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**ICANN Transcription**

**New gTLD Subsequent Procedures Working Group**

**Thursday, 03 October 2019 at 2000 UTC**

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**JULIE BISLAND:** Good morning, good afternoon, good evening all. Welcome to the New gTLD Subsequent Procedures Working Group call on Thursday, 3 October 2019.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you're only on the audio bridge at this time, would you please let yourself be known now? Alright, hearing no names, I would like to remind all to please state your name before speaking for transcription purposes, and please keep your phones and microphones on mute when not speaking to avoid background noise. With this, I will turn it over to Jeff Neuman, You can begin, Jeff.

**UNIDENTIFIED FEMALE:** [Inaudible]

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JEFF NEUMAN:                   Whoa, who's that? Sounds like someone else. I was trying to be me there for a second. Welcome, everyone. We have the agenda up on the screen at the moment. You'll see it contains accountability mechanisms that we're continuing, and Emily has just posted the link to that on the chat. Then if we have time, we'll start in on community applications.

But before we do that, let me just ask to see if there are any updates to any Statements of Interest? Scrolling through this list, I don't see any. Oh, wait. Did I see a hand? Or is that just my imagination? Yes, Kathy, please.

KATHY KLEIMAN:               Thanks, Jeff. Hey, I have a question, but it's not an update to Statement of Interest.

JEFF NEUMAN:                   Okay. Let me just do a last call. Any updates to Statements of Interest? Okay, not seeing any. Okay, Kathy, what's up?

KATHY KLEIMAN:               Okay. I was wondering – on the general question of updates to where the group went on the prior meeting. That was something that you're going to take back and consider with the leadership team. I was wondering where that went. Then in follow up to that general question, I was wondering what happened with the Legal Rights Objection in the last call, which of course was evening of a holiday, and whether the standards for the Legal Rights Objection

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– whether there’s a recommendation from the working group that they be changed. Thanks.

JEFF NEUMAN:

Okay. I have to go back and check on that first one. I’m trying to remember now, but in the meantime, let me just – the second one. On the last call ... I was going to make a joke but it wouldn’t have gone funny. I was going to say we got rid of all Legal Rights Objections, but of course we didn’t. Legal Rights Objections, I think there was some discussion on potentially clarifying some language that was in the objection itself where the language said – and I’m trying to do this from memory and I don’t have the specific language in front of me – but essentially the language said that it’s an infringement type standard. But there was some discussion on the list that the wording wasn’t clear enough, although it seems like the evaluators applied the right criteria where technically if you looked at it, because an application is not technically using a mark, there was no way that if you read word-for-word that an application itself could infringe the legal rights of another party. It’s really that the purported use of the string would violate the legal rights of a third party. So where we left it was that some members on the call were going to propose some new clarification language to basically follow through on what the evaluators did anyway. So that was pretty much where we ended up.

Then there was discussion on the redline proposal but that didn’t seem to generate a huge amount of support, at least on the call. That’s where we left off on Legal Rights Objections. Actions are in the notes, so if you wanted to just review that, you could see that

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in the notes. And on the first item, I got to go back if I can just update you after the call because I might not have followed through with that. So I got to double-check what it was. There we go.

Any other questions before we jump into continuing the discussion on appeals mechanisms? I know the section is called Accountability Mechanisms, but I'm going to summarize where we got to on the last call and you'll see why I'm not using the term accountability mechanisms right now.

Technically, the section is called Accountability Mechanisms but because when you use the term "accountability mechanisms," automatically what comes to everyone's mind are the Bylaws' accountability measures, which include things like reconsideration, independent review, etc., and what we're talking about here is not changing anything to do with the Bylaws or even making any suggestions on those processes as they're applied in the new gTLD context. What we're suggesting is an appeals mechanism from certain substantive decisions that are made, that don't rise to the level of being Bylaw-mandated accountability mechanism. Although in the 2012 round, any issue that an applicant for an objector or someone who lost an objection or members of a contention set or who lost an auction, etc, their only recourse was to file a Request for Reconsideration, and of course the standard of succeeding on a Request for Reconsideration is whether the staff or Board has essentially violated ICANN policies or the Bylaws by taking whatever action they took or failed to take an action that they took.

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In our discussions early on in Work Track 3, there definitely seem to be a need for some sort of appeals mechanism that would look at things like, did an evaluator just get something wrong substantively? Did the evaluator not adequately consider the Conflicts of Interest policy or the rules that were put in place or the ones that we will be putting in place? Did an objector lose an objection when the panel misapplied the facts? Whatever it is, these were things that we talked about that would be considered more in the purview of an appeals mechanism – appeals of that substantive decision as opposed to analyzing a question of whether the Bylaws were violated because of an action taken by staff or Board. Around that, we talked about several different types of elements. The obvious things that we need to decide are things like who has standing, which we’ll talk about in a minute.

What types of action should be subject and what is the standard of review? Is it just plainly a complete re-review of whatever the initial thing was? An evaluator just re-review the entire application. Or is there some standard whereby the initial evaluators given some deference and you look at how – whether there was an error in how the facts were applied or the standard was applied. That’s something that we need to talk about as well. That will come up on this call.

On the last call, we then left off at the question on top of page 17 which is, what are the types of actions or inactions that should be subject to this new limited appeals? We’ve gotten a number of comments. We went through a bunch of them. I think one of the things that we concluded on the last call was that trying to distinguish between the words “substance” and “procedure” is not

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very hopeful because there are certainly people that could define those two words in any which way that meets their needs. So it would be more helpful – we decided on the last call to come up with examples of things that we believe would be within the purview or the subject matter jurisdiction of an appeal.

So we talked about some of the elements that Jamie Baxter had in his comments. We talked about some of the elements that were in the ALAC. I think we might have actually covered most of these, and where I think we were going to take as an action item was coming up with some sort of chart that could list the different types of things that we think an applicant or an objector or whoever are standing, which we'll get to in a second, could file. After this call, I'll send around a chart that I've just been taking notes in that start to list some of these, and of course we could update it. But the things that at least in my mind and in some of the comments, certainly if a panelist got the fact or an evaluator or panelist, etc. gets the facts wrong, so that it just misses something, certain facts that were in an application or in an objection, if an evaluator or panelist misapplied the facts, if evaluator or panelist took an action that was inconsistent with the Guidebook or failed to take an action that it was consistent with the Guidebook. Those are the types of things that I think we were talking about the last time, it's being within this appeals process. Again, it's not to look at whether someone violated the Bylaws or violated the overall policies of ICANN. It's really a much narrower look at the evaluation or panel decision itself.

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I'm going to stop there before we go on to the standing discussion. Do you have any questions or comments? Alright, I already see a couple. Paul and then Alexander.

PAUL MCGRADY:

Thanks, Jeff. I put my question in the chat just as you were winding down. The list of things that could be – I wish we had a better word than “appeal” – but the list of things that can be appealed will be illustrative only, right? We're not trying to capture the entire universe because who knows what might happen.

What we're saying is – and correct me if I'm wrong – that what will not be captured in these appeals is anything that can be captured by the accountability mechanisms in the Guidebook, so anything else, any other things that went wrong within the context of an objection process could be the subject of appeals. Then we're going to list out five or ten things that come to mind. Is that the plan? Thanks.

JEFF NEUMAN:

Ultimately, we would love to come to a standard where we can just have illustrative examples. I think that would be the ultimate where I'd love to be able to get to, I'm not sure we're going to get there. Absent that, I think all we can do is provide examples. Whether they are non-exclusive or illustrative, I think that'll be up to the group to determine after we come up with these examples. I don't want to predetermine the outcome but certainly that is a possibility.

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The one thing that's hard in the comment that you made is that you said that basically we don't want to cover anything that could be subject to a Bylaw challenge. I think given the nature of – and Anne said this even the last time – attorneys that will try to file anything under the sun with anyone that they can, can never promise that someone wouldn't file something under the Bylaws that they should really be filing under the appeals, and we can't really change anything what the Bylaws has jurisdiction of. But the goal is really to take these more factual based decisions appeals and not have them go all the way up to the Board level to make a decision.

So that's the goal. I don't know if it's a long way to answering your question, Paul. I mean it is a long way to answer your question. I'm not sure it gives you the definitive answer but I hope that helps.

Alexander, please.

ALEXANDER SCHUBERT: Hi. In the last round, obviously there was a lack of [inaudible] mechanism. A lot of applicants, whether they want a CPE or they lost the CPE, used the accountability mechanisms to try to stop a decision. For example, those who were not a community applicant but lost, in the case of .hotel, for example, it's still going on almost 10 years after the application was filed. In other cases, they lost the CPE and they filed an accountability mechanism in order to make this right. Obviously, it didn't work because the accountability mechanisms were not made for this. But it had shown us that on both sides, people try to delay the process to



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force the other side to some kind of deal, auction whatnot. If you're 10 years in the process, at some point you just give up. You say, "I'm sorry. I cannot sustain this more than 10 years." And that works. People can force you into auction. We have to be careful that wasn't appeals mechanism. Not the same is happening.

I remember that back then when we made the rules for the first round, the appeals mechanisms were left away on purpose, not accidentally. It was a feature. And because it was said, "If there's an appeals mechanism, surely both sides will immediately appear." That's not a problem. That's okay. In many cases, it would probably not have happened if you just look at [ORACA], that we're fine with it. One lost, one won, and the [inaudible] applicant got [ORACA].

In other cases that are hardly contested like .hotel or .gay, surely both sides would've immediately involved in appeals mechanism whatever way it would've turned out. But that's completely fine because sometimes automatic mechanism doesn't work. People want to talk, let them talk. But we have to make sure that they're a little bit speedier than the accountability mechanisms. They're super slow. We have to be speedy.

JEFF NEUMAN: Yeah. I think that's right. I think you are a couple subjects ahead of us.

ALEXANDER SCHUBERT: Oh, sorry.

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JEFF NEUMAN: A couple pages down or maybe even the next page. We're going to talk about how to ensure that this is not frivolous, that it doesn't just add to the time and all the elements you discussed.

ALEXANDER SCHUBERT: [Inaudible].

JEFF NEUMAN: That's okay. They're on the radar and there will be things that we talk about, but I'm going to ask that you hold on until after we get through some of the subjects for appeals.

Alan, Kathy then Jamie, and make sure it's on this particular subject because there's a lot of pages on this, on appeals, so if it's on something related, I'm sure we'll get to it. Thanks.

ALAN GREENBERG: Thank you. I'm going to apologize to start with I became an occasional member/participant of this group instead of regular. So this may be something that's obvious to the rest of you.

There's an expression that reasonable people may differ. Is that a subject of eligible for an appeal mechanism here? If you look at the .cam, .com question where ostensibly following the same rules, different decisions were reached. Is that a problem or is that a feature? In other words, if same panel come up with different answers on different occurrences, is that something which should be appealable or is that something which is just the nature of the

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fact that we have different people and they have different judgments?

JEFF NEUMAN:

Alan, I think it's all going to depend on what we say the standard for the appeal is. If there's some sort of deference given to the original evaluator or panelist or whatnot, in other words, if you appeal it, whether the presider over the appeal just says, "Hey look, they followed the Guidebook and reasonable minds can differ," we're going to defer to that original evaluator. That's one type of an appeal. Another standard could be, no, we're just going to re-review it from the very beginning. So I think we'll get to that one as well.

ALAN GREENBERG:

So the answer is we haven't already settled that. Thank you. That's really what I was trying to ask.

JEFF NEUMAN:

Right. Now, hopefully the overall policy issues like string similarity, we're not going to have the plural/singular issue because we've come out one way on that. So, hopefully we've gotten rid some of those issues we had last time, but yeah. There's definitely going to be some areas where reasonable minds could differ.

Kathy, please.

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KATHY KLEIMAN:

Hi. Thanks, Jeff. It's hard to know the issues coming up, so I may be touching on them. But first, I wanted to double-check – I've got a few questions, so let me just spit them all out. First, what's the form that we're talking about? I think I know but I'm not sure we've clarified. I think the appeal is staying within the third party form. You know, National Chamber of Commerce, the American Arbitration Association. So that's one question.

Second question: who pays? And maybe we'll get to that later.

Third question: what's not in scope for an appeal? It sounds like we're going pretty broad, so what's not in scope?

Fourth question: should we have a quick first look for what's frivolous or what's out of scope for the filing so that we don't have people being driven out because of cost and not because of equity, for lack of better word. Thanks.

JEFF NEUMAN:

Thanks, Kathy. On the first question, second question, and the fourth question, there further down, those are topics here. In fact, I think the next one might even be whose got standing and the one after that I think is off of memory what we can do to stop frivolous and quick look is one of those mechanisms, so we'll get to those. On the what's out of scope, I think it's probably easier to come up with a list of what we think are in-scope, and certainly we could point to the Bylaws for things that are out of scope. But I don't know if we'll come up with everything that's out of scope. So let's just see where we get through in these discussions.

Then Jamie, let me go to you and then we can move on.

JAMIE BAXTER:

Thanks, Jeff. I wanted to just touch back on something that you mentioned on the last call but I didn't quite understand or absorbed properly when you mentioned it, but you raised the issue that there may be some appeals issues that involve staff. I didn't see that as a possibility considering they're usually covered under the accountability mechanisms, but then I realized that in the Guidebook, there actually is a huge void on how accountability mechanisms are addressed when they are successful, which ultimately may end up in the appeals area.

I want to draw your attention to the successful Reconsideration Request that .gay had with the Board. When it was successful, it was a staff decision, if I'm not mistaken, to put us back into a second Community Priority Evaluation with the exact same group that did it the first time, which feels like that might be a staff decision that is and should be appealable, given that there was no clear understanding from the Guidebook as to how successful reconsiderations are addressed. So I wonder if this is something that goes here or if it's something that should be up for discussion, or if that's perhaps an example of what you were alluding to from the prior call. Thanks.

JEFF NEUMAN:

Thanks, Jamie. On the prior call, there were some that tried to make a distinction that if the action, if the appeal was against staff or the Board that that would automatically be an accountability mechanism as opposed to a subject to these appeals. But then I brought up the, what if ICANN brings some of these in house?

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What if ICANN becomes the evaluator, or ICANN becomes the panelist for the objections, or ICANN takes on more than what it did in the last round? Which ICANN could do. We don't mandate in a lot of things that a third party has to be used for all of these things. In some cases, we do but not every one.

The point I tried to make on the last call was, we can't just delineate and say that if it's against staff or the Board, it has to be an accountability mechanism. The examples I raised were those. As far as that particular example, now you're talking about two different things. That will be one we have to think through because I followed you up until the point you said that it was now applied to another panel to redo the CPE. If they redid the CPE and there were some factual mistake, that would be something that, in theory, be subject to an appeal. But if your issue is whether staff was correct in who they assigned it to, I don't know the answer to that one. That's a tougher one.

JAMIE BAXTER:

Yeah. Sorry, if I can jump back in. I guess at the time there were no alternatives. There were no options put on the table. It was just the decision, "This is what we're going to do." I think in the larger picture, there were probably a lot of different options that could've happened at the time that never got explored. So, considering that it is part of an evaluation and it's a decision made by the Board, would that fall under the appeals or will that fall under the original accountability mechanisms to challenge? Just a question, I don't know what the answer is, but it's probably one of the very few examples of a successful Reconsideration Request then having an extra touch by the staff.

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JEFF NEUMAN: Right. Okay. Thanks, Jamie. Then I'll go to Paul and then I'll try to catch up on the chat stuff.

PAUL MCGRADY: Thanks. We talked about a lot of stuff, so I'll try to hit each of the things briefly. First, Jeff, I don't know that I am in alignment with you on the issue of in the event that ICANN decides to in-house, being the dispute provider themselves that it makes sense to have a separate appeals mechanism that would avoid the accountability mechanisms in the Bylaws. I think if staff makes a decision or if the board makes a decision, it needs to be [inaudible] to the Bylaws. I think that's a really good reason for ICANN not to in-house the dispute mechanisms and stick with third party providers. I don't see ICANN actually doing that. That would be a huge headache. I think it's a red herring and I don't think that we should build the process around a red herring.

That leads me to the next thing, which is I do think it makes sense to say that anything that could be objected to under the Bylaws has to be objected to under the Bylaws so that we don't end up with lawyers like me, filing two different things in two different places and being afraid that if we pursue only the Bylaws then somebody could say, "You would have won except for you didn't go through your administrative remedies and didn't file under the other thing." We need to make it clear. If the staff and the Board do something, that is an accountability mechanism under the Bylaws. If a third party provider does something, that is this interlocutory appeal process. Thanks.

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JEFF NEUMAN:

Thanks, Paul. I actually think ICANN doing a bunch of things in accordance with the Guidebook is not very farfetched. Now, it may be farfetched that they would ever do a Legal Rights Objection or some of the objections, but I certainly do not see it farfetched for ICANN to do some of the evaluation or the RSP pre-approvals or a whole bunch of other things. Again, the standard in the Bylaws for – you have to allege not that the staff got something wrong, but under the Bylaws it's that the staff or the Board basically acted contrary to the Bylaws or existing policy. Not like implementations of policy and not Applicant Guidebooks but policy.

So if you look back at all of the reconsiderations – at least all the reconsiderations – you'll see that 99% of them were not successful because ICANN basically said that it acted within the Bylaws by relying on the third party to take that action and therefore dismiss the reconsideration. Now, a lot of those Reconsideration Requests were filed before the change of Bylaws understood, but if you again look at the Bylaws specifically, you're going to get a lot of outcomes that where no substantive decision or appeal is made because of the legitimacy of relying on a third party or relying on themselves.

So, I hear what you're saying, Paul. And if we can avoid the double dips by putting something in about what's subject to appeals, I think that would help. I think the things we got stuck with the last time was that accountability mechanisms were the only things in place. In fact, even if you look at some recommendations from a CCT review team, they also recommend a form of appeals in certain circumstances as well. I just think that



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if we set a bright line saying that if it is anything against staff that it's Bylaws. I think we're, again, setting up the Board Accountability Mechanisms Committee or – sorry, I may have that wrong name – but the BAMC for hundreds of disputes for things that really should never rise up to a Board level and don't rise up to something where they violated the Bylaws.

Anyway, Alan and then Paul.

ALAN GREENBERG: Thank you. If I can try to put this argument in simple terms. You're saying that whether it's a staff member or, for that matter, an outside evaluator says that red is blue, it should be something you can appeal, even though it's not a violation of the Bylaws and rules but it's clearly a wrong decision. Am I reading that correctly? That's what our target is.

JEFF NEUMAN: Sorry. Yes, that is one of them. That is one of the things that [inaudible] appeals. So it's did they just get it wrong? And as you said, that may not be and probably it's not a violation of the Bylaws for staff to make a mistake or get something wrong. And it doesn't fall into the other two grounds either that there's new information that wasn't known that couldn't have been known. So, again, I'll go back to Paul.

ALAN GREENBERG: Okay. Thank you.

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PAUL MCGRADY:

Back to me, Jeff. Again, Jeff, I don't recall the hundreds of staff mistakes that got appealed up through the Request for Reconsideration in Community Engagement Processes and IRPs from the last round. We've had a round hundreds of staff mistakes didn't happen. And if blue has, in fact, been declared red when it's actually blue by a staff member, don't we have all kinds of rules that say ICANN's decisions must be fact-based. So I don't think finding a policy is going to be hard in situations like that. My concern is that if we make staff decisions appeal go through the interlocutory appeals mechanism, what we will be doing is essentially cutting out the hammer that, frankly, is having a decision brought up in front of the Board. That's a pretty good piece of incentive for staff to really think through things and make good decisions rather than just having a panelist who has no control over staff, they're not an employer. There's no leverage there, having a provider appeal panel look at an ICANN staff decision. It doesn't fit.

We've already made this wheel. The wheel works much better than it did before. The U.S. government stepped away from IANA oversight. I don't think we need to erode it by creating another mechanism with which to deal with staff errors. Instead, I think we should focus on very narrowly that the interlocutory appeals process has to do with what the third party panelists are up to. Thanks.

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JEFF NEUMAN:

Okay, thanks, Paul. So what you're saying, just so I can ask you a question, one of the options ICANN is considering and has been considering is that if we have a permanent new gTLD process, they are considering in-housing some of the evaluations and some of the aspects of the Guidebook that were dealt with by third parties in the last round.

So your position is that if ICANN does actually bring some of that in-house that now the appeals mechanism is no longer the correct one that rather than using this quick appeals process that we're trying to create, that you're more comfortable with them using the reconsideration, followed by the million dollar independent review or things like that, that that's okay because it's against the staff, because staff decided to do that in-house. I just want to make sure I understand that because to what we discussed the last call was that it's a function of who it's against and what the subject matter is that determines whether it's under the Bylaws or not. And if what is being alleged is not inconsistent with the Bylaws or inconsistent with ICANN policies as a whole, then there is no action under the Bylaws. So I just want to make sure I understand that. I'll give Paul a chance to respond then I'll go to Jim, or I'll read the comments in the chat.

PAUL MCGRADY:

This Paul again. First of all, maybe what we're afraid of is ICANN in-housing these functions, and maybe that's what we should be talking about instead of building a new accountability mechanism for staff. If we think what came out of the cross-community work on accountability is insufficient in this particular aspect for this particular program, then I'm not sure that us supplanting the hard

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work of the rest of the community on this point is the way to go. It may be unfortunate that it would cost a lot of money to use the Bylaw mechanisms but those are the ones that we were left with. I recall very clearly everybody in the community, different SOs and ACs, everybody getting behind those.

I'm sorry if they're flawed under the scenario if ICANN brings this work in-house, but I don't think building something that will erode those is the way to go. Instead, I think we should have a clear bifurcation, and if we're worried about ICANN in-housing some of these functions, maybe the policy should be that they should not in-house the functions and maybe we need to shift gears and talk about that. Thanks.

JEFF NEUMAN:

Okay. Thanks, Paul. I just want to go back. ICANN never announced that they were in-housing all of this stuff. They have discussed in the past that it is an option for doing that kind of stuff, especially if it was permanent. As an organization, I would think it would be incredibly responsible for an organization to consider all of that stuff.

I'm just trying to figure out where we're left with. So let me go to the chat here. Sorry, I'm going back a little. Again, there's talk of only things done by third party should be subject to the appeal.

As Rubens said, it wasn't an announcement, but a mention, discussing the assumptions for next round.

Anne says, "Agree that only third party decisions should be subject to the appeals process. Otherwise, there will be two

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actions filed. There will always be grey areas.” Okay. There’s some agreements with Anne. Then Anne says, “Doesn’t it seem that ICANN doing objections in-house would be subject to a further policy process?”

Anne, I would answer that by saying only if we mandate that all objections have to be done by a third party. How ICANN chooses to implement policy is up to ICANN staff unless it violates what we say is in the policy.

So if we use Paul’s example, if we said in here that ICANN has to outsource evaluations, it has to outsource objections then yes, then presumably it would have to be changed in policy. But one thing I don’t think this group should be in the business of doing is to be in the business of deciding how everything needs to be implemented if it doesn’t have a policy rationale now behind it.

It’s something like doing evaluations itself, put aside doing the objections. I can’t think of a policy reason but I’m listening, why we would have to mandate that ICANN would have to outsource it to a third party when in theory, a mature ICANN organization that was doing consistently doing rounds and processing these applications could probably more efficiently do that in-house.

Now, for saying we want to mandate that ICANN not necessarily do the most cost-efficient thing and in-house anything, simply because we want all appeals to go to the Bylaw mechanisms, I don’t think that makes sense. I’m not sure that there is but I’m willing to hear it. I don’t think we can mandate that nothing can be done by ICANN and that it needs to outsource everything. I don’t think that’s within our jurisdiction to mandate. But we could always

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set the policy that any complaints about what the staff does would have to be through the Bylaws and any third party through the appeals.

But I would love everyone to recognize that there is a big hole in the Bylaws themselves, which we pointed out the last time and in fact which we pointed out during the CCWG and we were told, “Why don’t you build something in the new gTLD process to handle that?” Because they didn’t want the accountability mechanisms to address substantive actions like that, the only Bylaw violations. Anyway, whatever this group wants to do is fine, but just recognize that there’s a hole there.

Kathy, please.

KATHY KLEIMAN:

Great. Thanks, Jeff. A lot of stuff going on. But if we are talking about appeals, we do need to know what’s being appealed – the objections or other things – and just state the obvious because a lot of people know it. Handling objections through third party makes sense because ICANN outsourced it because of the expertise required, and then handling the appeals through the third party makes sense because that’s still where the expertise resides like WIPO and the Legal Rights Objections.

Bringing these things in-house and then allowing them to go through reconsideration mechanisms under the Bylaws exclude the other party to the proceeding. It’s the appellant and ICANN, because they’re accusing ICANN of not properly running the process. But the appellee, the other party in the objection, isn’t

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even included. In fact, they're locked out of it. So, it's really important that we know what the form is for the objection, what the form is for the appeal because it's critical to know when you can go to ICANN and when you can't. Thanks.

JEFF NEUMAN:

Okay. We're working on trying to straighten that out, and one of the proposals was just on who it's against – it determines what mechanism you have to use, whether it's an appeal or a Bylaw mechanism. There are comments there in the chat that do not have that as a factor, but certainly I hear that in this call.

Jamie, please.

JAMIE BAXTER:

Thanks, Jeff. In the way you described it just now, I absolutely do see the hole. I see what's missing because in the example I illustrated earlier, there was no policy violation in the decision that was made by ICANN with respect to the Reconsideration Request next steps. But there was no way of challenging how that decision was made or if it was the right way to proceed.

So, I do see the hole you're referring to. I don't know what the answer is to fix it because using the accountability mechanisms, ICANN will just say, "We have the authority to make a decision," but nobody gets to challenge the way they made the decision. I feel like that's what's missing. So, I see what you're saying. I don't know what the answer is. Thanks.

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JEFF NEUMAN:

Okay. So let me go back. Thanks, Jamie. Let me go back to the chat. Sorry. I'm trying to figure out where I left off here.

Rubens says, "Paul, ICANN repeatedly defended itself in Requests for Reconsideration saying that following process is all the Bylaws require of them."

Paul says, "It automatically makes ICANN adverse in its own program. The idea of taking these in-house is really befuddling."

Again, I would ask everyone to distinguish evaluations from objections. I think I know everyone is thinking about objections, and yes, I agree. It does not make sense for ICANN to in-house a Legal Rights Objection or a Public Interest Objection or ... sorry. The other, the String ... well, actually, no. They may in-house the String Confusion Objection. But I certainly see in a distinct possibility that ICANN could take all of Module 2 and in-house it. There's nothing preventing that. Module 2 is the evaluation itself.

So any complaints about something that ICANN gets wrong in the evaluation, what we're saying here is that if it does in-house it, that's fine. But then ICANN staff would always be subject to the Bylaws, and therefore if they get something wrong, as long as they follow the Bylaws in getting it wrong, they're fine. It's okay. We can do that. That's totally fine. But we've got to recognize, as Rubens said, everyone of ICANN's arguments in the Request for Reconsideration was that ICANN was acting consistent with the Bylaws by relying on the third party or ICANN followed the process and therefore you cannot bring an action under the Bylaws, and they succeeded in almost all of them. I know what we're saying about – I hear what we're saying on the chat about



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ICANN should distance itself from doing that. We could always do a policy that says ICANN is forced to use third parties but that doesn't make sense from an organizational perspective that if they have the expertise in-house and, frankly, with all the hiring and stuff that ICANN does and can do, it wouldn't surprise me if people in-house know more than a KPMG or Ernst & Young or whoever else that they want to maintain. I hear you on the objections but I do think that we may need to consider this in terms of for the evaluations.

With that being said, let's move on to the next subject, the sub subject I guess. Let's assume it's only for third party decisions. Who would have the standing to file an appeal? The obvious ones that we listed – the obvious ones are an applicant that fails an evaluation for whatever reason. A party that loses an objection is an obvious one for an appeal, but then there are two subcategories of objectors that we need to consider. One is an independent objector. The second one is the ALAC whose objections are paid for by ICANN. Should those two parties have a right to file an appeal, and if so, obviously we'd have to discuss cost.

So I throw that out here on the last call. It seemed like those on the call were leaning against the independent objector and at least the ALAC having a right of appeal and having it paid for by ICANN. Of course it could appeal and pay for the appeal itself, but have it funded by ICANN, it would not have a right of appeal. Thoughts on those four examples? Then we'll go on to the next two.

Alan, please.

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ALAN GREENBERG: Jeff, it's Alan.

JEFF NEUMAN: Yes, Alan.

ALAN GREENBERG: I don't know if the ALAC has discussed this recently and I think Justine may know. I think Justine is on the call. But if we haven't, I would think that we need to quickly make a statement saying this is something we want to push for or are willing to go along with the position that you say has been the general consensus. I have my own personal opinions but I don't think I want to share them unless or until the ALAC has had at least a brief opportunity to discuss it, and I don't think we have but I may be wrong on that. Cheryl or Justine may know otherwise. Thank you.

UNIDENTIFIED FEMALE: [Inaudible]

JEFF NEUMAN: Yeah, thanks. Was that Justine or is that just an open line?

ALAN GREENBERG: That sounded like Cheryl saying not to her knowledge or something like that.

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JEFF NEUMAN: Oh, sorry, Cheryl. Were you –

CHERYL LANGDON-ORR: I'm driving. So, sorry. Justine –

ALAN GREENBERG: Justine in the chat said, "We have not discussed it." So I would suggest that I or her put it on the agenda for our next Wednesday's discussion and come back to this meeting after that.

JEFF NEUMAN: Okay. Thanks, Alan. Just to clarify, we're saying the general – on the last call, it seemed like there was general agreement. So it was not anything amounting to a consensus call or anything like that, which is why I'm again bringing it up on this call.

But to clarify, on the last call when we talked about objections being paid for by ALAC, we did not come to any conclusion of changing that. What we're talking about here is whether ICANN would pay for an appeal from the ALAC, not whether they could file an appeal because they could always file it. It's just whether ICANN would fund that appeal. So I just want to make it clear what were the limited part we're talking about here.

On the other categories, are there any other thoughts ... Sorry, I'm just scrolling through chat here. Sorry. I scrolled too high here. Okay. Paul says, "On the standing issue, it sounds like everyone wants there to be a direct connection between the decision and a bad affect. In other words, no standing for anyone who just wants

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to harass an applicant.” Okay, we’ll talk about harassment in a second but [inaudible] complaints.

I think on the standing, I think ... oops. Sorry. Alexander.

ALEXANDER SCHUBERT: Okay. Hi. In regard of standing, if we look at anything that has to do with community, shouldn’t be the targeted community have a standing as well?

JEFF NEUMAN: Sorry, Alexander. Can you repeat that?

ALEXANDER SCHUBERT: Yeah. You asked who should be eligible, who should have a standing in an appeal. That was your question, right?

JEFF NEUMAN: Yes.

ALEXANDER SCHUBERT: So, even an appeal is in connection with a community, for example, a Community Priority Application or someone applied for a city and the geo community or the city community would like to appeal the decision or whatever. Shouldn’t any targeted community have a standing to appeal?

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JEFF NEUMAN: If they file an objection then they certainly would have standing because they're an objector, they lost an objection. If they're the applicant and they lost, then yes, they have standing because they'd be the applicant. So, as Susan put, art isn't the community, the unsuccessful objector in the scenario. Right. So we would say that a community that files an objection that loses could be an appellant, but a community that never files an objection that's angry that another applicant got community status would not have standing because they didn't initially object.

ALEXANDER SCHUBERT: Okay. But just as an example, a CPE is being conducted. The CPE is lost. Should the community that is obviously target of the CPE have the ability to appeal the CPE decision even if they are not an applicant?

JEFF NEUMAN: I think the community would have to do that through the applicant. I'm trying to figure out how or what the circumstances would be where the community would want to appeal but the applicant itself would not. Since the applicant is representing that it is the representative of the community.

ALEXANDER SCHUBERT: Okay. Yes, sounds kind of right.

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JEFF NEUMAN: To answer Jamie in there, by object, I would say yes, a formal objection, not just a letter of opposition in the CPE. That to me would not be an appeal because they did not file a formal objection. Any thoughts on that one? Kathy, please.

KATHY KLEIMAN: I'm confused. I thought we spent a long time a few weeks ago saying that CPE is not subject to community objections, that it's a different process and separating out those two processes. It seems like we're merging them again. Do help us out.

JEFF NEUMAN: We are not merging them. They are still separate. CPE is a "evaluation." A Community Objection is a dispute. It's an objection. We are saying that appeals can be filed from both failing an evaluation or losing an objection. If you fail the Community Priority Evaluation then the applicant who failed could appeal.

If a community-based objection is filed, which is totally different, then the loser of that community-based objection could file an appeal. That loser could either be the applicant that loses or it could be an objector that loses. So I don't see why that's –

KATHY KLEIMAN: Where would the CPE appeal go to?

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JEFF NEUMAN:

Okay. We're not on where the appeals go to yet. We'll get there. We'll get through who decides the appeals but right now we're just saying who's got standing.

Anne is saying, "If the community is separate from the applicant, originally object can't appeal ..." Okay, wait. No. I think I just mixed two quotes because they both just jumped in.

Anne says, "If the community is separate from the applicant, they would have to object to appeal." Because you're on appealing, the result of an objection. It would naturally make sense. There has to be an objection to appeal from. Whereas, if you are appealing the evaluation, that could only be the applicant because it is only the applicant that's evaluated.

Alright, I think that is getting general agreement in the chat unless I'm missing something.

The question from Anne is if an applicant on CPE fails and appeals that, can the community that opposed a reversal of that decision have standing to oppose that appeal? There saying, "Appeal the appeal." Or you're talking about the parties to an appeal, which I think are different depending on which.

Alright, let's bring it up a level so as not to confuse everyone. Let's talk about from a standing perspective. Who has standing to appeal from an evaluation would only be the applicant that fails. Only an applicant that fails could have standing in an evaluation. Period. Correct me if I'm wrong, but I can't imagine a circumstance where anyone other than the applicant could have standing against the decision on an evaluation.

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Let's talk about instead of community, let's talk about a string similarity evaluation finds that two applications are confusingly similar or the term that's used in the Guidebook, and therefore she'd be in the same contention set. If an applicant for which it gets put into ... If you're an applicant opposed or believes the decision to put its application in a contention set is upset and believes that that was wrongly decided, then the applicant would have standing to file an appeal. Right? Makes sense? Different example? Hearing complete silence.

Okay. I'll go over a second example and then I'll get to Susan. In a technical evaluation, if the evaluator (whoever that is) fails an applicant because it finds that its technical solution is not up to par, it doesn't pass the evaluation, the applicant, in theory, could appeal that failure." It would seem to me that the only one that could appeal an evaluation result is an applicant that failed the evaluation. So sticking with just evaluations, Susan.

SUSAN PAYNE:

Thanks, Jeff. Okay. Here's a scenario where we need to consider whether there is an appeal for the non-applicant. In a scenario where there's a Community Priority Evaluation and the applicant in question is evaluated and awarded the community status, that then gives them priority over other applicants with the same string. Now, shouldn't those other applicants for the same string who now basically have been told they can't have it. Shouldn't they have standing to appeal if they think the decision is wrong?



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JEFF NEUMAN:                    Throw that out. What do you think?

SUSANY PAYNE:                I think yes, but ... yeah.

JEFF NEUMAN:                I see Paul McGrady says, "Jeff, correct, applicant only on the tech evaluation. And the backend service provider would not be able to file an appeal even though it was its systems that were found lacking."

Paul, I think that's correct except if it's part of the RSP program then it would be the backend service provider that is being evaluated. In that circumstance, it would probably be the backend service provider. But I think in a regular evaluation, I think that's right.

In Susan's example, what's thrown out there, should the other applicants have standing to argue that the decision by the CPE evaluator was wrong?

Anne is saying, "So Susan is saying that if CPE is approved, all applicants that are not CPE can appeal that."

Nobody is expressing an opinion one way or the other except for Susan thinks it should be.

Paul is saying, "Yes, because the other applicants are harmed by the decision."

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Okay. Does the same hold true then, let me ask, if an application is found either to be confusing to be in a contention set and therefore gets put in the contention set, can the others appeal that decision of the original evaluator because now it's in a contention set with a party that it was not originally in a contention set with? Susan?

SUSAN PAYNE:

Yes, I would say. The answer to that I would say is yes because – and I can't recall my facts sufficiently well to give a really good example here – but I think we have that kind of scenario in the first round where a couple of applicants were given a very limited effectively appeal process or re-review, where it was decided that some of the string decisions were wrong, but it was very one-sided. As I said, I can't remember the examples well enough to give the actual scenario, but there were multiple cases where people felt decisions were wrong but the rights to the appeal in the first round was only given to applicants on one side of the argument, if you like. I think that was widely considered to be unfair and incorrect.

JEFF NEUMAN:

Right, Susan. ICANN only gave some of the parties a right to appeal but not all of them. A party that was put into a contention set that it didn't think it should be put into I think had the right to appeal, but the others did not.

I think what we'll do is we'll do a matrix of these, so we can in each case see who could appeal and who is not subject to an

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appeal based on the type of evaluation and/or objection. On the objection side, it would seem to me that the party that loses the objection that suffers the harm should be the one that has the right to appeal. Can anyone think of circumstances with objections where another party would have a right to appeal an objection? Okay. We'll put together a matrix on this which should make things a little bit more clear, hopefully.

On the "What measures can be employed?" we're talking about the frivolous appeals and filing one after the other after the other. If we scroll down a little bit ... a number of comments here, essentially, said that there should be this quick look process or ALAC says, "Administrative check," but I think the quick look would incorporate that. INTA says, "Incorporate of a summary judgment process." IPC says, "A quick look."

I think there's general agreement at least for a quick look to make sure that the appeals aren't frivolous and that I think that would naturally get us to the next question which is, if there's an appeals process, do we copy that one appeal? How do we ensure that there's not an appeal from the appeal? Or that a party that initially may have been happy with the outcome is not happy with the outcome of an appeal, can they file an appeal of the appeal?

The ALAC says that we should have something in there that stipulates that there cannot be multiple appeals.

INTA said you should use something similar to a court to use, which is that designating that there is only one round of appeal on any decision.

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The Registries say that there should be a limit on the number of appeals to ensure that they're handled efficiently. Also allow the consolidation of appeals that are related, and then have a "final decision" rule, so appeals are only available based on a final decision rather than allowing "interlocutory" appeals. I think the only exemption to that in this sort of bleed over from a discussion on the last call might be where there's erroneous conflicts of interest decision. So a panel finds that there is no conflict of interest rather than waiting until the panel hears the entire appeal or hears the entire case and then file the appeal. It seemed to make sense to some on the last call that if there's a conflict of interest appeal, that should not wait until after a final decision by the panel.

Anne is saying, "The outcome of appeal would always..." Sorry. Let me go back. Things are jumping here. "The outcome of appeal is always going to end up being subject to accountability mechanisms since ICANN will act on the decision in the appeal."

We can't stop people from filing anything under the accountability mechanism, but hopefully if there's an appeal and the appeal is well considered and decided, it would be fairly easy for the Board to dismiss if it was just re-appealing the same things that were subject to the appeal, and certainly you could easily see the ICANN Board Accountability Mechanism Committee saying that there is no violation of the Bylaws because it relies on the result of the appeal. I don't think that would necessarily pose a huge problem, but anyway. Alexander, please.

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ALEXANDER SCHUBERT: If we look at appeals, then obviously a party that lost something – maybe the entire application – is always upset and feels unfairly treated, and an appeal is a way to talk about it. If you look at it from a psychological standpoint, it's like, "Hey guys, I don't want to lose this, I want to talk about it." I think we should let those appeals go even if there are several of them but we should act swiftly on them because the Accountability Mechanism took years, sometimes a year or two for just one, and then the counterpart files also one. So, talking is great, but let's talk a little bit fast so that we have within weeks a final decision and everything is good. Thank you.

JEFF NEUMAN: Thanks, Alexander. I think the issue with appeal after appeal after appeal after appeal is that it gets to a point where it's frivolous. So if there's an appeal, and then an appeal of the appeal, and then if for some reason that gets decided differently an appeal of the appeal of the appeal, it has to stop somewhere. That's why courts do what they do, which is generally one level of appeal on certain issues and that's all they get. If it's a question of law and inconsistent decisions between courts, then in theory it can go one level higher but that is at the complete discretion of the second level higher. Paul, please.

PAUL MCGRADY: Thanks. I'm just throwing this out there, not all the way through. What about [winning] it to one appeal and then one Request for Reconsideration filed with the appellate body that heard the appeal, just in case the appellate body just screwed something up

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royally on the facts or something like that? We don't want to build a circuit court system where we settle conflicts between various decision makers, that kind of thing, but just one appeal and then if the appeals panel just didn't read something they were supposed to read or got something just completely backwards or whatever, some sort of safeguard but limited to those two things, and then we're done.

JEFF NEUMAN:

Paul, what would the standard be for ... I guess you're still thinking about this. Something smaller like a reconsideration, I think it would be subject to a different standard I think is what you're saying. So we just put out to think about what that standard would be.

PAUL MCGRADY:

Yeah. I don't know exactly what a standard would be, but it would have to be some sort of clear error standard. I do notice a "yikes" from Kathy in the comments. I'd like to know if that "yikes" was in relationship to what I said. If so, I would love to hear a different view on this because I'm really just throwing it out as a means to talk about getting somewhere not because I'm in love with the idea yet. Thanks.

JEFF NEUMAN:

Okay. Kathy is taking that as an invitation. So, Kathy, please.

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KATHY KLEIMAN:

Yeah. Thanks. Paul, I see where you're trying to go with this but an appeal of an appeal – I think we're going to drive a lot of parties out from the process just due to time and money. Plus, we're really talking arbitration. There was always an idea of inefficiency, which is why we didn't create an appeal in the first place, that we'd outsource to third parties who are experts in the area, who would use expert panels in some cases comprising of three world experts in the field. And now we're creating an appeal on that. I don't know how many protections we need to put around the process where it's really an arbitration and we're trying to get the job done.

Throughout this whole process, I've heard about time being of the essence for the applicants and rolling out their name. So I would think the sooner we get to an answer, the better certainty, the better for everyone. Again, I really worry about inequities, the ability to continue to pursue very legitimate objections if this goes on through many layers. Thanks.

JEFF NEUMAN:

Okay. Paul says, "Thank you, Kathy. Your concern about over doing it is important."

Then of course we get to the next logical question of who pays the cost of an appeal. A lot of the commenters said that the loser should pay. I think that makes sense in if you're appealing an objection. But when you're appealing an evaluation, if you failed the evaluation as an applicant, you appeal and the appeal determines that you shouldn't have failed. Are we saying that ICANN as an organization needs to pay the cost of the appeal?

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Because it's not going to be the third party evaluator that pays the appeal. Jamie, please.

JAMIE BAXTER: Thanks, Jeff. I have a very strong opinion about this. That is that everybody needs to be accountable for their work. So if the evaluators did not do the proper job, they need to be responsible for the additional cost. It happens in the economy around the world every single day. So if you don't do your job then it's your responsibility to do your job. So if it's pointed out through an appeals mechanism that they completely got something wrong, the same way a plumber comes to your house and screws up your system when they were supposed to be there fixing it, they have to come back and fix it on their own. So I have a very strong opinion about this and I think it should be the responsibility of the third party. If it's proven there was a mistake. Thanks.

JEFF NEUMAN: Okay. I have Greg and then Susan.

GREG SHATAN: Thanks. I would have to disagree largely with what Jamie said. I think we're talking about adjudicators here who are making a decision weighing the matter in front of them, and they'd come to a decision. As long as it's within reasonable standards of being right or wrong, that's just the way the system works. Now, if there was something like a misconduct or gross negligence, maybe then you might have an action against the third party but, frankly, I don't think we have any third parties that would sign up for this if



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this were the case. Nor would I think I'll be able to get insurance for it. I think we'd be screwing ourselves over but in any case, anything short of just gross negligence or high crimes and misdemeanors – to use a currently popular phrase – should not result in liability to the adjudicating party. Thanks.

JEFF NEUMAN: Thanks, Greg. Then we'd go to Susan, please.

SUSAN PAYNE: Thanks. I've got some sort of sympathy but the basis has just been expressed but what I put my hand up to say was just that the scenario seems on the face of it to be a reasonable one but that would have a real impact on who would hear the appeal. If the deciding body is going to be stuck with the cost of where they got it wrong then they clearly can't be the party who handles the appeal from their own decisions.

So we're now at that point building something even more complicated. On that basis, I'm more inclined in Greg's camp as well. I think we'll ourselves unable to find bodies that want to take these disputes on if this is the case. I mean I think the assumption is that if they get too many wrong then ICANN [sacks] them.

JEFF NEUMAN: Thanks, Susan. I think that does make a lot of sense for evaluations. Again, when we talk about who hears the appeal as well, I think at the end of the day, I think for evaluations at least, which are not adversarial proceedings necessarily, it's not one

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party against another, it's just proving that you actually met some sort of criteria that they said you did not. I think that is the appellant, the party that appeals needs to pay and maybe it's out of discount or something. But in an objection, you could easily go with the loser because that's a two party. The objection is at least a two-party adversarial proceeding.

Greg, is that a new hand?

GREG SHATAN: Old hand, sorry.

JEFF NEUMAN: That's okay. One of the remedies for an appeal or for someone who's successful, well, if it's an evaluation mistake then the remedy seems fairly obvious that it would no longer have failed that appeal or that evaluation, at least that part of it. I think the remedy for objection, it would just depend on the type of objection. So if the winner of a Legal Rights Objections is the applicant themselves, then the application will be allowed to proceed. If the winner is the trademark owner ultimately at the end of the day then the application is dismissed, or the same remedies if the original decision was made. So I don't think the remedies are too difficult.

Just a side note to Steve. I do see what you're typing separately. I got it. Steve was warning me about time on Skype and then not thinking that I saw it because I know that we're running close to the time.

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I think the remedies, once we do a matrix, I think it will be fairly obvious. Again, we'll do that matrix. It seems like this is a good exercise for the different types of evaluations and the different types of objections, but we get into the question of who should be the arbiter of the appeal, and I think we'll leave off there. Let me see how close ... yeah. So we'll leave off there for the next call. I know there were some tough issues on this one. I think a matrix is going to help so I will definitely get started on that as soon as possible.

The next call is Monday, the 7<sup>th</sup> at 15:00 UTC, 90 minutes. You'll notice it is not at 03:00 even though at the last two calls before this one we're at that hour, this one is at the 15:00 hour.

Alright, thanks, everyone. Good discussion. Again, if I could just ask that people make sure they read ahead a little bit – in the documentation it's all there, the links are there in the notes – so that we'll spend a lot of time on the discussion and then of course not jumping ahead too much, especially if that topic is a little further up. Alright, thanks, everyone. Talk to everyone on Monday.

JULIE BISLAND: Thanks, Jeff. Thank you, everyone. Have a good rest of your day.

**[END OF TRANSCRIPTION]**