
ICANN Transcription

New gTLD Subsequent Procedures Working Group

Thursday, 05 December 2019 at 2000 UTC

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JULIE BISLAND: Good morning, good afternoon, good evening, everyone. Welcome to the New gTLD Subsequent Procedures Working Group Call, on Thursday, the 5th of December, 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, could you please let yourself be known now?

GG LEVINE: Hi. I'm on audio only.

JULIE BISLAND: Hi, GG. Okay. Thank you. All right. Hearing no other names, I would like to remind everyone to please state your name before speaking for transcription purposes, and please keep phones and microphones on mute when not speaking to avoid background

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noise. With this, I will turn it back over to Jeff Neuman. You can begin, Jeff.

JEFF NEUMAN:

Thank you. Welcome, everyone. I believe we're getting closer to the holiday season for a lot of people, but we still have a few more meetings. And on that, we are ... I don't know if it's been sent out yet, but there's some revised times for next week's meetings. I'm hoping that the calendar invites will go out shortly, if they haven't already. So, just take a look at your mail for those times. Before we get started, let me ask ... Or as Emily said, they'll go out shortly. That's great. There were some conflicts we just didn't realize at the time that it was originally scheduled, so I appreciate everyone being able to make those new times.

So, before we get started on the agenda, let me just ask if there are any updates to statements of interest. No. Not seeing any. Great. Okay. So then, what we're going to do today is go on to the next topic that we had drafted a summary-type document—a little bit more advanced, and we were supposed to cover, or could have covered at the last ICANN meeting, on the limited appeals mechanism.

I think because we had planned on talking about this at ICANN, we had ... If you click on that link, you'll see a document that's much more in the format of the things that we believe we've agreed upon, which is really setting the basis for the recommendations. And so, we figured it would be a good topic to go over now.

The other thing you'll see shortly after this call will be the agenda for next Monday's call. And when we come up to Monday, we'll start talking about how we're going to get to closure on some of these topics, where there's still some areas that we need to solidify—at least develop some sort of recommendations to go out for public comment on some of these subjects.

So, again, we will talk towards the beginning of the new year as well about what our current thinking is on public comment, but for now, we just want to cover some more of the topics. And for those areas that we pretty much know we will be soliciting comments on, we want to have some recommendations that we can at least have the community discuss, as opposed to just options.

So, with that said, the link for the limited appeals mechanism is up on the screen, and Julie has now posted it on the chat as well. And so, if you'd rather follow along in the Google Document, feel free to do so. I'm going to try to follow along on the one on the screen, and see where we end up.

Okay. So, what are the issues we're trying to address here? This was a question also asked within the CCT Review Team report, which was, "Are the dispute resolution and challenge processes ... Do they provide adequate redress options, or are additional redress options specific to the program needed?"

This working group, over our period of discussions on this topic, as well as the multiple comment periods, we believe that—or at the leadership believes that—the working group believes that the accountability mechanisms set forth in the ICANN bylaws were not adequate in resolving all of the issues for the new gTLD program

in 2012. And even the revised accountability mechanisms are not wholly adequate to address all, or to resolve all of the issues, or those types of issues that came up in 2012.

And so, although we do recognize there have been some significant changes as a result—or not as a result of ... Like I said, as a result of the work that was done at the same time, or around the same time as the IANA Transition, they're still not sufficient to address certain areas where we could foresee appeals or dispute resolution arising from the New gTLD program going forward.

So, what are our policy goals here? We still think that the 2007 policy continues to appropriate, which includes Recommendation 12, which states that “dispute resolution and challenge processes must be established prior to the process,” and Implementation Guideline R, which says that “once formal objections or disputes are accepted for review, there should be a cooling off period to allow parties to try to resolve the dispute or objection before review by the panel is initiated.” So, there's nothing from our discussions or the comments that we have received that would, we believe, change that—at least those two items from 2007.

We would also add to the policy goals that we believe dispute resolution and challenge processes should be transparent, fair, and cost-effective, and panelist evaluators and the independent objector must be free from conflicts of interest. So, one of the things ... And the reason why those areas are in bold, as opposed to—you see where the word “challenge processes—” is because that's what we're adding to the 2007. So, I think 2007 just stated that the dispute resolution, so we're making sure that it's both dispute resolution and challenge processes.

Also, as we mentioned, the working group notes that the CCT Review Team Recommendation 35 suggests that SubPro PDP consider introducing a post-dispute resolution panel review mechanism. We'll talk more about that.

Some other policy goals that we have gleaned out of the conversations and comments are that applicants and other impacted parties should have a challenge process to seek redress to errors in processes and/or outcomes specific to the New gTLD program. Any challenge processes must not conflict with or impinge access to accountability mechanisms under the ICANN bylaws. So, that's something that certainly came out of our discussions, and I think is something we need to pay close attention to.

Sorry. It feels like there's a line open. Is there someone with their hand raised, or that wants to speak? Nope? Okay. We'll get back to that point. I think that comes up over and over again, and we're going to keep stressing it that we are not intending to replace or do anything inconsistent with any of the accountability mechanisms that are in the ICANN bylaws. So, to the extent anyone feels like we are conflicting with that, that's obviously something we need to discuss, and make it clear that this is in addition to any of the accountability mechanisms.

The other and last item that we think is a guiding principle or policy is that any challenge process must have measures to prevent frivolous usage. So, certainly the fear or gaming, whether you call this gaming or not—not just using dispute resolutions to delay inevitable outcomes, or to not tie up applicants forever. I

think this is a goal. Sorry, Maxim. I thought you wanted to add something there. No?

Okay, so what specifically are we proposing? This is where we'll delve into more of the details, in line with some of our earlier discussions. The working group is proposing a limited substantive appeals process for certain types of actions or inactions that are inconsistent with the Applicant Guidebook. In general, the appeals process could be used to challenge evaluation results and/or objection panel determinations, where those results or determinations are inconsistent with the provisions in the applicant guidebook.

The new substantive appeal mechanism, as we stated before, and you'll see us keep highlighting, it is not a substitute for ... It's not a replacement of or for the accountability mechanisms in the bylaws, which can always be invoked at any time to determine whether ICANN staff or Board violated the bylaws by making or not making a certain decision, or taking or not taking a certain action. So, again, we're not revising the bylaws.

So, the substantive appeals process could apply to the following. These were examples that we came up with for specific items that we think—for illustrative purposes—that we think the appeals process could apply for. One of them is to recommend changing names for clarity. Some of these actually ... Sorry. I'm looking at the notes here, which are not as easy to see on this version, so I'm going to go myself to the Google Doc. Might make it easier for me.

This added in red is ... Let me just make sure I can follow along, because people have added comments in here, and that's great, but ... Okay. This was added by Kathy, so before I get to the additions, let me just go to what we had in the draft, which is that we had put illustrative examples of evaluation elements that could be challenged in an appeals process, as well as objection decisions that could be challenged in an appeal process.

So, Kathy has added the following language, that says that she would recommend changing the name of this for clarity—changing the names of the appeals process, I guess, to the elements below. She would recommend changing “evaluation elements” to call them “challenges.” “Appeals and objections” should be called “appeals.” One is more an administrative process, one is an arbitration process, and changes to names will make process differences clearer.

And then, I think there's a question from Susan. I don't know, so is Kathy on the call? Let me just take a look at the list. Kathy is not on the call to discuss this change. Paul put something into the chat as to who can make the challenges. I think we'll get into that as we go along, because I think standing is certainly something that needs to be discussed on all of these, and so, we'll get to that. It's a little bit hard to evaluate this comment, because Kathy's not here at the moment, but let's just put it out there.

So, Kathy's got a recommendation to change ... Instead of saying “substantive appeals process could apply to evaluation elements,” I guess what Kathy would say is that someone could challenge the evaluation results, maybe is the point there. And then, the second one is that, if we're talking about “appeals,” it would be “appeals

and objections.” Maxim says we could say “specially-trained challengers.” All right. Is there anyone that’s got a comment or that wants to address the point that Kathy has made in the chat? Maybe it’ll become more evident as we go through.

Right. Justine says that Kathy is specifically proposing to change the names or the terms of what these are called. Yeah, Justine. That’s the way I interpreted it, but I didn’t want to ... We can come back to that. That’s just a comment that’s in the draft. We can come back to that.

So, these are the elements—things that could be challenged—background screenings, string similarity, DNS stability, geographic names ... Because remember, there’s still a geographic names panel. There’s obviously technical and operational evaluation panels. There’s a financial evaluation panel, a registry services evaluation panel, potentially. There’s applicant support, whatever that panel ends up being called, to look at that. And there are something we spent a lot of time on, community priority evaluation decisions that will come out.

Jim says it’s tough to interpret her thoughts, so maybe we can table this until the next call. We’ll certainly send something to her via email, and if it’s something we need to come back to, we will. Paul is saying plus one. “The benefit of renaming everything doesn’t jump out at me, but perhaps Kathy sees something we may not.”

So, if we then move to the different types of objections ... Whoops. Sorry. Let’s just stay on the objections. These are the types of objections. There’s string confusion, legal rights objection,

limited public interest objections, community objections. Although this is not necessarily an objection per se, it seemed to fit in more here, which is to the extent that there's a panel that's constituted for the previous-mentioned objections, there are conflicts of interest rules.

We are certainly, in our recommendations, if you recall, going to strengthen those rules with some of the recommendations that we have already. But there does need to be a way to challenge the conflict of interest determination by one of these panels.

So, there already is the procedures a mechanism, or a requirement that there not be conflicts of interest with these panels, and usually, if there's a perceived conflict, one of the parties or all of the parties will bring this up. Each of the providers had a process for dealing with conflicts of interest, and they would make the first determination. What we're talking about now is an appeal of a determination made by a panel that there was not a conflict of interest. I suppose in theory there could be an appeal if a panel determined that there was a conflict of interest, but I can't see how that really, realistically would come up in that situation.

Okay. Let's move on to the next page. Here's some of the issues that we need to discuss, and an outline of additional recommendations we think we're leaning towards, but certainly need to have further discussion on this. One thing that we talked about, that I think there's agreement on, but I just want to test the waters again, which is that where the appeal would be heard is the same forum or same institution which heard the underlying objection, because they have the subject matter expertise. Again, this is for objections. It's actually both—for evaluations or

objections. These panels were put into place because of their expertise.

The one exception here may be with respect to the conflicts of interest. So, put that challenge of conflicts of interest aside, and think about all the other types of challenges or appeals of decisions, with the exception of the conflicts of interest. Thoughts at this point?

Okay. Then let's move on. We also further agree that parties would have the full—that both parties, or I guess in the case there's multiple parties, would all have full rights to participate in the appeals processes. We put in parentheses we're not sure if this is the same for challenges.

So, if you go back to the previous page, it makes a lot of sense as to why all the parties should be involved in objections, because there is an objector. There is a respondent to the objection, or I should say the applicant, I guess, is always going to be the respondent. Either side could lose that objection, and either side could have a basis for an appeal. So, it certainly made sense that for appeals of objections, it certainly makes sense to have multiple parties participate.

Where we drew the line—or not drew the line, but where we're still having discussions—is whether all the parties to an evaluation should technically be parties to a dispute based on challenging the evaluation results. As an example, if it's determined that the name is confusingly similar, and therefore should be placed in the same contention set, or if there's a determination that it's similar to an existing TLD, and therefore the application couldn't go forward,

certainly makes sense that the applicant who the decision was against could absolutely join or be the one to file this. But the objector should also be given an opportunity to be heard in these proceedings.

Whether this applies to something like an evaluation result, that's not as clear-cut. Do you take a process where, let's say, there is a technical evaluations panel ... They decide that this service should not go forward for whatever reasons. Assume for the moment it's believed to be legitimate reasons. Then, certainly the applicant whose application has now been rejected—at least for this use with new service—they would have the right to appeal. But the question is, would the party that filed the initial objection have the right to participate in the appeals process?

I think where we came out is that a party that files on objection should be involved in a appeal of the decision of that objection, but it didn't necessarily make sense that, let's say, a panel that does a technical evaluation becomes a "party to a challenge" of that technical evaluation. They could be a "witness" or something like that, but it's generally not viewed as being an adversarial process, where you'd have people on multiple sides. Hope that makes sense.

So, let me just go back in the comments. Paul says "They won't be held by the same panelist at the same provider." No, that's correct. Paul. I thought we had put that somewhere in one of the documents, but that certainly should be spelled out, and that's certainly intended. Justine says, "Just looking back, I suppose Kathy wants us to consider making it clear that the recourse against evaluations is a challenge to the evaluation elements,

while in respective objections, the recourse is an appeal.” Okay. That does make sense, but we’ll see if we can get some more information on our next week. Any other comments?

So, again, we believe that there is an agreement to employ a quick look mechanism to guard against frivolous appeals. This quick look mechanism has come up on this notion of appeals on all sorts of different types of objections. It was one of the principles we had earlier.

If you remember, also, one of the things that we talked about is when this appeal should be heard. In other words, do you wait for a decision to be final before you can lodge an appeal or challenge, or can you do that midway through, which is called an interlocutory appeal? An example here would be if you failed your technical evaluation, do you have to wait for all the other evaluations to be done, and contention set and everything else to get notified? On this, I think they’re essentially saying that interlocutory appeals would be ...

Kathy’s here now. Sorry. I’m trying to read both things here. So, the notion of an interlocutory appeal would be to hear it even before a substantive decision is made. The only type of appeal that we talked about where an interlocutory appeal made sense was if there was a conflict of interest.

So, if there’s an appeal because there’s a perceived conflict of interest, then that should be heard as soon as possible, as opposed to waiting for the panel to decide the overall objection, because then, it would seem like ... If it turns out there was a conflict of interest, you would not only be throwing out that one

determination that there wasn't a conflict, but you're basically putting into play the entire judgment anyway. Hope that makes sense. An interlocutory appeal, it seems like where the group is heading is to have a final decision for everything except for a conflict of interest appeal.

Kathy, now that you're on, if we can go back. Hopefully you have access to a mic. Can you just go into a little bit of background on the language in red, as to why you're making that recommendation? I know Susan has asked as well. It may be in your note, but it would be great if you can speak to that.

KATHY KLEIMAN: Sure. Can you hear me, Jeff?

JEFF NEUMAN: Yes. Thanks.

KATHY KLEIMAN: Great. Thanks. Apologies ahead of time. I'm just here for a little bit because there's a big dot org discussion taking place at the same time. One of the things that I was getting confused about is the different types of proceedings taking place. One, the evaluation elements are really about the discussion between an applicant and the ICANN evaluation panels. Objections are between third parties and the applicant. Objections are going through an arbitration system, and the appeals are more traditional judicial type appeals—as judicial as the arbitration process is, which is quasi-judicial.

Using the same word for everything just seemed to be confusing to me, because I'm not sure ... It confuses who the parties are. So, one of the things we did in drafting the different—say, between the UDRP and URS—so that they wouldn't be confused, because they are fundamentally different processes, was to change the name of the person making the decision, which is a panelist, of course, in the UDRP, to an examiner in the URS. That way, if you said "panelist," you know you're talking about a UDRP.

If we talk about "challenge" here, you know you're talking about these nine evaluation elements. If you talk about "appeal," you know you're talking about one of the types of confusions that involve a third party. I thought just having that easy identification would be very useful, because I think it has ramifications down the line. Thanks. And thanks for going back to it. I appreciate that.

JEFF NEUMAN:

No problem, Kathy. Let's go through that. Are you basically, then, drawing a distinction, saying for evaluation elements, or what's now called "evaluation elements," these challenges would be only the between the applicant and the evaluator or evaluators, plural, as opposed to involving any other parties?

KATHY KLEIMAN:

Not necessarily. I just think we should point out that these are very different. To the best of my knowledge, you're not challenging background screening in front of the American Arbitration Association. You would sit in front of something that ICANN has

created. It's much more an administrative process than an arbitration process.

JEFF NEUMAN:

Okay. So, let me see if I can ... So, because these evaluation challenges are brought at the same ... Well, no. It's the same thing for the appeals. So, the background screening, you would think ... Okay. I want to see if there's any other comments, but I think we can distinguish and call "evaluation challenges" and "appeals of objection decisions," essentially. I think that that makes sense. Let me just open that up for comments. Anybody have an issue with doing that? Anne, [inaudible]. Okay. I'll get to Justine's question in a second. Okay. Paul, please.

PAUL MCGRADY:

Thanks. Jeff, I know you've already said we'll get to this. I just want to ... This makes me nervous, once we start putting things into buckets. We're writing the name of the bucket on the outside, then we're putting things in it, but we're not developing what's going in. I just don't want the bucket things go into to affect the substantive outcome.

So, I know you've already said this. I don't have a problem with labeling the buckets, but I am concerned that because something goes into bucket A, or bucket B, it affects who can bring the challenge. So, for example, the background screening needs to be challengeable by third parties. I don't know of any mechanism or appeals process built into whatever evaluator they use. And so,

that kind of thing is not being done by WIPO. It's being done by some service that probably does not have a set of panelists.

So, the ability for third parties to challenge on some of these challenges, and the competency of the appeals mechanism that may or may not already be baked is really important. And just saying, "ICANN will develop something ..." If ICANN's vendor gets it wrong, ICANN won't have any particular interest in being proven wrong in a challenge. Again, all that to say this. It's fine to label the buckets, but I'm not at all comfortable, knowing specifically what it means to put things in those buckets. Thanks.

JEFF NEUMAN:

That makes sense. We do have, though for some reason I can't click on it ... In the Google Document ... Sorry for the background noise. On the next page of this in the Google Doc, there is a link to a spreadsheet. For some reason, I can't ... There you go. Okay. So, we'll get to the spreadsheet, Paul. I think that starts to cover what we were talking about. I understand the concern. So, let's just bracket the term "challenges and appeals," and then we'll come back to it after we get through all of the other elements, so that we don't just lose sight of the comment that Paul made.

The point is from Kathy and Anne that they're not trying to affect the standing with this new label. So, that's not the intention. That's good. Okay. Sorry. Jumped ahead a little bit to that spreadsheet, but we will get to that. Let me go back to Justine's comment. We were talking about interlocutory appeals, and Justine said, "But the COI, conflict of interest, discovered later could also be a grounds for a post-decision appeal." We'll have to talk about that.

That's not necessarily a given, and I think the working group needs to talk about it.

For example, the working group could say yes, that it could be grounds of an appeal later on. Or it could say that, "You raised the issue of conflict of interest to the panel, and you got a decision you didn't like. Maybe you have to appeal that within a certain period of time after you find out of the conflict of interest or you lose your right of appeal." Of course, that wouldn't stop an accountability mechanism, but it might stop a substantive appeal of the one we're talking about. So, I don't want to ... By the way, I'm just providing that as illustration, not as what would definitely happen. I'm just proposing, or just putting forth a potential answer. The working group can decide to go either way on that.

Okay. Let's go back, then, to ... We were talking about interlocutory appeals. Now, the next part is an applicant who is successful in an appeal from an evaluation challenge should not have to bear the cost of that appeal. That was something that we think most of the group, though not everyone, is here at this place.

Some had suggested that they should pay, but this is basically their version of a ... If you're going to appeal an evaluation challenge ... In other words ... Sorry. If you are going to challenge your evaluation results, and you succeed, meaning that you're potentially scored incorrectly, then the thought was that you shouldn't be responsible for having to pay for that challenge—or at least you shouldn't at the end of the day. But then, of course, that begs the question, who is going to pay for it?

We also state that there should be no impact on an interested party's ability to pursue accountability mechanisms under the bylaws. The remedy and the standing, we'll talk about when we get to that grid. And then, we also have in here that ICANN should have a thorough screening process to pick its evaluators and/or panelists. Should hopefully have the goal of lessening the amount of at least challenges to a background check or other items.

We had discussed all the appeals except for a conflict of interest appeal, to have a clearly erroneous standard. This means that essentially, during your appeal or your challenge of an evaluation result—really should only be overturned if it was clear on its face that the initial determination was clearly the wrong determination. Otherwise, you don't want to have ... You don't want to second guess to evaluators.

That's not the point. The point is not to have an entity that watches over and gets to substitute its own judgement in for the evaluators. You want to have this evaluated on the standard of, "Is it clear that the evaluator made a mistake in applying these criteria or not applying other criteria," as opposed to, "Let's force this appeal process to hear everything as if it were a new case from the very beginning." That was not something that it seems like the group was interested in. But let me go to Anne.

ANNE AIKMAN-SCALESE: Thank you, Jeff. I did want to talk a little bit about this clearly erroneous standard. I'm actually fine if it's applied to both challenges and appeals, as far as the buckets that we're talking about here, if other folks think that's appropriate. I did want to note

that clearly erroneous, in and of itself, is not a very easy standard to apply as a panelist unless you have a little bit more flushing out of what that really means.

When we talk about ... Some decisions were clearly wrong. Right and wrong on decision making is in the eyes of the panelist or the beholder. I want to suggest that we might flesh that out a little bit by adding that clearly erroneous, meaning either the reasoning was arbitrary or that any element of the evaluation or the objections finding was not supported by substantial evidence. As a panelist, you're trying to figure out, "Okay, what are my standards on appeal?" just like all judges do.

So, I think it needs to be fleshed out a little bit more so that we're talking about the element of reasoning and the element of evidence, just as I think it would be in an actual legal proceeding. That gives more guidance to the panelists. So, what clearly erroneous would mean, would mean that either the reasoning was arbitrary, or that any element of the evaluation or element of the objection was finding—the findings. There are elements to these objections, like a community objection has four elements. Any finding was not supported by substantial evidence.

JEFF NEUMAN:

I think a lot of that makes sense. Anne, if I can ask you to maybe put those additional elements into an email, and then I think we can flesh out the clearly erroneous standard. I think that would be very helpful for panelists.

ANNE AIKMAN-SCALESE: Sure.

JEFF NEUMAN: I do think that's a good add. I want to look at Paul's note. Paul says, "I'm confused by this line. We're using 'appeal' and 'challenge' in the same sentence. Now that we are bucketing things, is this still accurate?" Second point, then, is, "Clearly erroneous favors ICANN, not applicants. Everyone cool with that?" And then, there's a whole bunch. Is this from Anne? Let's see. Paul McGrady put some text in about clearly erroneous. I think this is some good text to flesh that out. I would love to hear people's thoughts on whether that's appropriate. As Paul notes, it is a very high standard.

I think the point there, in line with our previous discussion ... I think that's right, Paul. It is a high standard, but I think it's intended to be high, because in theory, these evaluators for the evaluations and panelists for appeals, are picked based on their subject matter expertise in the area for which they're responsible. I think that deference is certainly intentional—that they have the expertise to decide these types of things, and to override those decisions.

Even if it is another panelist from the same provider, let's say, I think it was intentional in making it such a high barrier, except for the de novo review of a conflicts of interest determination. Something like that, it would seem to be more of a, "Look, if there's a conflict there ..." In that situation, you didn't necessarily need to provide deference to the decision maker in that case.

Paul says, “What are the chances of a panelist from the same provider calling his colleague’s decision ‘implausible?’” That’s a good question. Anyone with thoughts on that? I guess one of the things, also, that went into this was that the group was thinking that this should not just be a complete re-litigation of the original complaint.

So, if a panelist was reasonable ... Sorry. Now I’m mixing up the terms “panelists” and “evaluators.” Let’s say it’s an evaluation. If an evaluator was reasonable in concluding that the applicant did not meet background check, then it was the thinking of this group that to overturn that decision would require—would be a substantial burden for the applicant, because again, in theory, these evaluators are supposed to be third-party neutral players, and not making any decisions based on where it stands in the ecosystem or its own beliefs.

So, from a purely philosophical standpoint, it didn’t necessarily make sense to have a ... It didn’t necessarily make the most sense to have less of a burden. Anne, your hand’s up, but I can’t recall if that’s an old one or a new one.

Let me also ... Whoops. I’m not seeing the full participant list. Hold on. Okay. No one’s got their hand raised. Just looking again, it says—this is from Kathy—“It’s my understanding that in legitimate arbitration forums, there’s always a process for handling conflicts of interest issues.” Yeah. Kathy, I think what we’re saying is for conflicts of interest, they would go through whatever process that provider has, and then this is to handle appeals of those, or challenges of those decisions are reached through their normal processes.

Paul's saying, "Other options are arbitrating capricious and substantial evidence." Those are two other options, but I think ... Again, I guess we're just trying to balance the not wanting to relitigate everything, and the understanding that these panelists are supposed to be skilled or trained up in handling these types of disputes or objections, and that they're the real subject matter experts on this. Anne's saying, "Paul, I don't think any panelist is going to accuse another panelist of being capricious." That's an issue with dealing with that term.

All right. Let's move on to the next page. Actually, let's go to that link to the chart. Let's go to the chart. Some of you, or most of you, should have seen this already, because it's the same chart we started when we first brought up this topic. There have been some proposed edits, so we'll go over those. But this was really to give more of an illustration of the sub-issues, or the other issues involved in considering these types of challenges and/or appeals. Let me just ask ICANN Policy staff. If it's in red in the Google Doc, who are those changes made by?

STEVE CHAN: Thanks, Jeff. I am struggling to recall why they're in different text.

JEFF NEUMAN: I think they—because they were just changes from the last version.

STEVE CHAN: Indeed. If you look at the text here, it says something like, “suggestion from a working group member,” so I think it’s changes from the original state, essentially.

JEFF NEUMAN: Thanks, Steve. So, let’s look at the first one, background screening. The first column, we have an outcome that might warrant appeal. This type of ... I guess in this case, we would be saying a challenge—this type of challenge. And so, what we have here is that if an applicant fails to qualify or gets disqualified for an application, the application is taken out of the program. So, you’re essentially ... Your application’s dead at that point.

So, it certainly affects the applicant, because the applicant’s the one that filed that application in the first place. Now, the question is would it ... Are there any other parties that we would think would be naturals for being able to challenge ... Sorry. Got to get that in my head now—challenge a background screening determination. During this subject we talked about the last time, I think it was Paul that said that he does think that a third party may want to get into these types of issues. I think Paul had explained or talked a little bit about his experience with some other registries in dealing with this.

It’s quiet today. So, Paul had made the suggestion, and he says yes, that third parties should be able to have standing in this type of dispute. That was certainly Paul’s belief with the examples that he gave us on one of the last calls. But we haven’t heard from others as to what they think. Anyone want to speak, or everyone just agrees with this—that essentially, the only people that could

challenge a background screening the applicant itself, or would you like to add a member of a contention set? Paul?

PAUL MCGRADY:

Thanks. I think at a minimum, we need to add members of the contention set. They are the ones who ... The applicant obviously has a lot at risk, but so do the contention set members. And it's patently ridiculous for members of the contention set to have to go through the whole process, and then have to pay a big, giant payment to ICANN at the end of the process, through whatever appeals mechanism there happens to be, all because ICANN either did a bad job of looking into an applicant's background, or ignored information that was brought to them.

I, for one, would like to make it even more broad, to be third parties that could have a negative impact if the applicant succeeds in their registry application. I understand there may not be as much stomach for that, but at a minimum, members of the contention set makes sense. Thanks.

JEFF NEUMAN:

Okay. Thanks, Paul. So, there's at least Paul. Are there others that believe that at a very minimum, the applicant should be able to challenge, as well as any other applications in a contention set. And would you also include, Paul, for a legacy ... Well, I guess this wouldn't be a contention set. Never mind. Scratch that question.

Let me see if there's any comments. Anne says, "Paul, I was trying to stick with clearly erroneous." Okay. So, we're still on the

... Justine says, "I'm with Paul here. I would even consider adding third parties." So, Justine, what type of third parties would you add—other third parties? While you're thinking about that, wouldn't that just potentially be a basis to game the system, if any third party can challenge based on a background screening—a failure to follow a background screening? I mean, if this panel decides that, "I know person A is a murderer," but that doesn't mean they can't have a TLD. I know it's an extreme example. Paul?

PAUL MCGRADY:

Thanks. So, yeah. Setting aside the extreme example of the murder, let's just think that it is possible for a moment that members of the ICANN community may know what's going on behind the scenes, that this third-party evaluator may not be able to uncover on their own.

Without naming specific scandals and other exciting events in recent domain industry history, it's not always obvious who's behind what, and how things turn out the way they do, and who's a good actor and who's not a good actor. So, there may be members of the community that could come forward with information that these evaluators can't get to, don't know about.

But that having been said, at a minimum, the people in the contention set who are directly affected by this situation, they should be allowed to bring that forward. And ICANN, through an appeals process, should have to listen to it and act on it, if it turns out to be actionable. And if it turns out not to be, then they need to

explain why, and not just ignore it like they did in the last round.
Thanks.

JEFF NEUMAN:

Okay. So, I'm just trying to get my head around this. You're saying it's not just any third party. It's a third party that is part of a contention set. If that's the case, is there a challenge mechanism by anybody else, if they do succeed in the background check and somebody doesn't like that? Is that what you're saying? Paul, please.

PAUL MCGRADY:

Thanks, Jeff. I would say the contention set ... [inaudible] the contention set in order to have standing is a fallback position. I would prefer that we cast it a bit broader, to third parties that can show some potential direct impact on them if the background screening is botched. So, I think the contention set position is trying to get to the middle ground, if there's no stomach for building out third-party rights to object.

But like I said, that members of the contention set, they're directly affected by this, and so it's nonsensical that there's no way for them to point out a problem. I should say they can point it out, but in the last round, it was just ignored. It's nonsensical that there's no process that ICANN has to take those things seriously, look into them, and either agree and bounce the applicant, or disagree and explain why they disagree. Thanks.

JEFF NEUMAN:

It seems like you've got some support from Jamie and from Justine on that notion. Anyone else have thoughts of [inaudible] the background screening challenge? Okay. For the background screening challenge, then, let's look at the issue of string similarity. There's a whole bunch of potential outcomes in the string similarity evaluation.

The first thing it could find was—or the easiest thing it could find is that there's not similarity with a legacy string, or any current application pending. So, that means that there's no remedy, because there's no issues found. Everyone, that's fine. That's the easy case. There's no one to appeal in that case. Or do we allow people to appeal if they ... I'm trying to think of who ... The only real appeal or challenge is from the ... I'm just trying to see exactly here. Trying to go through all the situations and look at the chat.

Okay. So, if it is a case where it's found ... A string similarity, if it's found to be similar to an existing TLD reserved names, two-character IDNs against one character ... These are the reserved strings or the "do not apply for" basically stuff. If it's found to be similar to one of those, it's dropped out. If it is ... Sorry. Reading Cheryl's note there. So, the applicant could appeal that. If it's found the other way around, or it's found not to be similar, then the impacted party would be the existing TLD operator, because now it stays in the program.

So, in that case, the parties with standing ... We have it in red here, because I think when we talked about this, we said that we weren't sure if an existing TLD operator should have standing, if an evaluation panel finds that it's not similar to that existing TLD,

or whether we say, “No, look. Because you have a right to submit an objection, that’s the way to handle it. You submit an objection. You don’t have a right to appeal the evaluation decision.”

So, I want to make sure that we agree with that, so let me go over that one more time. With string similarity, for the situation where the evaluator is looking at whether a string is similar to an existing TLD, a reserve name, or some of the other strings that you’re not allowed to apply for, if you are found to be similar, then the applicant is likely to appeal. The existing TLD operator is affected, and certainly with standing, if you are found to be similar, an applicant would have standing to bring a challenge.

If you are found not to be similar with an existing TLD, reserve name, two-character IDN, etc., then the question is should the existing operator then be able to challenge that evaluation decision? What we talked about the last time was no, because they can always file an objection, which is the purpose of that confusingly-similar objection. Sorry that was a little confusing there.

Justine says, “On the background screening, please refer to the email of the 21st of September.” So, if someone could pick that up, that would be great, to make sure that we’re addressing that. Sorry, Justine.

In the string similarity evaluation ... I guess I’ll just keep going until people raise their hand or want to talk. In the string similarity evaluation, there is an outcome that could say that you were found to be similar to an applied-for TLD. If you are, then you’re just put in that same contention set. So, who’s impacted by that? The

applicant and other applicants for that, that are deemed to be in that contention set, or not deemed to be in that contention set.

So, if the result is that you're found similar—if it's found similar to another applied-for TLD, the applicant could certainly appeal, because it doesn't want to be considered similar, but we've also decided that other applicants in that same contention set should have the right to challenge. And that was a discussion point, because we weren't necessarily sure about that. But then, when we thought about it again, we thought, "You know what, if you're found to be similar, but other applicants in the contention set don't think that you should be in their contention set, they may want to challenge that as well." Paul's saying that—thinks that's right.

The arbiter of the appeals, as we talked about with evaluations, is having the same entity do the appeal or challenge. It's just a different person there. What's the result? If you're found to be similar to and apply for a TLD, and you challenge, and you are successful, then you are removed from that contention set.

And then, who bears the cost? We talked about the filing party would obviously bear the cost, but then there's a question of should there be a partial refund if the filing party wins—so again, the applicant or others in the contention set that don't believe that application should be in the contention set. Should there be a refund, or at least a partial refund, of the challenge fees if it turns out that you should not have been in that contention set to begin with?

Okay, but let's say you are found not to be similar to another applied-for TLD. I'm not sure why an applicant would appeal that

or challenge that, but it could. Or it could want to, I should say. But if you're found not to be similar, certainly other parties in the contention set may want to object based on the confusingly similar objection.

So, again, let me just repeat that, because that even sounded confusing the way I said it. Because there is this objection for confusing similarity, we discussed on the last call that this was not really the situation where the applicant itself would challenge. I don't know why it would want to challenge anyway. It would only be available for other applications in the contention set to file an objection. So, we're basically saying this is not appropriate situation for a challenge.

Everyone understand that? I know as we talk about it, it sounds confusing. But hopefully it makes sense that we're not saying that they have no remedy. The remedy is essentially—or not the remedy. We're not saying that they don't have a way to address the situation. We're just saying that the appropriate way to address the situation is through filing of an objection, as opposed to challenging the results of an evaluation. Anyone? Thoughts? Questions? Totally confused?

Okay. DNS stability ... So, this was an evaluation. If you fail DNS stability, which I don't think anyone actually did in the last round, but the failure to meet those qualifications, or to pass that evaluation ... If you don't pass, you're thrown out of the program, essentially. So, the person that would appeal would be the applicant. And the result of a challenge for that case would be to have the application reinstated. This one, if you fail, it seems

obvious that the applicant should have the ability to challenge, but not anyone else.

Okay. For geographic names, this one we sort of skipped the last time, because the geographic—the Work Track Four—was not finished with their work. So, we sort of glossed over this one. But now that Work Track Four is done, we may have to revise some of these outcomes based on the work that Work Track Five did, but essentially if you are ... The situations that we thought of were if you're designated at a non-capital city name, but using it for a geographic purpose, if you are then required to get consent, then that might be something you may wish to challenge, or an applicant may wish to challenge.

On the other hand, additionally, we thought of potentially a challenge if you're supposed to get consent for a particular geographic name, and you get consent, but whether it's considered to be the relevant government that you're supposed to get consent from or not ... If that decision is made against an applicant, that did seem like something that should be able to be appealed by the applicant. But these were not ones that we initially thought of as challengers being able to file an appeal. Thoughts?

Okay. Technical operations ... Let's say you failed your tech evaluation or ops evaluation. Your application is then thrown out. Who's impacted? The applicant, obviously. Therefore, we would think the applicant's got standing. But we did not, in our last discussion, think that any other applicants would have standing to

complain about someone else passing or not passing a technical evaluation. Ya'll are quiet today. No one wants to talk about anything. Paul, thank you.

PAUL MCGRADY:

Hey, Jeff. A couple things—one, back up to DNS stability, and then back down to technical and operations. On those, everybody's quiet, so I take it that that means nobody thinks a backend provider should have a right to appeal. Obviously, if they've sold their system, and the applicant gets on board with them, and ICANN doesn't think their system's any good, and the applicant gets bounced, that's a bad day for the backend provider, right?

So, if the answer is, "No. Too bad for them," fine. At least I think we should talk about it. And then, we should also talk about whether or not ICANN should allow you to amend your application, if it's based upon the backend provider's failure to be a good back end. Hopefully, we solve 99% of the problem with having a prequalification round. But if there's a newcomer, maybe under likely results of successful appeal or likely results of unsuccessful appeal, there should be a right to try again on that particular element, rather than just being bounced entirely. Thanks.

JEFF NEUMAN:

Yeah. Thanks, Paul. Let's take the two separate, DNS stability and technical operations. DNS Stability is not against the technical operations, or even the backend provider. DNS stability refers to

the string itself. So, there's something about the string itself that you've applied for that is the reason for which you should not move forward.

It's hard to explain what that would be, because nothing failed DNS stability the last time. But I guess, if you had applied for a string that ... It was hard to do, because essentially the Applicant Guidebook said your string had to be less than 64 characters. It couldn't have hyphens in the third and fourth. It had to be compliant with the different types of rules, if it was an IDN. So, it's really against the string itself. In that case, it's not an issue with the backend provider, and not even an issue with the frontend provider. It's an issue with the string itself.

But the technical and operations, you brought up an interesting point, which is that if there's an issue with the technical and operations during a preapproval process—we'll start with that—then, yes, I do think—or it does make sense. I shouldn't say "I think." It does make sense to provide a challenge mechanism for the backend provider who ... As weird as this is going to sound, in that preapproval program, the backend provider is the applicant trying to get approved. It's not the applicant in the sense of applying for a string, but it's applying for approval.

So, I do think a registry backend provider that's applying for a preapproval that fails should have a challenge mechanism if they don't pass. However, I think when it's application time, it's not the backend provider that is trying to be approved. It's the applicant. And so, it would make sense that the applicant could challenge the evaluation results on behalf of the backend provider. That would make sense.

And perhaps the “cure” of that is just that an applicant can say, “Okay, I’m going to ditch my backend provider and choose one that is preapproved.” That might allow the application to go forward. I think that does require some thought—more in terms of the remedy, but less in terms of the outcomes that might warrant challenge.

Let’s see. Donna says, “If there’s a problem during preapproval, would that likely be resolved before it gets to the application process?” Right, Donna. So, I think if we provided a challenge mechanism during the preapproval process for the backend provider, I think that’s right. I think that will be dealt with.

And so, any applicant that wants to use a preapproved provider would certainly know before applications are submitted who preapproved providers are. If the applicant chooses a backend provider, or says it wants to do it itself, and it fails the evaluation, that ... Let me ask. Obviously, the applicant can challenge that, but I don’t know if the challenge ... If a way to address that is to just choose another provider. I think that requires some thought.

Okay. Hopefully all that made sense. Financial evaluations are that if you fail, you’re going to be disqualified from the program. So, an applicant obviously is impacted, and the applicant should have standing to appeal. That doesn’t seem like a difficult case. And Donna and Elise pointed out that in 2012, there was a clarification—not clarification. There was a process to seek answers to clarifying questions that should have straightened this out. So, I think that’s right. ICANN was not too keen on failing any providers.

Paul's asking, "Are we setting aside the question of arbiter of appeal for now?" No. I don't think we're setting it aside. I think for each of these—for the evaluations, each of these, at least from the discussions before, we thought it was going to be a different person from the same evaluation company, or group, or whatever you want to call them. So, Paul, please.

PAUL MCGRADY:

Thanks. Again, I think we ... That doesn't feel right at the initial thinking of it. We're going to have somebody from company X say that a string is unstable and causes DNS problems, and we're going to, what? Go to the cubicle down the hall to his buddy and ask him if he got it right? And the standard's going to be implausibility?

It's one thing to have an appeals mechanism baked up by an organization like WIPO, with intergalactic fame and general adoration, that knows how to do appeals, or the AAA or the international whatever. But who in the world is going to be the appeals mechanism at the financial evaluator? Those kinds of big accounting houses that do this kind of work don't have internal appeals mechanisms. So, I would be really careful before we just say "different individual and the same place."

I'd like to look at ... Once we get worked out who an appeal or challenge, I really think we should put some thought into the arbiter of appeal who hears it for each one of these, not just default to some other standard, because I do think that not all these are the same, and many of these, as I said, do not have a

corresponding appeals mechanism baked in, or even the internal expertise necessary for an appeal mechanism. Thanks.

JEFF NEUMAN:

Thanks, Paul. That all makes sense. I'm just trying to get us back to ... The conversation we had initially, when we were talking about this kind of lightweight appeals process or challenge processes was that we wanted to set up a process that wasn't too costly, resource-intensive. I think we also discussed during those discussions not having to get a complete second different evaluator because of how costly that could be.

And so, it seemed like on those last discussions, when the topic was brought up, should it be another provider or should it even be ICANN listening to this and making decision? What we had come up with, it seemed like, from the group was to keep it with the same provider but a different person there, when you balance the potential costs of getting another evaluator on board to handle these issues.

Now, for some of these evaluations, like the technical ones, ICANN had three different providers because of the amount of work and also making sure that there was consistent results. And so, it initially had two. Then it had a third to make sure that the other two were consistent. So, for technical, it may not be an issue. ICANN may do it that way.

But I think to get two financial evaluators—two different firms in place to do financial evaluations, and two different firms in place to do community priority evaluations, the way those discussions went

was for us to do that would be too resource-intensive and not lightweight enough. And conversely, giving that job to ICANN also didn't seem to make sense to a lot of people. So, I think we just have a balancing here.

Just going back to the comments, Donna said that, "2012, did ICANN have some built-in mechanism for technical evaluations?" Donna, ICANN did have a mechanism in place. I can't speak to the other types of evaluations, but for technical, it had KPMG, I think maybe Deloitte—so, two of the accounting firms, and then Jazz Advisors were the evaluators. So, in theory, if you had an issue with one evaluator, it could go to another evaluator in the program. But I don't think that that was the case for financial, for registry services, community priority evaluation, etc. Anne, please. You have your hand up. Sorry, Anne. I don't know how long it's been up there.

ANNE AIKMAN-SCALESE: Hi. Thanks, Jeff. I would like to agree with Paul in relation to community priority evaluations and appeals on those, and also with respect to evaluation challenges, that those likely require an independent analysis for the challenge. The CPE was ... I guess there was only one firm doing that. Seems unlikely they would overturn their own evaluation.

I think with respect to other types of—with the objections and appeals of objections, those are done by dispute resolution providers who have panelists that are essentially not employees of those dispute resolution providers. They're independent analysts with regular day jobs usually. So, I don't think that the problem

that Paul's raising would necessarily apply there, where there are panelists not employed at the dispute resolution provider, because others can be appointed.

But with respect to CPE and evaluation challenges, I think there is a real issue there—challenge of keeping it lightweight but having it be sufficiently independent. Thanks.

JEFF NEUMAN:

Okay. Thanks, Anne. On that also, as Donna and Steve have been talking back and forth, there was backup for the financial evaluation, as well as the technical one. So, on the community priority evaluation one in particular, there was not the kind of backup, as Anne was saying. There always is that risk.

I guess the balance that needs to be made is how much, in terms of resources, would be needed for ICANN to hire essentially at least two firms to do the CPE process, and that stems from how many CPEs do we think are actually likely. So, ramping up two different providers could be very resource-intensive.

Let's keep talking about that. It's definitely a balancing act. So, the group just needs to think about what the impact on costs and complexity would be if we had two providers for CPE, or whether we would say, "You know what? Getting two providers skilled-up and trained on doing CPE is too expensive. Maybe ICANN itself could be the arbiter of the challenge." That may not be satisfactory to everybody, but in theory, that may be less resource-intensive.

Jamie's saying that there were two proposed in the 2012 round, but only one was engaged in the end. Did not know that, Jamie.

Thanks. I didn't remember that. Kathy's saying, "What part of ICANN?" Any part we want. I don't know. It was just an off-the-cuff potential alternative to having ICANN go out and retain two firms, and get two firms skilled up on doing CPEs. It is an option, especially for that one. It seems a little bit more objective for financial, technical, and operations, to have a second provider. But getting someone else skilled up for CPE, even registry services, seems like ... It's a topic we need to absolutely discuss.

Anne's saying, "ICANN being the arbiter puts ICANN much closer to content regulation." Sure. But again, if the criteria is clearly erroneous, it's a harder standard, and I don't know. So, let's flag that as a potential issue, and maybe flag for the other types of evaluations, where we think it would be likely to have multiple providers. We could say, in the case of multiple providers, it the appeal should be heard by a different provider than the original evaluator.

Applicant support ... This is another interesting one, because it's such a unique program. So, for applicant support, if an applicant is denied support, it's obviously going to be negatively impacted by that. It would likely want to appeal that. And then, this is another situation we have to think about, where there's probably not going to be a backup to the application support evaluation panel. And so, the question then is, is that something that someone at ICANN should be backup, or whether we're okay with someone else at the existing provider?

Although RSP preapproval is in there, I kind of think that that so closely resembles technical and operations that perhaps we just mirror whatever the ... We mirror the two to each other, so

whatever we allow for technical and operations should probably be allowed for an RSP preapproval.

Anne is saying that she supports evaluation challenges being considered by alternate qualified provider. Yeah, Anne. I think that's sort of where I hear you all leaning towards. I guess my question for everyone to think about is balancing that with the notion of having to skill someone else up on all of these types of niche evaluations. They're so unique.

So, I know we have to stop here, because we are running out of time, or are out of time pretty much. But I think we've made a lot of progress. Please do ... I know there hasn't been that much discussion today—a lot of people quiet, and that's fine. But if you have something to contribute, please do it on the mailing list or in the documents themselves. You can always put comments in that will show up as redlines. We will update this chart after the call, or as soon as we can after the call, so that we can reflect the discussions.

Also, remember the original principles and goals when you're making the comments of keeping this a lightweight process—one that's not to replace the accountability mechanisms—one that does not get abused, so that it overly delays the progress of the program, or even of that string, especially where there's contention sets. And we'll start off on Monday with the discussion of the second part of this chart—the objections tab. It's the same chart. As Paul says, "lightweight but not weightless." Right. So, we'll start off on the second part of this tab, the objections tab, where we are going to have equally difficult conversations on this topic.

Next call is Tuesday, December 5th at 03:00 for 90 minutes. This is a change. You will see this in calendar invites that will go out very shortly. This is because there is a conflict at the originally-scheduled time. So, thank you very much. Please do make some comments, and I'll talk to everyone on Monday.

UNIDENTIFIED FEMALE: Thanks, everybody. Bye for now.

[END OF TRANSCRIPTION]