

GNSO
Operations Steering Committee (OSC) GNSO Council Operations Work Team
25 November 2009 at 17:00 UTC

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Participants on the Call:

Ray Fasset - Registries
Wolf Ulrich Knoben - ISPC
Avri Doria – NCSG
Eric Brunner-Willaims

Invited Guests

Kristina Rosette - IPC
Steve Metalitz - IPC

Staff:

Ken Bour
Julie Hedlund
Glen de Saint Gery

Apologies:

Ron Andruff - CBUC

Glen DeSaintgery: This is Glen. On the call we have Ray Fassett, Avri Doria, Wolf-Ulrich Knoben, Steve Metalitz. And for staff we have Julie Hedlund, Ken Bour and Glen DeSaintgery. Thank you Ray.

Ray Fassett: Okay, Well first of all I'd like to thank Steve for joining us today.

Steve Metalitz: Sure.

Ray Fassett: Sure. And Wolf, I think you were about to make a comment.

Wolf-Ulrich Knoben: Yes, thank you Ray. And just about the question of 25th which is today which is in the (other loops) in the past on council level I would just give (Chuck) a call. So and he should be aware of that.

So maybe in the next conference meeting he comes back to that in three weeks. But I don't think we really a formal resolution. But just check with (Chuck) and that could be solved.

Ray Fassett: Yes. Yes and I think today's call especially with Steve on is really going to help our work team in the direction we're going to go.

Wolf-Ulrich Knoben: Yes.

Ray Fassett: I quickly just shortly though, sent out a summary, hopefully articulated the issue of where we're at on the conflicts of interest not firm, just where we sort of landed and we need more guidance.

The distinction being conflicts of interest as this pertains at the stakeholder group level versus a conflict of interest at the Council level.

And I think Steve is up to speed on this point. Steve -can I defer to you to jump right in? I'm sure your schedule is busy.

Steve Metalitz: Yes. Yes, thank you for sending this note around earlier today. It's very helpful. Let me just clarify a couple of things.

First of all when you say solve the stakeholder group level, one thing we - well we don't know much about how stakeholder groups are going to function, we know one thing. They're all different.

Two of them are really are really the constituencies in the old systems and they just changed their names. The other two are quite different from anything that's existed before.

I can tell you that there is no way that conflicts will be even - address the stakeholder group level in the commercial stakeholder group at least at present because counsel positions aren't even worked out. The positions on issues are not even worked out for the stakeholder group level. They're worked out at the constituency level.

And while there may well be discussion at the stakeholder group level, it's meaningless to say that the stakeholder group will have anything - it will necessarily have anything to say about the position taken by for example, you know, David Taylor who is a representative and I think we see himself as he's elected by and he would see himself as responsible to the IP constituency, not to the commercial stakeholder group.

That may change over time. That - this is kind of an interim arrangement. And I think there is some discussion about having a more integrated stakeholder group. But right now that's not the case. And I would not even try to speak for the non-commercial stakeholder group on this.

So I think that the premise here that the stakeholder group level is at all relevant may need to be re-examined.

Ray Fassett: Okay so let me see if I understand. So, you know, I'm in the contracted party house so things aren't as complicated.

Steve Metalitz: Right.

Ray Fassett: But when I look over into the other house we have stakeholder groups that are comprised of different constituencies.

Steve Metalitz: Right.

Ray Fassett: And ...

Steve Metalitz: Well that's true in the...

Ray Fassett: Yes.

Steve Metalitz: ... commercial side, yes.

Ray Fassett: Yes, yes. So trying to get an elected rep of the stakeholder group to represent the views of all the various constituents - constituencies that may form that stakeholder group is not as easy as we might be assuming. Is that pretty much it?

Steve Metalitz: Yes. Well it's just that they're not there to represent the views of the stakeholder group. They're there at least, because in the stakeholder group at this point they're there to represent the views of their constituency.

Man: Ray, can I jump in there?

Avri Doria: This is Avri if I can add something also?

Ray Fassett: Okay so we have a queue. Who was the first one there before Avri?

(Christina): Ray it's - I just – it's (Christina). I just want to...

Ray Fassett: Oh.

(Christina): ... let you know I just joined.

Ray Fassett: That's wonderful okay. Who was the first one in the queue there?

Ken Bour: It was Ken.

Ray Fassett: Ken, please go ahead and then was it Avri? Yes. Go ahead Ken.

Ken Bour: Yes I just wanted to see if we can make a differentiation here between constituencies and stakeholder groups.

Where the stakeholder groups have not yet sort of fully fleshed out their role vis-à-vis the counselors and their decisions, I think the issue we're considering here is if a counselor has a conflict of interest in a voting matter on the council can he or she appealed to whether it's constituency or stakeholder group that organization to which they have, They owe their sort of allegiance or their reporting representation and ask them for a direction so as to eliminate the conflict.

Maybe the problem here is we use the term stakeholder group but we meant constituency or stakeholder group -- whichever is appropriate.

Ray Fassett: Yes. Fair. That's fair yes. I think that's correct. Avri?

Avri Doria: Yes I was going to say two things. One I was going to say basically what Ken just said that that stakeholder group is really just a stand in for group you are responsible to.

The other thing is just thinking on the NTSG side where I'm on the, its executive committee is it's still being discussed whether there'll be SG-wide or whether there'll be some notion of constituency.

I think it's trending towards SG-wide council members. And of course for the next year we're in that funny situation of two coming out of, you know, the (MG) – I mean three coming out of the (MGC) and three being board appointed, so obviously the board ones will completely fall completely outside of these categories.

Ray Fassett: Okay so let me see if I can rephrase the question to Steve and (Christina). Is there -are there remedies - all right. Is it true that at the council level, the rep regardless of where they're coming from are intended to be representing a membership group as a whole versus an individual position?

And if that's true is there - are there ways to resolve the conflicts before the council level?

Steve Metalitz: Well I think that that reformulation that what Ken suggested is - this is Steve.

Ray Fassett: Yes.

Steve Metalitz: I think that reformulation that Ken suggested is helpful. And let me just say from the standpoint of the IP constituency, we do attempt to - we do give guidance to our council members as much as possible on issues that are coming up before the council.

But we've basically elected these counselors also to exercise their judgment. And in some cases, you know, it just may not - in some cases it's not really feasible to give a very detailed guidance just because of schedules and timetables and...

Ray Fassett: Yes.

Steve Metalitz: ...amendments and so forth that come up.

So I agree with you that if (Christina), let's say as one of our representatives, has a conflict and is therefore feel she's unable to vote on a particular matter, the first thing I would hope she would raise that at the constituency level and we could try to figure out what to do about it.

But I'm not sure that the idea that she would say I'm conflicted but if you tell me what to do I can do what you tell me to do. I'm not sure that's really – that necessarily resolves the problem.

First because there are going to be some circumstances in our consistency anyway where constituency doesn't really tell the council member what to do, at least not in detail.

And second I think which may be a broader problem is that I'm not sure from a professional responsibility standpoint - and both of our IP - both our council representatives happen to be lawyers.

But I don't I'm not sure from our professional responsibility standpoint that it - that someone can resolve a situation in which he is conflicted by saying I'm not voting what my personal preference is, I'm voting the will of my constituency.

(Christina): And I'm actually consultant with the profession - the chair of our professional responsibility committee. And, you know, again, this is just from my particular situation, you know, it is their view that it doesn't matter if I am on the council in a representative capacity.

If I have a conflict in an individual capacity I cannot, you know, taking the position that while I'm not voting as an individual I'm voting on behalf of the constituency does not avoid the conflict.

And moreover going to the other point about consulting with the constituency as to how to proceed, if I have a conflict I have a conflict. And the constituency say we disagree that it's a conflict or we acknowledge your concerns about a conflict but we still want you to do that, that is not a route that I can follow.

Ray Fassett: No I agree. I - this is Ray. So I'm going to offer this sort of suggestion and see what you guys think on this issue.

The issue to me appears still to be at the stakeholder group level. So it becomes a remedy for the stakeholder group to have to solve the conflict. And it could be passing the vote where the council rep discloses the conflict not open for - not necessarily open for debate within that constituency or group just that I'm telling you folks I have one, I need to be relieved of this one where then the stakeholder group or constituency has an option now where they can pass the that vote to a different rep who doesn't have the conflict.

(Christina): Which is fine, but then you would need to amend the council bylaws to expand the categories of situations in which proxy votes are permitted...

Ray Fassett: Well actually we don't even have anything...

(Christina): ...to encompass...

Ray Fassett: ... now. Yes we don't anything in there for proxy votes at all.

(Christina): No I think there's proxies in the council bylaws?

Ray Fassett: No.

Steve Metalitz: But that's someone voting. This is not really a proxy situation. This is an alternate situation.

(Christina): An alternate situation, yes, yes.

Steve Metalitz: Your basically saying, you know, (Christina) was saying I can't vote and...

(Christina): Right.

Steve Metalitz: ...so if the IP constituency has elected an alternate whose only job it is to vote and participate in a case in which one or the other of our constituency representatives is conflicted then that would be fine I think.

We - and if that person, assuming that person is not conflicted. We don't have that in our bylaws now. We can put it there.

And but then the other question would be the council would have to say oh, who's this person popping up to vote in place of (Christina)? I mean, you know, the council would have to obviously approve of that type of arrangement.

Ray Fassett: Well I think we would go to the operating procedures.

Steve Metalitz: Yes.

Ray Fassett: And we would describe the situation in hand. And in these instances a stakeholder group would be permitted to do these things if they choose.

Now if the stakeholder group or constituency doesn't change their charter or doesn't change their methods, I mean we're putting - the rules of procedure to put the onus on the stakeholder group if this is the issue that's being brought forward, put the onus on the stakeholder group to modify their own operations to solve the problem.

Steve Metalitz: Yes I I'm comfortable with that I mean assuming its stakeholder group/constituency.

Ray Fassett: Yes.

Steve Metalitz: But and that would certainly solve that problem. The stakeholder group would have the choice of either, you know, having an alternate who could step in or not.

Now if the answer is not, then we have the other problem which is okay, our constituency is only going to get one vote instead of two votes but...

Ray Fassett: Well no in that case...

Steve Metalitz: ... that's fine, but what's the denominator? It...

Ray Fassett: Yes, yes in that case I mean the option was provided for. The stakeholder group chose, for whatever reason, chose not - I mean the burden is on the stakeholder group. If the stakeholder group chose not to invoke it they are - they at that point would be faced with an abstention at the council level.

And I don't think it's reasonable since the burden was not exercised by the stakeholder group or constituency to then say well we're going to adjust the threshold count on the denominator.

Steve Metalitz: Well no but I'm again, I'm taking this now from (Christina)'s point of view. And she...

Ray Fassett: Yes.

Steve Metalitz: ...correct me if I'm wrong. But I think if she has a conflict and doesn't vote, then her not voting shouldn't have any influence on the outcome.

And of her not voting is counted as a no vote in practical terms, in other words if the denominator is not changed...

Ray Fassett: Right.

Steve Metalitz: ...then she may have, you know, it may affect the outcome. And I just I don't know whether that's consistent with her...

Ray Fassett: I hear you.

Steve Metalitz: ...professional obligation.

Ken Bour: Ray this is Ken. Can I pop in there?

Ray Fassett: Yes please Ken.

Ken Bour: Yes, so the way that I drafted the set of procedures that the team is actually considering at the moment is step one is to attempt by all reasonable means to resolve the conflict. We discussed two ways to do that that are actually specified in these procedures.

And in the case of an attorney perhaps maybe the first one which would be direct - directed to vote a certain way doesn't work. But it might work in other situations where somebody is not an attorney and not held to a professional code of ethics or standard.

And so that one would still I think potentially play a role where the – its constituency and/or stakeholder group could say do this and therefore you're absolved.

If and if that doesn't work then we have alternative B which is the constituency and/or stakeholder group chooses an alternate person to register their vote on behalf of the conflicted individual.

If that doesn't work I can't remember if there were any other - I don't think there were any other - ways out of this situation that we thought of yet.

If that doesn't happen then what the procedure says is the vote shall be recorded as an abstention and the denominator shall be reduced by one.

Avri Doria: This is Avri. Can I...

Ken Bour: Okay. That's what we - that's what I wrote already. So...

Ray Fassett: Okay.

Ken Bour: ... there is a provision in there that if all reasonable efforts fail to avoid the conflict, well then yes, you have to go by a full abstention. Then you've got to take that denominator and change it.

Avri Doria: This is Avri. Can ask a question?

Ray Fassett: Yes.

Avri Doria: Okay first of all, actually the first one is a statement and not a question although it may be a question.

If, you know, the idea that lawyers are held to a certain standard and the rest of us may not be, I think ends up sort of a mute point because at any point we would be saying well I don't have to be or as moral or as abstentious in doing this as a lawyer would.

So then anybody is sort of incurring a conflict of interest risk simply by not picking the standard, the highest standard possible. So I think that that becomes a sort of a mute point.

On the second one, the whole notion of having an alternative come in which is similar to the proxy vote but not, has that thing cleared with legal staff as a motion? Because I know we had specifically legal staff issues with the use of a proxy vote.

Now I don't know if that was because we try and defined it strictly enough or because proxy vote was in some inherent way problematic.

And so I'm just wondering if this substitute suggestion has already been cleared by them and whether there are special conditions that would need to be identified that would make it strictly speaking acceptable.

Because we're talking about decisions that have to do with things like contracts so, you know, and that whole serious level of making it acceptable. So I'm curious. Thanks.

Ray Fassett: Well this is Ray. My first response to the second question is no. We have not - this has not even been floated as a kite through ICANN staff legal.

It would have to do that once we as a work team as a sort of policy position came up with this is what our chosen approach is. And then we would run it through ICANN legal. So we're - I don't think we're there yet.

(Eric): Hello?

Ray Fassett: Yes. Anybody have a comment?

(Eric): Sorry Ray, this is (Eric). I just joined the call.

Ray Fassett: Okay, thank you (Eric). Okay so, you know, we're - I'm still I think our work team could really use some help. Is - now Ken on your three options there, you know, every - one of your options was every reasonable means was exercised.

And in the case of not all regional means - in case of that after all reasonable means have been exercised, then the third one would pop in which is an

abstention can be recorded at the council level which would then change the denominator.

Now my question to you is if that third option is out there, how do we ensure that the reasonable options that preceded it were in fact follow through?

Ken Bour: That's a good question. This is Ken. I don't - we didn't - I didn't think about that and didn't provide for it in the – at least what's been written so far.

I do want to raise another element in that mix of options to be exercised that one of the things that we also added -- and I think Steve and (Christina) might have an opinion about this too -- is we said that if all reasonable means are exercised, and we'll take a separate question as to whether we can prove that that's the case or not, and so they conflict remains and it can't be avoided and so we register an abstention, the next thing that we said was that the non - the house that did not have the conflicted individual had to approve by majority vote that that, that the denominator should in fact change.

Woman: Absolutely not.

Ken Bour: Yes that's what we wrote. And - so go ahead guys, have at it.

(Christina): I mean it's just, you know, I guess what I'm having - the problem that I have is that, you know, not only are these professional obligations not only to ensure that, you know, to my clients and to my ability to practice law but, you know, worst case scenario we're talking malpractice exposure for my entire firm, you know, all however many employees and lawyers.

So, you know, I frankly could care less what the contracted party stakeholder group has to say about whether or not they believe I do or do not have a conflict and whether or not my abstentions count or do not count.

It really comes down to if the Professional Responsibility Committee here who I do consult with, you know, regularly just to ensure that there are no issues. If it's their determination that I have a conflict that's the end of the discussion as far as I'm concerned.

And it may actually sometimes be the case. And Ken I wanted to get information from you as to what you mean by reasonable measures, because it is in fact possible that in some cases the conflict, the basis of conflict is something that is confidential and I can't disclose.

Ray Fassett: Yes. Let me throw this question out to the (lower) team. We have myself, Avri, Wolf, (Eric). So let's just do a litmus test here on this question here that (Christina) is raising a point to.

How strong are we on this option of going - having to go to the other house for the approval? Does anybody feel strongly that that is something we really need to put our stake in the ground and feel is - has to be part of this? Anybody have any comments on that?

Avri Doria: Hi, this is Avri.

Ray Fassett: Avri yes?

Avri Doria: Yes I certainly don't. I don't know how we, you know, confirm or just accept, you know, the truth of somebody swearing on a stack of their version of the Bible that yes, they have a conflict of interest.

I totally accept that that conflict of interest could well be confidential. I'm assuming that saying there's a conflict of interest is not confidential, otherwise we really do have a problem.

(Christina): Right, right, yes absolutely.

Avri Doria: Right. But I accept that. And I think that, you know, council members have to accept that when somebody is saying something like that that they're telling the truth.

And if at a certain point there, you know, it happens all the time and it becomes really problematic or one notices a pattern of behavior that says well maybe there is something fishy there, then you deal with that differently.

But I think if somebody says hey, I've got a conflict of interest and it's serious and either I can or I can't tell you about it, it has to be accepted.

Ray Fassett: Yes? Any other – yes?

Wolf-Ulrich Knoben: Wolf.

Ray Fassett: Yes Wolf?

Wolf-Ulrich Knoben: Yes. But I'm just thinking not so in detail so, I'm just thinking what really came from them, what they would like to have.

I understand, you know, if we came as or our team we came to the point that you said okay, conflict of interest should be accepted.

But it's the question is what is a conflict of interest in this case? So that means, so we are little bit unsure about that. So and we would like to have said some guidance on that.

So what we expecting, what we are also discussing was do we have any criteria about so and do we expect that within many different kind of cases where somebody could come up and only say okay, I have a conflict of interest and that's it, and I would like to have to abstain from voting.

So we wouldn't like to open that door too much. So just we would like to narrow that door. That's how I see that.

So for me the question is -- and that's my question to (Christina) and Steve -- do you expect from your point of view and many different cases, so maybe it could come up so?

And if that is the case, could we find some criteria which we could lay down in the audit procedures to, and where we can have a kind of guidance or not measurement, but a kind of guidance how to see okay, that is – it could be a conflict of interest which is now in our list let me say, which of order of procedure and which is - which has been accepted already and which should be accepted also in the future.

And we could update this kind of list also throughout our meetings if a new kind of conflict arises. Why not? So that's my question is do you really expect many different kind of conflicts there?

(Christina): I mean, you know, it hasn't happened yet. And in terms of specific kinds, you know, obviously the facts are going to vary.

But I think ultimately you're getting to whether or not the particular vote, because and, you know, whatever it is that's being voted on is going to have a direct, you know, I think it would really go to, you know, is a client engaged in a transaction or in litigation?

Wolf-Ulrich Knoben: So last time we differentiated between let me say so called materialized conflict of interest. So I mean, what we would like to see in the team is okay, there is material behind the conflict really.

So that, not only in argument, you know, just...

(Christina): Right.

Wolf-Ulrich Knoben: ...to hide something but is really materialized.

(Christina): My concern about doing that though is that, you know, I have an obligation to not only avoid actual conflicts but also the appearance of the impropriety.

And that's where I think applying that materiality standard that I think you're trying to get at Wolf is going to be very difficult to do.

Ray Fassett: If I can jump in here and answer. Oh go ahead Steve.

Steve Metalitz: I was just going to provide my perspective on Wolf's question. I think one reason this hasn't come up is because I think when people stand as candidates for the council they have to be, they are thinking about this. And the voters if you will, may also be thinking about it.

And I can reflect back that in one - at one point when the GNSO council was selecting one of the people to go on the ICANN board we instructed our representatives in that case to vote against somebody or not support somebody because we thought that person was too likely to have conflicts that would prevent the person from actually participating actively as a board member. And there was too...that person would have to be recused and therefore that wouldn't be a good situation

So, you know, one way to deal with this problem is to ask candidates for these positions to be as candid as they can be about whether they foresee, you know, what they see as the likelihood that they would be conflicted.

Now a conflict situation certainly may arise after the election. So that this is not a panacea. But I think this is one way to try and deal with this problem which is - and I don't know exactly how to - whether, you know, there was this type of message or something like that said to either the stakeholder group or their constituency, whoever is selected these people. Bear in mind that if

you're, you know, you want somebody who is unlikely to have too many conflicts that will require them to abstain.

Ray Fassett: Right.

(Christina): But I think, you know, at least, you know, just speaking for me and for David because David and I did talk about this before he decided to run, I mean that was absolutely a consideration.

You know, do I have any conflicts here? Because if you have conflicts going in there, you know, to certain point there's no point to doing it.

Ray Fassett: Yes, right.

(Christina): You know, because you effectively can't - you essentially can't participate and you're also having to make public your inability to participate. So that's a silly benefit anyway.

So I think there is a lot of kind of self filtering on the front end. But Steve's absolutely right. I mean he knows what we're going to be voting on a year from now.

Ray Fassett: I think (Eric)...

Avri Doria: This is Avri. Can ask a question? Okay thanks?

Ray Fassett: (Eric) then Avri.

(Eric): Thank you Ray. We're back I think to where we were in about a month ago when I explained that I thought that the extension should not result in changes to the denominator and that we couldn't look inside them.

And I'm really glad (Christina) spoke to this issue at Seoul and is speaking to the issue today. Because she - I didn't have her exactly and mind but every scenario she's discussed is what I did have in mind. That's it.

Ray Fassett: Okay. Thank you. Avri?

Avri Doria: Yes. The question I have on one of the criteria, that I had mentioned when we talked about this in the past, is that in, I would think in any case where a vote came up and someone had to abstain they would have had to recuse themselves from any of the conversations on that up until then because you obviously can't debate something you have a conflict of interest on.

(Christina): Tell that to the...

Avri Doria: ...anymore than you can vote on it.

Ray Fassett: Right. So I was thinking about this. Let me just interject a comment on that one.

So a subject matter comes up at the council level it would be right at that point that the council rep would say to themselves likely oops, I might have a conflict here. They would disclose to their other council members that they likely or may have a conflict.

They would need to go back to their constituency to discuss the issue. And we'll come back to - and will not and be involved in discussion until they get clarity that they can.

Man: I'm shaking my head Ray because I can't see how we can prevent - how we can speak to an issue before it's actually been posed as a question that can be voted on. How do you?

(Christina): No but I think the point that Avri makes -- and this is frankly an issue that, you know, folks within the IPC, myself included, have had with the board from time to time -- is that there's kind of – there's a - at a certain level there's no point in abstaining from a vote on the grounds that you had a conflict if you've participated so fully in the discussion that you essentially had the opportunity to sway the outcome.

Ray Fassett: Right.

(Christina): You know, I remembered that at one point the position that Avri is suggesting was not what applied to the board. And I guess my question for Ken is, is that in fact what applies to the board now?

Ray Fassett: Ken are you there?

Ken Bour: Yes. I don't think I - I have read the board's conflict of interest provisions many times. So Steve and I have been having some good dialogue on it or back and forth on email.

But I don't think there is anything that I can remember that talks about what happens in discussions ahead of a vote. But there is certainly a mention that a conflicted board member should not discuss and should not vote.

But where that comes up in the process and what's to be done if somebody did discuss then I don't think all that's actually just mentioned in the procedures.

Steve Metalitz: Well this is Steve. My recollection's a little bit different. And I filed several comments to the board when they were discussing their conflict of interest procedure.

And I think where they came out was that there was a, you know, I think where they came out is that there's a different standard for recusing from a

vote than there is from recusing from discussion which I disagreed with. But I think that's where they may have come out.

But I would agree with what Avri said. I think that if you were conflicted from voting you should really not be engaged substantively in the discussion either.

Ray Fassett: Well I think it comes down to the individual too, doesn't it Steve? I mean if we're hearing that the issue here is exposure, perhaps even liability, legal liability exposure to the individual or to the firm, I would think the individual's going to even in a discussion is going to speak up and say I've got an exposure issue here.

(Christina): Not...

Ray Fassett: Not...

(Christina): ...if the topic is one on which they can benefit their client by the outcome. That's where you're not necessarily going to have exposure but you...

Ray Fassett: I see.

(Christina): ...would still have a conflict.

Ray Fassett: I see. All right so not an exposure issue but a – a conflicted issue.

(Christina): Like unfair benefit type issue.

Ray Fassett: Well in theory is the client then part of the constituency even if not a member of the constituency? Maybe that's a bad question.

(Christina): I mean it's, you know, I don't know that that's necessarily the case.

Ray Fassett: Okay.

(Christina): And I'm also not sure why it would matter. Again...

Ray Fassett: ...all right.

(Christina): ...I don't - I think I may not be understanding you.

Ray Fassett: Yes and that's not - that's - let's not go off on that change.

Steve Metalitz: Well but this is Steve. I would just say that if - I think it would make sense that if you spell out, you know, procedure for conflicts you might want to say that this should apply to any substantive discussion on an issue on which a person would be prevented by a conflict from voting.

Ray Fassett: I agree with that. Does anybody disagree with what Steve just said, anybody on the work team? Okay. I happen to agree with that. To me that should be part of what we're doing.

What I'm also trying to accomplish here is I would like to keep, unless others on the work team disagree, the rules of procedure not so granular but offer guidance.

And I'd like to push the autonomy down to the stakeholder groups to resolve these things. And I understand there could be exceptions that happened at the council level, but really trying to push the autonomy down to the stakeholder groups by providing options to remedy at that level whether it's naming an alternate out, you know, pushing it there, pushing the burden down at the stakeholder group level or constituency group level.

(Christina): Why?

Ray Fassett: Why? Because I think when we look at the council, their role is to be, you know, the manager of the policy process...

(Christina): Right.

Ray Fassett: ...not be getting into the substantiveness of whatever the outcome is to be. So to me in the spirit of managing the process you really need to be accountable to who you're representing.

So it's who you're representing that you need to resolve this conflict with at that level. And I think that's more true to the spirit of then the council simply acting as the manager of the process.

(Christina): I understand that perspective. My concern about leaving it entirely to the stakeholder group is that at a certain level it would seem to me that the - independent of the personal issues, in other words my personal professional issues relating to conflicts, it would seem to me that one of the goals of having a robust, delineated conflict policy is to ensure the integrity of the output.

And it would seem to me that the best way to do that is to ensure that the policy is consistent across the stakeholder groups.

I have no reason to – we have no reason to think that they wouldn't all adopt the same measures anyway. But I think if you have a situation where you have different stakeholder groups doing different things in regards to conflict situation, then I think to the extent that one of your goals is in fact to ensure or try and making sure the integrity of the process that you may not be able to do that.

Ray Fassett: Okay, all right. But keep in mind too that really what we're trying to get the bottom of is when and under what conditions should the denominator change at the council level.

I mean at the end of the day, isn't that really what we're trying to horn in on? Where are those specific and we should consider as rare circumstances when the denominator needs to change at the council level? That's really the substance of this discussion.

(Christina): Right.

Ray Fassett: Or do others have other opinions? And that's what we're truly trying to get our hands around. How - what can we do in the council rules of procedure to provide direction and guidance while at the same time -- and again, these are my words not the work teams words -- but in my words, push the burden onto the stakeholder group or constituency to take on that burden to resolve the conflict before it gets to the council level?

And then what all those have been exhausted reasonably then okay, this is when the denominator can change at the...

Woman: He's breathing, heavy breathing. Now he's...

Ray Fassett: All right, we've got interference?

Avri Doria: Basically a side shot here. Yes, this is Avri if I can comment once we get through the side chat.

Ray Fassett: Okay Avri, go ahead.

Avri Doria: I think that we've circled around some of the things that can allow us to define that, for example one who the request comes from and making the request for - and these are mostly going to be invoked at least a week in advance it's known that the votes going to happen.

And if people have been recusing themselves from discussion because of this conflict, then they'll know far in advance that this is the case.

So first of all perhaps the request can come not from the individual but can come from a constituency say we have a - or the stakeholder group, you know, the, probably should come from the stakeholder group even if it is originating in a constituency that, you know, we have a conflict of interest that we have not been able to deal with on counselor so and so.

And that request goes in. And it goes in long before the vote is actually held. So the abstention is not a surprise during the vote.

It - and in fact, you know, with for example with (Christina), you know, she's always told early in a conversation hey, you know, folks I'm going to have to abstain here.

And I mean we didn't do it seven days in advance because that wasn't the practice. But it was only something that was known before the vote happened.

And so if the conditions are built like that that the request comes from the stakeholder group that the request is there at least seven days before the vote and means that, you know, there should be evidence of a certain amount of recusal.

And I don't think you can demand full recusal because sometimes it may only be in the end game discussion that, you know, it's probably not often the case but there could be cases that it's only an endpoint of a PDP that you've been going at it four months that something gets said, something gets put in that all of a sudden triggers the conflict of interest.

So someone might have negotiated, you know, this thing for three months and then in the last month gone oh my, you know.

So but that kind of conditioning may make it -- and it's at that point is when the denominator is decreased because it's known way before the vote that's going to need to be.

(Eric): Ray this is (Eric). Could I jump in the queue?

Ray Fassett: Yes (Eric), go ahead.

(Eric): Thank you. I keep getting knocked off by the call piece who thinks that I've got too much ambient noise. It's a real pain in the ass. Because basically it means I'm missing all of the call.

You said something about pushing the mechanism for cure down to the stakeholders group. And...

Ray Fassett: Yes.

(Eric): ...I wanted to point out that while the registry constituency is very representative of the registries which have contracts with ICANN, in the registrar constituency or now stakeholders group, a very small minority of registrars actually are members of the - of these now called stakeholders group.

So the notion that, here's the real question. Does the council narrowly represent the stakeholder groups from which each member arises or do they broadly represent the ICANN community which is concerned with their policy area that is with generic names?

So who represents the interests of registrars who choose for one reason or another perhaps a, in my case I'm just not happy with the corruption or what I think of the corruption.

Ray Fassett: Right.

(Eric): Who represents their interests at the board?

Ray Fassett: Okay. So I have an answer to that but I'm going to let others if they have one go first. Anybody?

Okay so when I say - by - see I think there's an inherent benefit by pushing the autonomy down to the stakeholder group level.

It's that for the registrar who feels hey I'm not being represented. And, you know, by joining my constituency and getting involved I'm going to get myself representativeness.

That's the...

(Eric): Well...

Ray Fassett: ...that's the benefit of it.

(Eric): I'm shaking my head if you can hear that from the ambient noise, the rattling.

Anyway I just wanted it to be out there that if the mechanism for cure for problems that exist at the council level for conflict of interest amongst members is constrained to a per stakeholder group mechanism of cure, then conflicts which deal with issues that aren't – that don't affect the actual members of a stakeholder group don't seem to be resolvable.

And I can go on mute now but I'll probably not be, you know, I'll be lost for the rest of the call if I do.

Ray Fassett: Okay. Does anybody else have any comments to (Eric)'s point? I think he's - I think his point is how does someone who's not a member of a constituency or stakeholder group feel represented in that...

(Eric): No it's not someone. It's for the stakeholder groups which actually have a very small minority of membership relative to that contractive parties. This is just a contracted house problem.

Ray Fassett: Okay.

(Eric): Basically the problem doesn't exist in the registrar house because all the registrar registries are members of the registry constituency group and now the registry stakeholders group.

But in the registrar constituency group, membership has shrunk considerably since 2002. And, you know, I stopped paying dues for reasons of my own. So it's potentially...

Ray Fassett: Okay...

(Eric): ...a very small majority that's represented.

Ray Fassett: Okay. Again I would have comments back to that, but does anybody have any comments on that point?

Okay well all right, let's note that point for now.

I do want to try to achieve some results here today because we have Steve and (Christina) on the call. I want to double back to one question I put out there.

Does anybody feel strongly that you have to go to the other house to get permission on a conflict of interest? Does anybody feel strongly on that?

(Christina): That it should happen or that it shouldn't?

Ray Fassett: That - well trick question? Anybody feel strongly that that is a - that should be a requirement? All right, I personally do not. I think that would bog things down and add a layer of bureaucracy and even potential gaming.

So if nobody disagrees lets advise, you know, staff or Ken who's really helping out with this or - and Julie that, you know, that's we don't really want to go there with whatever procedures we can come up with for the rules of procedure.

High level is (Christina) and Steve any - on this issue of let's do whatever we can in the rules of procedure to influence the autonomy to exist at the constituency level to resolve the conflict at that level. Do you guys have - do you guys agree with that notion and approach?

Steve Metalitz: This is Steve. I do because I think that's where that's the group to which that council member is accountable. And so if a conflict situation arises I think it would be good for that stakeholder group and or constituency to have a mechanism for resolving it.

And if this group thinks that and if it passes legal muster that the idea of designating an alternate is a good way to do that, I think you should say that in your report and stakeholder groups and constituency should be advised of that.

Okay. Does the group feel that we should start to work on some sort of policy formulation on this, advice if you will? And then throw it to ICANN staff legal to get some initial interpretation of the idea? How does...

Avri Doria: Hi, this is Avri.

Ray Fassett: Yes.

Avri Doria: I'm not sure that I am comfortable with the notion of the substitute voter.

Ray Fassett: Okay.

Avri Doria: And I think that that's really complicated. I think that a lot of conversation would have to go around either the notion of substitute and proxy. And I know you said that we wouldn't get legal advice on it until afterwards. But I was...

Ray Fassett: Not necessarily. I just...

Avri Doria: ...really like legal advice on what the conditions for such a thing would be before we put that in.

I'm certainly comfortable with going ahead with, you know, denominator reduction when the - I still think it should be the stakeholder group even if the machinations went on in the constituency. It should be the stakeholder group that brings it because stakeholder groups are the unit of measure as it we're. But, you know, that one is a small point.

So I'm certainly comfortable with the reduction of denominator in particular things and working on that policy. But I think we need to do a lot more on proxy/substitute voters.

Ray Fassett: Yes and I want to make clear Avri actually you articulate it better than me. I'm saying the same thing as you is yes, we just want to come up with what we're thinking as a work team on this alternative or proxy -- whatever word we want to use. I know proxy's always a word that draws up antennas.

But anyway whatever it is we use, we definitely want to get legal counsel advice sooner, not wait until we're all done and then try to get it. That would be a waste of time. So I agree with you on that.

And then my third question is, is there any disagreement from today's call that in those cases where reasonable methods have been exhausted to resolve the conflict in the cases where the conflict has not yet been resolved at the council level that okay, we can now go ahead and reduce the denominator? Does anybody disagree with that sort of high level motion?

(Christina): This is (Christina). I don't have a problem with it. I guess I would feel more comfortable with it if I had a better sense as to what those reasonable measures were.

Ray Fassett: Exactly. And that's where the work team is going to have – has their work cut out for them. So this is not a be all end all final. I'm just trying to get a consensus view if there's any disagreement on this approach.

And once we, if we feel we have that kind of consensus agreement, okay now let's roll up our sleeves. Let's hit - look at the rubber hits the road stuff including legal. What are those reasonable measures as a work team?

And before any final decisions are made we'll probably invite you back again or share with you by email if you don't mind us CCing you on things where - how we're progressing on some of those more, you know, detailed matters.

Ken Bour: Ray this is Ken if I might?

Ray Fassett: Yes Ken?

Ken Bour: I'm happy to continue to help with the pen and with the writing and drafting for the team. I am only aware at the moment of two mechanisms that have been discussed so far that a constituency or a stakeholder group might avail itself to resolve a conflict.

One was to direct the vote to that counselor and say you will vote as such. Here it is in writing. Now that may or may not resolve the conflict depending on the professional ethics and other things that have already been discussed. But it might also apply in certain instances, right?

Number two, the only other mechanism I've heard discussed is some substitute alternate proxy, somebody the constituency or stakeholder group says okay, that voter isn't going to vote. They're recusing themselves and not participating in discussions. And when it comes time to vote that vote's going to be done by this person.

And we can try to draft up a set of conditions for how that might take place, what nouns we might use to describe it and then, you know, run it through the legal department and see if it passes muster. But so far that's the only two mechanisms I've heard unless there are others.

Ray Fassett: Well I think...

Avri Doria: Hi. This is Avri.

Ray Fassett: Yes, go ahead Avri.

Avri Doria: Yes I think the other thing that needs - I think you're right. I think the other mechanism that needs to be described in some detail is the mechanism that makes abstaining and reduction or dominator - denominator okay.

Ken Bour: Yes that's actually provided for, I'm sorry. I was thinking about the remedies rather than...

Avri Doria: Right.

Ken Bour: Yes, okay yes so...

Avri Doria: But that first one still needs to be defined in detail also.

Ken Bour: Right. And we've got something already drafted the deals exactly with and even provides an example of how that denominator gets reduced.

Ray Fassett: All right so Ken in your first scenario let me try and branch it off into two ways, segregate it into two things. One the council rep goes back to the constituent and says I have a conflict of interest.

So the constituency group says is it a material conflict to you in your mind or is it not a material conflict? So there's a question there.

And then the rep might say no, it's not material. I don't view it as material. So in that instance perhaps then the rep is required to follow whatever the constituency tells him to do.

And if it's a material conflict of interest in the mind of a council rep okay, in that case it now, a new remedy could kick in which is, you know, passing it off to an alternate or some other way of having somebody else take that vote for them. Does that make sense?

So there's a question that comes in what kind of conflict is it? It's still a question which it goes back to Wolf's point. You know, what kind of conflict is it? Is it a material conflict or is it not a material conflict?

I think this stakeholder group has to take responsibility for that. It can't just be I have a conflict or I mean that's me talking, me deciding. Any views on that?

We've got silence. Anybody there?

Ken Bour: This is Ken let me just, in some of the material that we've already prepared we did make a differentiation between a voluntary abstention that resulted from a non-material conflict of interest.

And, you know, in some of the discussion that happened here today I'm not sure if these, if the qualifiers will stand up.

But what we, some of the examples we gave of a counselor said, you know, I'm going to abstain but it isn't because necessarily I have a conflict of interest but, you know, I haven't - I'm not adequately informed on the issue, I haven't participated in the last three discussions, and so forth and so on. And I just – I'm going to abstain. I'm not going to vote.

Ray Fassett: Well we all know that that would not qualify as a reduction of the...

Ken Bour: Okay.

Ray Fassett: Nobody disagrees with that right?

Ken Bour: Well I don't know that we've passed that...

((Crosstalk)).

Ray Fassett: I want to ask that now. Steve, (Christina) on the call, that scenario that Ken just described we're not talking about that as a reduction of the denominator right?

(Christina): That wasn't my - it was not my understanding that that is what we were discussing.

Ray Fassett: Okay. All right.

Ken Bour: So then the next question is is what defines a material conflict of interest? And just based on some stuff I looked on the Internet it typically relates to financial problems where you – there's my interests are financially enhanced or whatever if I act...

Ray Fassett: Well yes, let me interject again. I'm not sure, and I just want to get out an opinion here. I'm not sure we're looking to debate what is. I'm almost like leave it to the rep. If the rep feels they've got a material conflict of interest let them say so. I don't think we want to do an investigation or interpret whether it's kind of whether it meets the criteria.

I think the rep should be able to say whether it is or isn't. And no one - I'm not looking to question the council rep.

Avri Doria: This is Avri. Can I comment on that?

Ray Fassett: Yes, yes go ahead.

Avri Doria: I think you're right. But I think that giving guidance to what sort of things do constitute that is...

Ray Fassett: So examples.

Avri Doria: ...reasonable.

Ray Fassett: Examples, examples.

Avri Doria: Right examples or...

Ray Fassett: Okay.

Avri Doria: ...it doesn't need to be a extrinsic. It could be intrinsic definition. But also I think what I was talking about before and I'm not sure it's included, is not only the definition of what's material but the conditions under which that material conflict would have reasonably been expressed.

So the things I was talking about before, having announced it a lot in advance, having not taken part in the debate. And not only that you define, that we define the necessities for material and try to give either intrinsic or extrinsic definitions of what it is but that we also define the conditions upon which calling that and therefore having the reduction in denominator accepted are also given a guidance.

Ray Fassett: Fair, fair I don't disagree with that. Anybody have any disagreement with what Avri just said?

Man: No.

Ray Fassett: Now again I'm looking to Steve and (Christina) here because we have you on the call today. I want Steve and (Christina) to feel comfortable with how we're approaching this. That's important too.

(Christina): You'll hear from me if I'm not. You should have no doubt of that.

Ray Fassett: Spoken like a lawyer. Okay so we're at our 1 o'clock time slot. I'm feeling comfortable that we have some level of consensus on how we move forward with this and some meeting of the minds. Does anybody have any additional comments on this subject?

All right, our next call is scheduled for two weeks. And of course I do want to extend to Steve and (Christina) or anyone else that they feel could be impacted by this particular discussion to continue to join our calls. You're always welcome to join in and help us with this discussion.

I like where we're heading. I think Ken has also done very good work. I don't have the action items in front of me. I'm wondering if Julie could help me with what the action items are of this discussion or not?

Julie Hedlund: Yes Ray this is Julie. What I heard was that -- and I heard Ken volunteer to take the pen on this -- but of course Ken if you need help from me please say so, although you seem to be much more of an expert on this than I am that we need to - staff is helping out to flush out some additional details.

I think as Avri mentioned, providing some guidance of what is a material conflict of interest, how to express and take, you know, the steps to express a conflict of interest?

And this can be in the form of guidance as opposed to something mandatory since we're talking about it at the stakeholder or constituency level.

Ray Fassett: Yes.

Julie Hedlund: And then the mechanism for how to make the reduction in a denominator assuming the other things have all that - the rest of that process has gone through.

We've determined there's a material conflict of interest. The stakeholder and constituencies have done their due diligence based on the guidance. Now how do we reduce the denominator? Did I miss anything Ken?

Ken Bour: No. And in fact everything that you just articulated has already been written. And I think probably what's missing here is - there was - we published a draft that went up on the ICANN site in response to the council operating procedures that had dealt with this whole subject.

And I think Steve and (Christina) actually had a got a read on that but I'm not sure many on the work team have looked at it.

That paper is kind of long and includes some research elements in it. But there's a section in there that was written to be the council operating procedure material to be actually included in some section to be determined.

What I think I'm going to do is I'm going to cut that out and frame that up. I'll make the changes that have been discussed today especially taking out that approval procedure of the other house, right?

Ray Fassett: Right.

Ken Bour: And so I'll do some cleanup on that. And is there a wiki Julie on this group?

Man: Yes.

Man: Yes.

Ken Bour: Okay.

Julie Hedlund: Yes there is Ken.

Ken Bour: Okay then how about if I...

Julie Hedlund: If you want to send me what you - your revised version of that document, the sort of redacted version, I will also post it on the wiki.

Ray Fassett: Excellent, excellent.

Ken Bour: And so that then I would suggest Ray that maybe the team could sort of swarm on this language that might actually go into the procedures. And that can be edited and adjusted and things moved around or whatever. But that would give you the grist I think for creating the procedure.

And then if we have the piece that's nailed down a little bit on how this substitute thing might work -- and I'll take a shot at it -- we could actually carve that out and send it over to the legal folks and ask them for an opinion on that as to whether that's doable.

Ray Fassett: I think that's an excellent summary of action steps from this call.

(Eric): Will you...

Ray Fassett: Yes. I'm sorry, was that (Eric)?

(Eric): Yes it is.

Ray Fassett: Go ahead.

(Eric): Could you provide a link to the original where your taking this excerpt from so I can check for consistency as well?

Ray Fassett: Absolutely, absolutely.

Avri Doria: Yes and I read that and I'll reread it. This is Avri. I read it and I'll reread it. But I don't remember seeing the things that I was concerned about and it – but maybe I just missed them. So I'll go back and reread it.

Ray Fassett: Okay so our two guests with the expert advice, are they comfortable with the direction we're taking?

(Christina): Oh yes no, I think...

Steve Metalitz: Yes.

(Christina): ...that I'm much more comfortable with this than I was with the previous direction.

Ray Fassett: Very good. Now so we have a little bit of work ahead of us. Our next call is not for two weeks. We're clearly, you know, not going to be in the 25th range per that resolution.

I'll double back to (Chuck). I think he's probably already aware of this that the 25th was a little aggressive.

But anyway I will double back to him so he can inform the whole council of where we're at and some degree of comfort level as to how we're progressing.

I mean we'd rather take the time if needed than just to meet a date.

Wolf-Ulrich Knoben: Yes.

Ray Fassett: And we're not going to extend it. This is top priority. This is number one on our plate. We have other things to work on as a work team but we're not going to move to those items until this one is somewhat resolved or in some level of completed state. Fair enough?

Wolf-Ulrich Knoben: Yes.

(Christina): All right.

Ray Fassett: Okay folks.

Steve Metalitz: Thanks very much for inviting us to this.

Avri Doria: Yes thanks. Happy Thanksgiving...

((Crosstalk)).

Ray Fassett: Thank you very much.

Woman: Yes thanks...

Ray Fassett: Have a great holiday for those that are having one and talk in a few weeks.

Woman: Thank you.

Ray Fassett: And thank you Ken and Julie.

Ken Bour: Okay, bye-bye.

Woman: Good-bye.

Woman: Bye-bye.

END