.

Marilyn Cade: I do think that the last -- so one consideration would be whether a commercially reasonable term is in a range of four to seven years or five to seven years is (reward again). It is beginning to sound more like what some of the discussions was like in PDP 05.

And I concluded my quick thoughts now.

Danny, you and then Liz.

Danny Younger: I'm sorry. I couldn't hear you. Say that again.

Marilyn Cade: You first and then Liz.

Danny Younger: Oh, thank you.

Point 1.A.1.2 (op) actually specifies X years as opposed to four to seven.

Marilyn Cade: Right.

Danny Younger: And our constituency has taken the view that we prefer commercially reasonable lengths, so we pointed to 10 to 20 years.

Marilyn Cade: Okay, so noted in my notes.

I will just say, Danny, before we go on to Liz, that 10 to 20 has never been, to my knowledge, discussed in the - fairly discussed in PDP 05. But I will take note of your 10 to 20 years on renewals. We're not talking initial launch, right?

Danny Younger: Yeah, we are talking renewals.

Marilyn Cade: Okay. I just want to be sure I've got that.

Okay. Liz?

Maybe we can come back to Liz's comment when she returns.

Danny, you're right that 1.A.1.2 (op) did say X because I was hoping that we would get some suggestions of terms.

John and I did discuss the idea of a range of years to fill that in as being from four to seven or five to seven and that's why I had suggested that.

Can we go through - Is Liz back?

Liz Williams: Yes, I am. Sorry, I'm having trouble with my mute and I'm just in a position where it's very noisy and I don't want to share the noise with the group.

I'm, you know, in asking these questions, I'm just being demographic and I want to make sure that the questions are asked to make sure that we re-visit things that have been the subject of many hours of discussion elsewhere...

Marilyn Cade: Okay.

Liz Williams: ...to make sure that we approach things consistently.

Danny, with respect to your 10 to 20-year term point of view...

Danny Younger: Uh-huh.

Liz Williams: ...I'm hoping that in 20 years time, I'm retired and living on a beach. So I don't know whether that's a reasonable commercial term. I don't know whether you see reasonable commercial term same in those numbers in other industries. And if you do...

Danny Younger: I think we see it like a 50-year (lease) for Hong Kong, and that was considered reasonable at that time, so it's...

((Crosstalk))

Liz Williams: Well I mean (unintelligible) lease is not common, you know, in Australia for lease hold on land. But that's a slightly different proposition at a registry agreement which requires performance specification and requires, you know, an understanding that a registry would operate in, first of all, best practice industry standard, secondly that they would be introducing the next most wonderful technical innovations to serve their clients And we need to - we really need to stay on top of that, I think.

Danny Younger: Oh yeah, I mean you do raise the interesting point that I boast earlier with Marilyn. And that is there are government clauses that in addition to termination for clause, we'll also have a termination for convenience

clause added to the contract. And it is certainly possible over the course of time that we may say that within this particular renewal timeframes that the registry operator is not still serving in the public interest, we may need to review that situation.

So I understand this point that you're raising.

Liz Williams: Thanks.

Marilyn Cade: So can I just try to get this down to two choices? Can we eliminate 1.A.1.1 and focus just on whether there should be one choice, there should be a standard term for all gTLD registries of, and I'm going to propose five to seven years, after which there should be a rebid?

Danny Younger: First observation, Marilyn, without a full participation of members on this call, it might be premature to eliminate anything. Can we at least leave it open for a few days and give them the opportunity to get their comments in?

Marilyn Cade: No, we can't. Unfortunately, this report is got to be done by the 27th and people were noticed and noticed and noticed about the need to provide comments.

David Maher: Well, Marilyn, you...

Marilyn Cade: Oh, great, you know David, we were looking for a cell phone for you earlier.

David Maher: Yeah, well I'm on now.

I agree that it's premature to eliminate any of these things in a working group. I don't see that as an option. I knew you sent out your - this working document just, what was it, a couple of days ago. And I have been traveling and I couldn't make it on time for...

There's just too much to do to (complete it) into this timeframe. And I think it's ridiculous to eliminate these possibilities before the task force meets in full.

Marilyn Cade: Okay. The purpose of today's call is to winnow down the number of possibilities. And, David, I think - sorry because you were late getting on. I said that I want to get it down to no more than two options.

So I am going to push to get it down to no more than two options and then, you know, members of the task force can - members of the task force or the repertory group can do their comments, can put one of the options back in if they feel the need to do that. But let's see if we can get it down to no more than two options as we go through this.

David Maher: Well, I dissent from this procedure of the working group and it will be noted before the task force of the working group was not - did not take account of the conflicting views and its members.

Marilyn Cade: Wait a minute, David. I just gave you a way to keep options open. So I am taking your views into account.

David Maher: And I - well, I think that's not sufficient.

Marilyn Cade: Okay. What's your proposal?

David Maher: To leave all the options in as what's suggested.

Marilyn Cade: Okay, let's continue.

Let me hear from Ute. Do you have a comment on leaving everything in or trying to get it down to one or two?

Ute Decker: I think, you know, if people feel they cannot make a decision on the call, they will have to send in written comment after the call in any case. And if in that case they can put options again, it seems to come to the same result, no?

Marilyn Cade: Yeah.

Danny?

Danny Younger: Well, I agree with Ute's take on it. Just leave it in for a little bit, Marilyn. A couple of days will suffice and we all get our thoughts in order.

Marilyn Cade: Yeah.

Danny Younger: I mean for example, just with regard to the single point on X years, probably my constituency would like to change that language to read of reasonably commercial lengths as opposed to putting in your definition of four to seven years.

Marilyn Cade: And how would your constituency plan to determine what reasonably commercial lengths are then?

Danny Younger: We've already come to a preliminary conclusion. Obviously, we're amenable to (congealing) on the part of other parties. These are the types of things that get discussed in a multi-stakeholder environment and we arrive at a consensus.

Marilyn Cade: Liz, can you just refresh my memory? Let me try a reword on this. There should be a standard term for all gTLD registries of a reasonably commercial length. And, you know, this is bad editing as we're going, but let me say the English might not work.

Of the reasonably commercial lengths, after which there should be a rebid. And then a definition of a reasonably commercial length should be consistent with the renewal provisions proposed in PDP 05.

Liz Williams: Yup, which is 10 years

Danny Younger: Marilyn, we have not agreed the language of "after which, there should be a rebid". My constituency does not agree with that point of view.

((Crosstalk))

Marilyn Cade: Okay. Let me get back to the - let's see if we can get anything. There should be a standard term for all gTLD registries of a reasonably commercial length, reasonably commercial...

Liz Williams: No, reasonable commercial lengths. But I suggested that's an area to edit on the (fly). I don't think that we should do that. I think that we should put whatever the group comes to today out and then say we need responses on this by X period of time.

Marilyn Cade: Liz, I'm trying to reword this so that we...

Liz Williams: Yeah, I know.

Marilyn Cade: ...have to put something out, okay?

Liz Williams: Well a reasonable - in that case, the correct term is reasonable commercial lengths of approximately 10 years which is consistent with the December '05 PDP.

David Maher: I think it's commercially reasonable.

Marilyn Cade: Thank you. I knew there was something wrong with the English there.

Okay. So the - no one's committed to anything, but we have now proposed a reword of 1.A.1.1.2 (op) which would be there should be standard term for all gTLDs of a reasonably commercial length. Period. Is that right?

Danny Younger: That satisfies me.

Marilyn Cade: And then, Danny, I am going to propose because I understand, Liz, that PDP 05 is still evolving. I am going to propose that the definition of reasonably commercial length should be...

David Maher: Commercially reasonable.

Marilyn Cade: ...right, commercially reasonable. Thanks, David. Should be aligned with the reaward term that is being discussed in PDP 05. And I'm going leave a number of years blank and let's see if we can then reword this

and send it out, and that gives us one revised option that does provide an (unintelligible) consistency with PDP 05, and it also does address the issue of commercially reasonable.

I got to mark this out so I don't read it that way. Commercially reasonable.

I am going to take a straw poll, however, on where people are on the other two and whether there's any support in the group to keep all three of these -- and some people will say yes, but some people may say no -- and see if we can get at least centered around one of these.

And, David, I may need to go back to 1.A for you because we did record a straw poll for the other participants.

David Maher: Uh-huh. Okay.

Marilyn Cade: And so 1.A is examined whether there should be a policy guiding renewal and if so, what the element should be. And the first choice is yes, there should be a policy and no, there should not be a policy.

I recorded a yes for Danny, Ute, John Nevitt who had contacted me ahead of time and walked through his vote and myself.

Do you want a record a vote?

David Maher: No, I'll abstain.

Marilyn Cade: Okay.

Okay. Let me go back to this. So the first choice is a standard time. Does anyone support a standard timeframe of five years after which there should be a rebid of all registry agreements?

Okay. Does anyone support that there should be different standard terms for not sponsored gTLDs than for sponsored? No?

Okay. And then on 1.A.1.1.2 (op) that we just edited, the constituency that I represent would support there should be a standard term for all gTLD registries. And I'll put this back out to them of commercially reasonable length. So ICANN gives BC support to that.

Can I hear from others about whether they can give straw poll support to that?

David Maher: Can you read it again please?

Marilyn Cade: There should be a standard term for all gTLD registries of a commercially reasonable length.

The definition for a commercially reasonable length should be developed in a manner to be consistent with the reaward phase being developed in PDP 05, or the reaward term - the reaward term being developed in PDP 05.

David Maher: Well, if you stop before the PDP 05, I could support that. I'm not binding myself to or my constituency to the outcome of PDP 05. So I can't give you a yes or no on that.

Marilyn Cade: Okay. What about others?

Woman: Can I ask a question?

Ute Decker: Same for the ITC.

Marilyn Cade: I'm sorry Ute?

Ute Decker: I think the ITC also supports the commercially reasonable, but we would not want to have (unintelligible) to the other PDP.

Marilyn Cade: Okay. Avri?

Avri Doria: Okay. I was confused. So basically what people are objecting to is consistency with PDP 05.

((Crosstalk))

Avri Doria: Okay. I just want to understand. Thank you.

Marilyn Cade: Yes. Yes, yes, yes.

Danny?

Danny Younger: Yeah, I've got the same problem and frankly, I wonder why we...

Marilyn Cade: Okay.

Danny Younger: ...still have a PDP 05 that's dealing with contractual conditions, you know.

Marilyn Cade: So then, what I'm going to propose is there should be a standard term for gTLD registries of a commercially reasonable length (full-stop).

Is that right?

Danny Younger: I can live with that.

Yeah, that's okay.

Marilyn Cade: Okay.

Liz Williams: Marilyn, just before you move to the next point, just to answer Danny's question. Danny, we have a PDP 05 which has terms of reference which we're obliged to deal with as it relates to contractual conditions for new TLDs. So of course we're going to be dealing with it through the new TLD process.

Marilyn Cade: Okay. I'm trying to move this on because we're not going to make it all the way through.

On renewal expectancy, and Danny and I spoke earlier. And Danny, I think we were disagreeing that renewal expectancy is a term that is probably easier to understand than expectation of renewal.

Danny Younger: I think the point that I was making, Marilyn, is that expectation of renewal is different than a presumptive renewal, at least in the eyes of my constituency.

Marilyn Cade: Right. Right. Right.

Danny Younger: And I think you're using the language interchangeably which doesn't serve us well.

Marilyn Cade: Actually, I'm not using interchangeably, so it's good to point that out.

Danny Younger: Okay.

Marilyn Cade: I wrote a definition, an expectation of renewal is not an automatic right of renewal but includes a competitive bid over a registry that has fulfilled the term of the registry contract with excellence, should have a reasonable expectation of renewal.

And then I gave an example in another adjacent market of where someone who's held a contract and it's not a very good job is often given certain (weighting) for the excellence of their job that's taken into account the time of the award.

That's different than a presumption of renewal. I defined which I suggested under 1.A.1.1.2.2) (op) would be a consumption of renewal would mean there would not be a rebid; there would be a negotiation with the ICANN staff and corporation of consensus and other policies publishing for the comment, but there's no competition to the present registry holder.

Danny Younger: I think I have a problem with the initial definition of expectation of renewal including a competitive bid because we don't see it that way.

Marilyn Cade: Okay. So you think that an expectation of renewal, whatever we call it - tell me how you think it would work.

Danny Younger: All right. The way we see expectation of renewal is if a contractor performs well over the timeframe, hasn't breached his contract that we don't see the need to toss things up for biddings.

Marilyn Cade: How do you...

Danny Younger: So an expectation of renewal would simply mean that good performance is rewarded by renewal.

Marilyn Cade: Okay. How do you see that renewal happening? So let's say hypothetically that in your scenario, there's a 10-year term that you had mentioned before.

Danny Younger: Uh-huh.

Marilyn Cade: Okay, 10 to 20 year term, so at the end of the 10-year, what happens?

Danny Younger: At the end of 10 years, an evaluation is made as to whether there has been contract breach or not contract breach. That's the current language that we're dealing within these contracts. If there is no contract breach, then you move forward.

Marilyn Cade: And what do you do about the new consensus policies?

Danny Younger: I'm sorry. How do those equate specifically to this renewal?

Marilyn Cade: How do you this is about renewal expectancy, right?

Danny Younger: Correct.

Marilyn Cade: So your view would be that we could deal with consensus policies later, maybe in some other consensus policies?

So in this case, there's a - your proposal would be to have an option which says - so what's the difference if you - there should be an automatic presumption - 1.A.1.1.2.2A (op), there should be an automatic presumption of renewal for registry agreement, and then would we - an evaluation should be made whether there has been contract breach. And if not, the register agreement should be reawarded to the present holder. Is that right?

Danny Younger: Correct. Under a current contract language as long as the contractor performs well, we're looking at a reaward scenario.

I guess what we have in the back of our minds is a concern over what has been called presumptive renewal. And that presumptive renewal pretty much eliminates ICANN's ability to designate a different registry operator if conditions actually warrant.

Marilyn Cade: Uh-huh.

Danny Younger: And I don't know the rest of you feel, but I would think that it's within ICANN's prerogative to be able to take actions when conditions warrant. It's in fact might be their responsibility to do so.

Marilyn Cade: So 1.A.1.2.2 (op) can be edited to provide Danny's preferred option.

Let me just go through the two - the other options. And we may be able to eliminate this one or not quickly. And that is should there be an automatic presumption of renewal only for sponsored registries, that is

should we treat non-sponsored registry and sponsored registry differently on presumption of renewal.

Can we just do a yes or no on that and see if we can eliminate it?

Danny?

Danny Younger: Read it one more time please?

Marilyn Cade: Should there be an - basically, it...

Danny Younger: An automated presumption of renewal only for sponsored agreements?

Marilyn Cade: Yeah. Yeah.

And from what you...

Danny Younger: All right. We would not differentiate sponsored and non-sponsored.

Marilyn Cade: That's what I thought you would say. Okay, that's no. Okay.

Ute?

Ute Decker: No.

Marilyn Cade: Okay.

David?

David Maher: No.

Marilyn Cade: Avri, do you want to weigh in?

I'll weigh in for John which was no.

David, you don't want to weigh in or you do?

David Maher: I said no.

Marilyn Cade: Oh, I'm sorry. Got it. Okay.

So that one is gone. Danny, would you - do you assume that 1.A.1.3 applies in the...

Danny Younger: We will simply change the phrase "presumptive renewal" to "renewal expectancy" in that particular section and then we'd be happy.

Marilyn Cade: I have to tell you that renewal expectancy - Liz, can you help me on whether we have discussed renewal expectancy in PDP 05 in a definitive enough way that we could turn to them?

Liz Williams: Just, I didn't hear the end of the question, Marilyn.

Marilyn Cade: Well renewal expectancy as it's used by my constituency is something like that is - it's something more like, you know, if the registry has done a good that there should be a renewal expectancy that we still support having a reasonable expectation of renewal, I guess, is maybe the phrase that we would use, but we would still expect to have a competitive bid.

Do you think that there's language and in PDP 05 that's useful here about the term "renewal expectancy?"

Liz Williams: Yes, there is. And I'm just opening up again the master document that I have with respect to the recommendation.

A couple of things that come to mind, also I'm just finding the right section for you are that a couple of times members of the group have said on the basis of performance, on the basis of an evaluation, on the basis of...

Marilyn Cade: Right.

Liz Williams: ...(unintelligible), now what you're proposing is a subjective evaluation unless at the same time you also propose a way in which registry "performance" is it technical performance, is it being (asked) to registrars, is it being (asked) to ICANN, is it paying the bills on the time. You're getting a diverse subjective territory.

Marilyn Cade: Uh-huh.

Liz Williams: So that needs to be consistent as well.

Marilyn Cade: Uh-huh.

Liz Williams: If you go back down again and I'm up to a renewal expectancy bid which is in Section 4 - (unintelligible) I'm just getting to the right section. I'll read it to you.

In recommendation 4.3 of the new TLD's draft recommendation, so I'll go - actually, I'll just go through it quickly because I don't know whether if one's got the draft recommendation summary in front of them.

Section 4.1 with respect to policies and contractual condition says there should be a (prime) agreement to provide some level of consistency amongst TLD agreements. And any material additions to the base agreement, which we've been talking about base contract, would be the subject of public comments before approval by the ICANN board.

Marilyn Cade: Uh-huh.

Liz Williams: So that's the first thing.

The second thing is Section 4.3 which says the initial term of a new TLD agreement should be of commercially reasonable length. I don't know what that of course what you had written down before, Marilyn, but that's what the recommendations say.

Marilyn Cade: And I'm reading it.

For example...

Liz Williams: (Unintelligible) 10 years, although it may be changed in a case by case basis.

Section 4.4, there should be renewal expectancy...

Marilyn Cade: Uh-huh.

Liz Williams: ...which says there should be a contract would be renewed provided that the license holder is not in material breach of the contract. And that material breach is a well defined term.

(A second), I'm just going to go down a bit because it goes over two pages. And has not been found and repeated non-performance of the contract and provided the license holder agrees to any new framework contract conditions that are reasonably acceptable. And a new framework in a base contract will take into account the consensus policies in place at that time.

Marilyn Cade: You should go on the - we should go on to read - so 4.6, during the term of the agreement, the registry might comply with new or changed consensus policies to one or more of the following areas.

Liz Williams: Yup, which is the one to five and, you know.

Marilyn Cade: Yeah.

Liz Williams: Yeah.

Marilyn Cade: Which would be...

Liz Williams: So (I'm at) the quickest way around to go with this discussion is to say - just make a note to say make sure this is the discussion in this - PDP is consistent with that in the December 05 PDP and the draft recommendations are pretty clear on all of these things.

Marilyn Cade: So renewal expectancy, Danny...

Danny Younger: Uh-huh.

Marilyn Cade: ...so the way that this is used in renewal expectancy, there is no - I'm reading that to say that there is no competitive bid, Liz.

Liz Williams: Yes, that does seem to be the way to read it.

Marilyn Cade: And that's - I've got to go back and talk to (Philip) because that's not what my constituency has supported. We have thought there should be a renewal expectancy but that there would be a competitive bid. So - but that's a different issue and a different input mechanism.

((Crosstalk))

Liz Williams: Marilyn, sorry. May I interject?

Marilyn Cade: You can. And then Avri wanted to speak?

Liz Williams: Sorry, Avri, excuse me.

One of the things that I think is important, Marilyn - and I'm sorry I'm changing the topic here from PDP December `06 to December `05. One of the things that's important here is that there are draft recommendations. And you and (Philip) and Alistair and I have exchanged email over today that says yup, we've got the draft; let's make sure we understand that we're all in the right place. Now the conversation is not over on these draft recommendations and it's not over and in this context either.

So if you think that there is more clarity that's needed in either of the two contexts, then that's how we get it. We get it by deliberately and explicitly seeking people's different views.

Marilyn Cade: Thanks.

Avri, and then I'm going to try to propose a reorganization of this one so we can move on.

Avri Doria: Right. Okay, yes. Sorry I fell off before just when you asked me a question.

Marilyn Cade: Uh-huh.

Avri Doria: And (Grants) have another constituency just an individual, but I would tend to be much more aligned with the notion of there needing to be rebid as opposed to presumptive renewal, presumption of renewal. And, you know, I'm so far out of touch with the rest of the group on this time period that my opinion would probably not count so much.

Marilyn Cade: But I still like to hear.

Avri Doria: Well, that's basically it. I do believe that there should be rebids and I certainly don't believe in, you know, commercially viable period of 10 years. And, you know, as I said, but I'm only an individual. Okay.

Marilyn Cade: So here's what I'm going to propose, on renewal expectancy - let me see if I can get rid of a couple of these.

1.A.1.3.1 is actually a sub-point and it's dependent on other choices. But it proposes that a registry can apply for an exception from consensus policy based on a show of circumstances about why consensus policy should not be applied, posted for public comments, consideration given. An exception to consensus policy cannot be grandfathered to other registries automatically.

What I was thinking about there as an example, is the exception that was given to dot-name onto (who is our policy).

So that's an exception which I think probably still and maybe that actually should be moved over to the discussion under consensus policy. And I can move it out at here.

Danny Younger: Yeah, it would make deliberations a little easier on this, Marilyn.

May I suggest that you include another point which articulates your views on the competitive rebid process, so that's the set of options is more clearly delineated?

Marilyn Cade: And so one thing I would do is have an option which says there should be an expectation of renewal by the incumbent present registry holder and a competitive bid process. And I'm going to keep 1.A.1.2A at the top. I'm going to keep that and then I'm going to go over and pick up the definition on PDP 05 on renewal expectancy, and reword 1.A.1.2.2 to reflect that and Danny's - which I think, Danny, are you - Danny, would you say that what's in PDP 05, there should be renewal expectancy, a contract would be renewed provided the license holder is not in material breach, blah, blah, blah? Would you say that 4.4, does that capture what your constituency might support?

Danny Younger: Yes.

Marilyn Cade: Okay. Then let me take 4.4 up.

David, do you feel comfortable commenting on that?

David Maher: Well, the only position that my constituency can support is that there is a presumption on renewal, whichever number that is.

Marilyn Cade: Presumptive of renewal is...

David Maher: I think that's 1.A.1.2.2 (op).

Marilyn Cade: Yeah. Okay.

So...

((Crosstalk))

Marilyn Cade: Okay.

David Maher: And everything else could be a (null).

Marilyn Cade: And just period after. So you would prefer it to say there should be an automatic presumption of renewal for all registry agreements, period, full stop?

David Maher: Right.

Marilyn Cade: Okay.

And then, Danny, I'm going to put you beside 4.4 and mark everything else out, keep the edited version of 1.A, but first, there should be an expectation of renewal by the incumbent present registry holder in a competitive bid process.

So I'm going to put Marilyn's initials beside that. Avri, can I put your initials beside that?

Avri Doria: Oh, sure.

Marilyn Cade: Okay.

Ute?

Ute Decker: Well, the ITC supports presumptive renewal but not automatic presumptive renewals. So we would be supporting 1.A.1.3 (unintelligible) consensus policies and negotiations.

Marilyn Cade: Okay. Then I will put that in.

So there will be a presumptive renewal of the agreement every - so every (seven) years.

Ute Decker: Uh-huh.

Marilyn Cade: But the negotiations must include, incorporate some consensus policies and other policies applicable?

Ute Decker: Uh-huh.

Marilyn Cade: Okay.

Okay. Well we got this done.

And on 1.B, the conditions for not all registry agreements show the same rights of renewal. Use the findings above to determine whether or not the conditions can be standardized. Maybe this would be simple.

One, the conditions for right of renewal should be standardized for all registry agreements that are in the same category -- (EG), consistent for non-sponsored TLDs and consistent for sponsor TLDs.

That again allows differentiation between sponsored and non-sponsored. Or there should be standardization of rights of renewal across all registry agreements. Or registry agreements rights of renewal can be negotiated on an individual basis.

And I'll just provide a little analysis that I pulled out of the chart (Dan) did.

So let's start at the bottom. The condition for registry agreement right of renewal can be negotiated on an individual basis. Is there anyone on the call that supports that?

Danny Younger Marilyn, we're (going) to say tentatively yes, but it's only in view of the fact that we have a particular issue with the problem of market dominance and we would tend to think that certain contracts - well I

think particularly of (net) and (com) should really be negotiated on an individual basis, on a blanket basis of the remainder of the registry.

Marilyn Cade: Okay. I captured the thought.

Anybody else want to comment on 1.B.3?

Liz Williams: Marilyn, I need to make a comment about what Danny had just said, if (I) can?

Marilyn Cade: Oh, you can.

Liz Williams: Thank you. Thank you.

Danny, just to be very clear here, we're looking at policies to contractual conditions additions that are applied across existing registries on a consistent basis and do not focus on the specifics of one or other agreement.

So if you're going to have a "problem" with that, I mean we have to think that how to frame that properly because we're not in position of being able to make exceptions, and that's been the case from the very beginning of the PDP.

Marilyn Cade: Wait a minute, Liz. I think your...

Liz Williams: Yeah, I don't think it was - if my interpretation was not that it was an exception but that there's obviously a history of situations that make individual treatment necessary.

Marilyn Cade: And, Liz...

Liz Williams: I'm just putting on the record, I don't want to hold up any debate now but just to be sure that we all understand where that's going to come from.

Marilyn Cade: Yeah, but you - I want to say something (about) the legal stuff. In the bylaws and in the original document, it was a provision for having to justify when a registry - when a contract is treated differently.

I thought what Danny was saying that if there was a determination of a market power situation, then his constituency would think that any registry that will determine to have market power would perhaps before an individual negotiation.

In looking at the document, the resolution of the board passed, the economic study of proposed registry agreement, and noting that the board has recognized that domain registration market is very complex in producing reliable analysis and findings will require high levels of economic expertise, they go on to ask to have domain registration markets to have a determination of whether it's one market or whether each TLD functions at separate market.

I'm thinking - and then they asked what is the effective market structure and pricing on new gTLD entrance.

I'm thinking, Danny, that the...

Danny Younger: Well, Marilyn, I'm looking at the bylaws language under non-discriminatory treatments.

Marilyn Cade: Right.

Danny Younger: It basically says that you can craft policies that can provide for (desperate) treatment in the event that there is a substantial and reasonable cause such as the promotion of effective competition.

Marilyn Cade: Okay. And which bylaw is that?

Danny Younger: That's ICANN bylaws. It's under Article 2 Power Section 3, Non-Discriminatory Treatment.

Marilyn Cade: Right. I remember reading it. Thank you. Okay.

Well let's go on to see if we can eliminate either 1.B.1 or 1.B.2. So I have 1.B.3 is there and 1.B.1 says you - that we can have two standards. One for sponsored, one for non...

The other option is that the rights to renewal should be standardized for all registry agreements.

Ute, do you have a pick?

Ute Decker: Well I have a question (foremost) because, you know, using the findings above, we just discussed whether we have presumptive renewal or not and what the term is going to be and whether or not this is going to scale across our agreements or such as TLDs.

Are we talking about the same conditions and only those or are we talking about additional condition?

Marilyn Cade: So the question is whether there should be - so good question. Let me go back to this.

So I'm looking at - in this case, using the finding above refers to the fact we answered the question yes or no. So the finding was 1.A.1, yes, there should be a - there should be a policy guiding renewal. And then we went in to talking about what the element should be.

But the finding from above - so if you said yes, there should be a policy guiding renewal, then should that policy be standardized and should the conditions guiding the right of renewal be standardized?

Ute Decker: So, I previously (unintelligible) opinion that there should be presumptive renewal and should be commercially reasonable in terms of (years). And that should be for all TLDs the same. Can I then - would it be coherent to support 1.B.3?

Marilyn Cade: I think so. I think because before you said - well, it depends. Before you said for all types and so whether you're deciding that it needs to be consistent for all types of TLD, but then you have the issue of market power that might make exceptions. And so I think it can be consistent. At least that would be my view on that.

Ute Decker: So we would have a policy but we could still negotiate exception?

In that case, I support 1.B.3.

Marilyn Cade: Okay.

Okay. John gave me a support for standardizing across all registry agreement.

David?

David Maher: I'm sorry, I -- which number are you on?

Marilyn Cade: Sure. It's 1B and the options are whether we should have different renewal term for sponsored - I'm sorry, different rights of renewal for sponsored versus non-sponsored or...

David Maher: So I have to abstain on that.

Marilyn Cade: Okay. Okay.

And - I guess, Ute, I'm on 1.B.3. I would have probably for the BC said that the condition for registry agreement rights of renewal should be standardized for all registry agreements unless there is a determination of market power or dominance in which case, the condition should be negotiated on an individual basis. The...

Ute Decker: Yeah, but I think that is - that's on good and that encapsulates I think as to what the thinking of ITC (unintelligible) that is intended to - it doesn't seem to be available.

Marilyn Cade: But the problem that I have with 1.B.3 is it sounds like that every registry agreement can be negotiated on an individual basis. And that's not where the BC head is. They would say there should be a standard and there would have to be justification based on market power or dominance for unique treatment.

Ute Decker: Well, is that something that maybe we should use to amend the current proposed wording of 1.B.3?

Marilyn Cade: Danny?

Danny Younger: Yeah. I'd like to have it reworded.

Marilyn Cade: But would you be on agreement with that - of that approach to rewording?

Danny Younger: I'm thinking that perhaps Ute's constituency in addition to market dominance as an issue might perhaps have other exceptions in mind. I'm not really sure but is she pointing to the possibility of let's call it variances, so that she could basically agree with 1.B.2 if the clause were added except for variances.

Ute Decker: Well I think my constituency would use market dominance as probably the main (example) for an exception of the duration.

Danny Younger: Okay.

Marilyn Cade: I'm going to propose to modify 1.B.2, the condition for registry agreement rights of renewal should be known and standardized for all registry agreements except for - except in the instance of determination of market power or dominance and not defining what that is, right?

Ute Decker: Well, I could not - could we not reword 1.B.2, let's say, except for exceptional situation such as market dominance.

Marilyn Cade: Okay, exceptional situations, okay.

Danny, are you going to stay...

Danny Younger: I would think a rewording that's comprising more with the bylaws would be in order as in throwing in a phrase that deals with the promotion of effective competition as being a reason for (unintelligible).

Marilyn Cade: Say that again.

Danny Younger: Well, the bylaws point the promotion of effective competition as the one justifiable reason why policies can be promoted on an equitable basis.

Marilyn Cade: Okay. Let me try rewording it. The condition of registry agreement right of renewal should be standardized for all registry agreement except for - except - this is what I'm struggling with this, how to get the exception in.

Danny Younger: But - unless justified by substantial and reasonable cause such as the promotion of effective competition.

Marilyn Cade: Got it, wonderful.

Ute, did that sound okay?

Ute Decker: Yes.

Marilyn Cade: Okay.

And then Danny, are you going to stay with 1.B.3 then?

Danny Younger: No, I just switch to the new variation.

Marilyn Cade: Okay.

Ute Decker: So, would I.

Marilyn Cade: Okay.

Then, I'm moving us to at last - no, not quite, I'm almost there, 2.A, consensus policy limitations and registry agreements are appropriate and how these limitation should be determined.

The first choice is consistent policy limitations are appropriate or consensus policy should always apply to all detailed gTLD registries or consensus policy should always apply, but there's an escape clause that a registry could present the justification situational analysis and justification for an exception, or consistent policy should not exist at all and the advice of the GNSO should be limited to advisory status.

Why don't we deal with those because I think actually 2.A.5 becomes a subpoint to choosing one of the above. So let me start at the to, consensus policy limitations are appropriate.

Do I have support for that?

We can come back.

All consistent policy should always apply to all gTLD registries.

Danny Younger: I support that, Marilyn.

Marilyn Cade: Okay.

And 2.A.3, consistent policy should always be applied, however, there can be a situational analysis and justification which would lead to an exception.

Do I have any support for that?

And again I would give .name as an example.

Woman: I would probably support that except that I'm insecure about the determination of what makes an exception.

Marilyn Cade: My constituency would lean towards supporting that in order to have formal process by which exceptions are granted rather than just leaving it up to the staff and the board which is what has happened in the past.

David, do you have a view on this?

David Maher: Well, yeah. Reading this over, Number 1, I don't think that the argument about consensus scope is within - or a consensus policy is within the scope of this PDP. But given subject of that reservation of right 2.A.5 is the position of the registry constituency.

Marilyn Cade: Okay.

David Maher: I'm looking also at the elaboration of 2.A, 1.1A, I think that's really identical to 2.A5.

Marilyn Cade: Uh-huh, uh-huh. Right.

So, David, 2.A.5.

Avri, it sounds - and Ute?

Ute Decker: Well, the ITC supports 2.A.3. I think that would be an improvement to the (transportation) realistic and useful. I'm not sure whether in the final version we want to maintain an (example).

Marilyn Cade: Okay. Okay. That's probably a good idea.

Danny Younger: Marilyn, my constituency would be comfortable with a language consensus policy limitations are inappropriate.

Marilyn Cade: Consensus policy limitations are inappropriate.

Okay. So I would change to - is that - how does that differ from 2.A.2. You would prefer I just reword 2...

Danny Younger: 2.8.2 is not really talking about limitations. They're talking about policies generally.

Marilyn Cade: So you would prefer...

((Crosstalk))

Avri Doria: It says all and always. That's pretty much unlimited.

Marilyn Cade: Yeah. But, Danny, if you prefer I reword that to say consensus policy limitations are inappropriate.

Danny Younger: Yeah, we'd prefer that.

Marilyn Cade: Okay.

David, I'm going to keep 2.A.2. David, I will note your comment. I'm going to keep 2.A.3 and 2.A.5 and everything else is gone. Okay?

2.B, examine whether delegation of certain policy making responsibility is appropriate and if so, what changes are needed. And 2 - the first choice, 2.B.1 is yes, policy making responsibility should be delegated sponsored TLD operators. And I just pulled out what I discerned from .job and .travel as what I see as the responsibilities that are delegated now. And, David, you may be aware - I mean I may have missed something, but that's kind of what I saw as being in - what's delegated now.

David Maher: Well, again, I don't think that the scope of this PDP includes decisions on existing sponsored TLDs. Say, registry constituency doesn't have any - you know, I feel that this PDP should not be dealing with that issue. I think it's appropriate for the other December PDP to talk about new sponsored TLD as a question of policy.

Marilyn Cade: Okay. I've got that.

So the choices here are, yes, certain policy making responsibility should be delegated sponsored TLDs, or they should be delegated but they need to be uniform across all sponsored, or they should be delegated - variations can be made based on the characteristics of the sponsored community based on the request from the sponsoring registry for - I think you probably should say as described in their charter as opposed...

Woman: Can I ask David for clarification?

David Maher: I was going to do the same thing. Go ahead.

Marilyn Cade: Sure.

Woman: Okay. I'm not sure I'm understanding. When you say that it's inappropriate for this PDP to deal with them, is that because you believe that the terms of reference do not include it or is it because you do not accept the terms of reference?

David Maher: The latter.

Woman: Okay. Thank you.

Danny Younger: David, just a follow-up question. I think what we're basically looking at is what I would describe as a review of existing policy. Is your constituency of the view that existing policies are not right for review or how did you arrive at the out of scope conclusion?

David Maher: Well, it's a, you know, in fact a long story, but fundamentally that this PDP was initiated as a PDP on the .com. After being told by the

General Council that that was out of scope, the PDP was amended, but the Council never requested an issue statement on this PDP. And in any event, I don't think that if the question had been presented at the General Council as it should have been, I believe you would have said that existing contracts are not within the scope of this PDP and therefore the sponsored TLDs - and I currently speak for them in the overall from the registry constituency, their - they have their contracts. As far as new TLD is concerned, I have no problem with that, Avri, you know.

Marilyn Cade: David, this is Marilyn. Thank for that brief restatement.

But subsequent to that, the Council requested and received answer to the -- (Martin Cubberly) act as then chair, request for clarification. And the General Council has basically said that it depends on both the policy and the contracts on whether new consensus policy will apply. And then it goes on for three pages to explain...

David Maher: Right, he can't answer.

Marilyn Cade: But in the end, he says - he stated the intent of PDP Feb 06 is to make policy recommendation on a series of subjects for which ICANN does not currently have uniform policy. And then it goes on to list what they are. Such recommendations could be useful in negotiating future agreements that might impact amendments to existing agreement even where consensus policy may limit the impact of such advice or policy on current agreements.

David Maher: Right. But that's not (unintelligible) to create policy on every conceivable subject. I mean you can't create policy saying that every officer of a registry should have to (red hair).

((Crosstalk))

Marilyn Cade: Wait a minute. You happen to take my favorite one.

David Maher: Sorry.

Avri Doria: More jobs (for red).

Marilyn Cade: Okay. Well, I think that - David, thank you for restating that clarification though.

Danny, did you have a follow-up or are we...

Danny Younger: All right. So I guess David, you're just basically uncomfortable with the fact that it's not narrowly tailored as would be ideal?

David Maher: Well, yes, you know, that's one way of putting it. There's no authority - I think that PDP does not have authority to do anything. It might have been narrowly tailored if the proper procedures had been followed, but they weren't. So here we are in my view wasting a lot of time, but I'm on the call and I will express my opinion.

Danny Younger: Okay. Thank you for that, David.

Marilyn, I would just point out that the language in 2.B that specifically asked what if any changes are needed, we haven' really addressed the

aspect of the changes themselves in your document. Will that be the subject of written of commentary or how do we move forward on that part of it?

Marilyn Cade: Good question. So I need to add a question which says - so do you have a thought on changes that are needed?

Danny Younger: Well, in the - in earlier thinking that I did. I guess a concern was raised over the - that travel registry and that in their original application submission, they did not detail their chain or of ownership. And the concern was if you have a piercing of a corporate veil where the parent company in effect directs the activities of its subsidiary, that actually might represent a risk to a sponsoring community and that they are under the assumption that their sponsored acting in their best interest where in fact it may be under its own obligations to pursue proprietary interest of its parents to the detriment of the community.

So we were thinking in terms of a possible change which simply a disclosure requirement with respect to ownership consideration.

Marilyn Cade: For now, I thought that probably it would have been in the original contract for all of the - David, not putting you on the spot but just generally thinking about when you originally put together the original bid for (PIR), do you recall whether there was any kind - are you familiar with whether there is a disclosure requirement?

David Maher: Disclosure of what?

Marilyn Cade: Of ownership.

David Maher: Oh yes. I believe so. I think it's on the Website.

Marilyn Cade: Yes. That's what I thought. I didn't mean about your (unintelligible). I didn't mean about your particular registry. I just meant - I assumed that the contracts all would have to have a disclosure of ownership.

David Maher: I guess so.

Man: Marilyn, the fact that we saw no disclosure of the globe ownership and (Proliance) just wasn't there in any of the paperworks.

Marilyn Cade: Uh-huh.

Man: So that's a concern that we think can be addressed as, you know, as a potential change.

Marilyn Cade: Okay. Okay.

Are there other thoughts about - let me see, before I go on with that, can I -- between 2.B.1 and 2.B.2 and 2.B.3, so they all - and I should call your attention to 2.B.4 on the next page so that you are aware. All three of those assumed delegation of policy making responsibility to the sponsored TLD operator. 2.B.4 says there should be no delegation.

Can we eliminate 2.B.4?

I'm hearing no objection. I'm going to try to get it down to - between two of (Bs).

So I'm not sure there's a lot of difference between 2.B.1 and 2.B.3. So really it's kind a between, I think, 2.B.3 and 2.B.2. That the standardization or there can be flexibility based on a sponsored community. And I guess, my thinking is that there does have to be some flexibility based on the sponsoring community because sponsoring community do not all alike.

Do I hear objection too?

David Maher: Yeah, I'm objecting, Marilyn. I think that issue is not to policymaking but the policy-making responsibility. And we see the responsibility as uniform and there certainly is going to be divergence in the act for policymaking

Marilyn Cade: Got it. Maybe what I should do is clarify that under 2.B.2 that shows that the development of the actual policy itself may include variations that are based on the characteristics of the sponsored community.

And then, can I eliminate everything else, I've just put the edited version of 2.B.2, so get rid of 2.B.3 then. Add that phrase from 2.B.3 to 2.B.2 makes the examples above in 2.B.1 just for example and have only one choice on this?

Hearing no distension, I'm turning the page.

Traffic Data, 5.A.

Should there be a policy regarding the use of registry data for purposes other than that for which it is collected, and if so, what should the elements of that day?

And I guess, we actually ought to do a Yes and No before we do anything else.

So, can I ask - first of all, yes, should there be a policy regarding the use of registry data for purposes other than that for which it's collected.

Avri?

Avri Doria: Yeah.

Marilyn Cade: Okay.

Danny?

Danny Younger: Yes.

Marilyn Cade: Ute?

Ute Decker: Yes.

Marilyn Cade: Okay.

David?

David Maher: Yes.

Marilyn Cade: Okay. And Marilyn, okay.

Marilyn Cade: Then - and I - as I'm assuming we're not addressing, Liz, the obligation to deposit registry data escrow, that's elsewhere in the agreements.

And I just made this note that that - we're not addressing that point, we're assuming it's been given. But can I just ask you to clarify that?

Liz Williams: Marilyn, would you be kind a sort of repeat your question and...

Marilyn Cade: Sure.

Liz Williams: And the reason why I'm asking you to do this so that nobody thinks I'm going mad here is that if we have two birthdays in our house today, a 10-year-old and a 2-year-old. So it's rather noisy and in approximately 25 minutes its birthday dinnertime.

Marilyn Cade: Oh good, well we should wrap up here.

Liz Williams: Yeah, I think my son would be very grateful.

Would you mind repeating the question?

Marilyn Cade: I will but let me just ask David. As I reviewed the contracts, the reference today to escrow is in a - registry data escrow is in a different part of the contract. And I have assumed that we are not addressing that. Can I just ask you if that makes logical sense to you?

David Maher: Well, I think escrow is different than the use of traffic data.

Marilyn Cade: Exactly.

David Maher: Registry data.

Marilyn Cade: Yes. Okay.

David Maher: Okay.

Marilyn Cade: So in that case, Liz, I think I don't need to ask you to do anything.

Liz Williams: No, that's right. Thank you.

Marilyn Cade: Okay.

Liz Williams: Thank you.

Marilyn Cade: Okay. Back to - so the purpose for which data is collected by the registry must be defined or published in the registry agreements and in the agreements between registry and registrars.

If such data is related to who is and therefore an end includes personally identifiable information, then the registry of a thick registry should be bound by the applicable ICANN WHOIS policies.

To the extent that a thin registry has first personally identifiable information, it - related to who is, it would be bound by applicable ICANN WHOIS policies. Because I don't see us as remaking the WHOIS policy either. And then I go on to say in any event, any data available to the registry related to the information of a personally identifiable nature beyond to (unintelligible) will be kept private and secure.

Such sharing of such data will be subject to agreement, and the responsibilities for protection of the data or the use of the data shall be maintained by the third party to whom the data is transferred.

Liz Williams: Marilyn, I have a number of questions on this, but let me just start with - my first one is do we look at 5.8.1 and 5.8.2 as being mutually exclusive or are they really standing next to one another and one adding more detail to the other?

Marilyn Cade: I think one is adding more detail to the other.

Liz Williams: Okay. So we're looking at 5.8.2 to add more detail that we presume is necessary to 5.8.1. So what is it exactly in 5.8.2 that we think is adding to what is the case in any event?

Marilyn Cade: So the idea that should there be a policy regarding the use of registry data for purpose of - which is collected and it says that - this says any data available to the registry related to information with personally identifiable nature will be kept private and secure. That's one point. And two, the sharing of such data will be subject to - they probably should say contractual agreement. And the responsibility for protection of the data or the use of the data needs to be maintained by the third party to whom the data is transferred.

So the registry has an obligation to keep the data secure. If they transfer the data to a third party for another use, they need to transfer the obligation to keep the data secure and to protect the private - the personally identifiable nature of the information.

Liz Williams: I have a comment on 5.8.2 which is that essentially I think everything - well, referring to ICANN WHOIS policy that should go without saying thing and we make reference to the application of policies and other

places. So I'm not really sure why we need to highlight the WHOIS policy...

Marilyn Cade: Okay.

Liz Williams: ...here if assume that this is (better).

Marilyn Cade: Okay.

Liz Williams: Now, when we come to the other issues about data being personally identifiable, I'm not sure though this is actually the term that a data protection lawyer would use in most jurisdictions, probably not in Europe. And I think we're actually making (unintelligible) to take over at something that is dealt with at a national level by data protection laws and to rewrite that into all policy here. And I question against it because I think that's not only something that as for some reason turned out to be contributor, but I think it is also unnecessary because in any event registries like anybody else would be bound by data protection rules.

Marilyn Cade: Okay. Other thoughts?

Danny Younger: Uh-huh.

Marilyn Cade: Maybe you and Danny?

Danny Younger: I've got a thought Marilyn.

Marilyn Cade: Uh-huh.

Danny Younger: 5.8.2, yes, there should be a policy on the use of registry data and to govern the provisions of registry data to any third party for any on purpose.

We look back at the fact that in, I think in 2003 we had a complete task force devoted to bulk WHOIS issues.

Marilyn Cade: Right.

Danny Younger: Now, if we're going ahead and saying that there should be a policy, I don't feel comfortable with the idea of a few of us in this current (repertory) environment attacking this issue when it took the efforts of an entire task force or good part of an entire a year just to confront the bulk WHOIS who is questions.

It's a very expansive area and I think my constituency will prefer to see this spun out of the process with a separate (TF) devoted to it.

Marilyn Cade: And let me note that and just review what else is said here and then come back to take more comment on that.

So in 5.8.2, there should be a policy in the use of registry data by the registry and to govern the provision of registry data in any third party for any purpose. And I think that probably could be the place in 5.A.2, the long thing that was above.

So let me - wait a minute, let me do 5.A.1.A. Any data collected by the registry that has applicability to the security and stability of the Internet should be available to ICANN and responsible parties who may need

to deal with trends that affect visibility and secure to the (DNS) such as but not limited to the CSAC.

So that's basically more about sharing the kind of information that helps to deal with risk.

Then 5.A.2, there should be a policy on the use of registry data by the registry and to govern the provision of registry data to any third party for any purpose.

And I noticed that - I assumed something, and that is that the registry would have closed - would have disclosed in their bid and that they should not modify without public comment the kinds of data collected and the purpose for which it is used.

Then 5.A.2.2, recognizing that the registry is in a unique situation to get a certain kinds of data due to the sole-source nature or rule of operating the registry when it is appropriate to provide data to third parties, the registry should provide data to their parties on a non-discriminatory basis and in a cost-plus basis.

And 5.2.3, uses of registry data should not become a marketable product or service us as a registry service.

Now, David, I'm going to ask for advice there because what I mean - what I meant by drafting that was - so uses of registry data that are different than those for which the data was collect - the purpose for which the data was collected should not become a marketable product or service.

David Maher: Well, in general, I think that's probably - I am sorry that the - I'm thinking, I'm thinking.

Marilyn Cade: I know. I know.

David Maher: Yeah, the registry - the reason that's a problem for me is that I think (PIR.org.) has a somewhat different approach for this in some other registries.

Marilyn Cade: Uh-huh.

David Maher: And I can't give you an answer for the constituency. So I'm sorry, I just...

Marilyn Cade: No, no, no, I - then 5.A.2.4 should be modified. Registry operator should not be allowed to promote the use of individual domain names, not that they shouldn't be allowed to promote the sale of domain names. Sorry about that.

And here's the concern that I have. It's really in 5.A.3. Certain data that is available to the registry as the consequence of operating registry services, but that is not related to the provision of the registry such as traffic data related to (unintelligible) should not be gathered or used by the registry.

If they can present a case where this information is in the interest of security and stability of the Internet, then the data needs to be provided to third parties as well on a non-discriminatory basis and in no case can personally identifiable information be gathered.

David Maher: That raises so many complex issues.

Marilyn Cade: Uh-huh.

David Maher: I mean, I couldn't vote on that now.

Marilyn Cade: Right.

Danny Younger: And, David, let me just ask a question. In your belief or the belief of your constituency, do registries essentially have grandfather rights to the dissemination of registry captured traffic data? I mean, do you view it as right for viewers of the commercial entity?

David Maher: No. The only rights that we have are those spelled out in our current agreement.

Danny Younger: Okay.

Marilyn Cade: But the proposed agreements include reference to gathering traffic data.

David Maher: Right.

Marilyn Cade: And also to being able to market domain names.

David Maher: Yeah. And - but those are just proposed. They're not signed yet.

Marilyn Cade: Right.

And let me just go on with this. So, an alternate to that was traffic data that's available to the registry as (unintelligible) of operating the service such as traffic data cannot be used and cannot be provided to third parties.

So let me just read 5.B.1. Consensus policy, determine whether policy is necessary to ensure non-discriminatory access to registry data that has made available to third parties. And the option I provided was that consensus policy is needed to ensure a non-discriminatory access to registry data that is made available to third parties.

And it occurs to me that that question of what the data is that is made available and kind of coming back to the Danny's suggestion that this is a very complicated - these as a registry data are very complicated and may need further discussion and analysis.

David Maher: And, Marilyn, one other question if I may interject.

Marilyn Cade: Uh-huh.

Danny Younger: I'm starting to take hit of David's concern over scope. And if I understand it correctly, this particular PDP is devoted to contractual conditions for existing registries. And as I understand it, these existing registries currently do not have any contractual conditions that deal with the topic of registry traffic data. Is that correct?

Marilyn Cade: Let me go back and refresh everyone's memory, actually.

The agreements - the only agreements that have contractual terms are Com2 2005 and Com3 2006. And in both of those cases, the staff negotiated a permission to traffic data.

The - however, Danny, just because the contract is silent on something doesn't mean that it's permissive. But the answer to your question is summarized...

Danny Younger: But it does raise the question of scope, Marilyn, because frankly if there is not a contact clause in there that deals with it, I think we probably are out the scope trying to address it.

Marilyn Cade: Actually, Danny, the terms of reference and I kind a dealt with it before but let me do it again. The terms of reference are approved by the Council. There was an objection to the terms of reference by one constituency. There was a long discussion about the intent and the purpose. And, you know, I'm happy to report that your constituency...

Danny Younger: I'm not speaking on behalf of the constituency now, Marilyn. I'm must, you know, thinking about the situation and I'm saying to myself well we're trying to deal with existing language and existing contracts and yet we have no existing contracts that have such language.

Marilyn Cade: But wait, wait, we do have two existing contracts that have this language.

Danny Younger: Approved contracts?

Marilyn Cade: One of them is approved by the board but not accepted by the Department of Commerce.

Danny Younger: Well then, it's not an approved contract yet, is it?

Marilyn Cade: That doesn't - so your point would be that you...

Danny Younger: How come we talk about, you know, contract clauses that don't exist?

Marilyn Cade: Well, Danny...

((Crosstalk))

Avri Doria: ...potentially approved.

Marilyn Cade: I didn't hear you, Avri.

Avri Doria: I basically said they do exist and, you know, whether they're approved already or approved by the time this PDP comes out, basically our job in the task force is to respond to (unintelligible). Now I think once it gets back to the council, the argument becomes valid again if someone wants to argue that the recommendations of the task force should be voided in a particular area because the council has now decided for whatever reasons that it is not a in scope question.

But as far as the task force goes, we got, you know, a set of terms of reference that we're supposed to respond to and deciding on whether they're in scope or not, so the task force is at scope.

Danny Younger: Okay.

Marilyn Cade: Let me return to try and to make something out of what to do with registry data so we can wrap up.

I'm - you had earlier said, Danny, that you thought that the breadths of the topics to discuss in registry data were very broad.

Danny Younger: Yes.

Marilyn Cade: And I noticed that, you know, certainly, one alternative to us would be to propose a task force or a further working efforts specific to the usage of registry data.

Danny Younger: Well that seems reasonable.

Marilyn Cade: Ute?

Ute Decker: It seems reasonable?

Marilyn Cade: David?

David Maher: I'm sorry. I'll have to ask you to say that again.

Marilyn Cade: At one option in addressing the registry data, 5.A and 5.B is to suggest that there'll be a task force to deal further specifically with traffic data since...

Danny Younger: Okay, that's...

Marilyn Cade: Sorry. I have to say registry data because I got corrected on that. But to take 5.A and 5.B and say, okay, that deserves further examination

including the fact that it may include information which could be important to determine the security and stability of the (DNS) and the Internet there may be interrelationships.

And so we think that there should be a task force specific to this topic and potentially discussion with the CSAC and maybe we should propose discussion with the CSAC first before we make the recommendation for a further task force.

Danny Younger: And that's - I'll go along with that.

Marilyn Cade: So why don't I proposed that, that we think this topic needs to be discussed with the CSAC and then consideration given after that fact to whether there should be a separate task force.

Danny Younger: Fine.

Marilyn Cade: Ute, are you okay with that?

Ute Decker: Yes.

Marilyn, you should also add a piece in - about that being dealt with in board resolution.

Marilyn Cade: Hold on. I'm looking at the board resolution.

Danny Younger: It's included, Marilyn. It's at last...

Ute Decker: It's the very bottom of it.

Marilyn Cade: ...phrase. Yeah.

Marilyn Cade: Oh sorry. I was looking in the - okay, yes. So relating to competition traffic data - okay, thank you, I will reference that.

Okay. So...

Liz Williams: Guys, I wonder if I could be excused once you're wrapping this up. Birthday cake and candles are being lightened. I am being summoned...

Marilyn Cade: Right.

Liz Williams: Would you excuse me please? Thank you very much to everybody. And I will be taking up - I'll be taking detail while everyone has been speaking. So I will catch up with you all when you send me that last pieces that you can send me.

Marilyn Cade: Thanks, Liz.

Ute Decker: Thanks, Liz. (Have fun).

Liz Williams: Okay. Bye.

Woman: Happy birthday to all.

Marilyn Cade: Happy birthday to the children.

Okay.

Avri Doria: Can - Marilyn, can I...

Marilyn Cade: (Unintelligible)

Avri Doria: ...just one small change to that one.

Marilyn Cade: Yup.

Avri Doria: And I think we jump the gun slightly when we say and possibly another task force. I think at the moment, you would want to say and possibly request another issue's report. Because we don't really request a task force since we request issue report.

Marilyn Cade: Very good. And everyone's okay with that?

And maybe and actually, Avri, it needs to say and based on that information, the counsel should consider what steps to take including the possibility of requesting an issue's report.

Avri Doria: Yeah.

Danny Younger: Yeah. That's good.

Avri Doria: Uh-huh.

Marilyn Cade: Okay.

So I have some significant editing down to do. And I'm going to - I find my numbering (scheme) almost unusable. (We're going to change) the numbering underneath this. It won't be so complicated next time

because it's got fewer choices. But I also am going to try to capture some of the discussion and send this back to you guys.

And I realized that everyone really should have the right to edit the document because I did try to take notes, but I won't necessarily have captured everything that was said.

Ute Decker: When do you think, Marilyn, you will be able to send it to us?

Marilyn Cade: Oh God, I have to do it tomorrow. I have no choice.

Ute Decker: All right.

Marilyn Cade: I have to finish a briefing for the (AT) - I have to finish a briefing for a client that's going to the (ITF). But I'm going to then turn my hands to this.

Ute Decker: Yeah. Because it seemed to me that in particular - this section on use of registry data was not quite as mature as the rest - both - in terms of addressing and I was thinking -- that as my own thinking.

Marilyn Cade: Yeah.

Ute Decker: And as well so we will have written comments on that one when you send me your address.

Marilyn Cade: Okay.

Okay. And, David, thank you. And, Danny, thank you. And, Ute, thank you.

Ute Decker: Thank you Marilyn.

Marilyn Cade: And, Glen, if you want to give me a few minutes, I can talk to you about agenda plan.

Glen Desaintgery: Yes.

Marilyn Cade: And other things. I can give you a call.

Glen Desaintgery: Thank you very much, Marilyn. Otherwise, you want me to call you, but you call me when you're ready.

Marilyn Cade: I'll call you in just a few minutes. I'm going to grab some lunch and I'll be right back at my desk.

Glen Desaintgery: Okay.

Danny Younger: And, Marilyn, do you when Group B got the next scheduled session?

Glen Desaintgery: Yes, Danny, I do know. It is on Thursday.

Danny Younger: Thursday, okay.

Glen Desaintgery: Thursday and it's 3:30...

Danny Younger: Eastern. Okay, thank you.

((Crosstalk))

Woman: Marilyn?

Marilyn Cade: Yes.

Woman: I just basically wanted to let you know on the 2nd, what I'll be asking you and John to do, and I'll let John know (unintelligible) is I'll be asking you to talk the whole task force through the report that you're putting out.

Marilyn Cade: Oh, okay.

Woman: Okay. Just so you and...

Marilyn Cade: Yeah.

Woman: ...the group know that that's how I'd like to structure, you know, the discussion. We'll have a two-hour meeting and one hour, you know, goes through one with discussion, the other hour goes through the other with discussion and...

Marilyn Cade: And we have all the additional participants included, right? Glen, Danny and...

Glen Desaintgery: Oh the list?

Woman: Oh, yeah. I would assume that at that task force meeting...

((Crosstalk))

Glen Desaintgery: Yes, yes, yes. Yes, yes. Yeah.

Woman: ...yeah, everyone should be invited. That would be good.

Glen Desaintgery: Danny, you're on the task force list as far as I know. Didn't you get the last notification?

Danny Younger: I just get so much e-mail. That's my problem.

Glen Desaintgery: Okay. You just get so much email. All right. I'll have to put you on the task force list.

Danny Younger: Thank you, Glen.

Glen Desaintgery: Okay.

Avri Doria: Yeah. Oh yeah, or you can also just make sure that for that meeting, you know, A and B are both copied on the announcements so everyone is...

Glen Desaintgery: I'll send it to the whole task force, Avri, for the 2nd.

Avri Doria: Yeah. Okay thanks.

Glen Desaintgery: Okay, thanks.

Danny Younger: Okay, Marilyn, thank you for the effort. I'd have to leave the call now.

Marilyn Cade: Great. Thanks.

Danny Younger: Bye-bye.

((Crosstalk))

Glen Desaintgery: Thank you very much, Marilyn.

Okay, bye-bye.

Marilyn Cade: Bye.

Woman: Bye.

Glen Desaintgery: Bye.

END