
ICANN Transcription

GNSO New gTLD Subsequent Procedures PDP Working Group

Monday, 17 August 2020 at 15:00 UTC

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TERRI AGNEW:

Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures Working Group call taking place on Monday, the 17th of August, 2020, at 15:00 UTC.

In the interest of time, there'll be no roll call. Attendance will be taken by the Zoom room. If you're only on the audio, could you please identify yourselves now?

Hearing no one, I would like to remind all to please state your name before speaking for transcription and recording purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. As a reminder, those who take part in ICANN multi-stakeholder process are to comply with the expected standards of behavior.

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With this, I'll turn it back over to our Co-Chair, Jeff Neuman. Please begin.

JEFF NEUMAN:

Thank you very much, Terri. Welcome, everyone. Hopefully, we can get a lot done today. Perhaps, if we get everything done, this could be our last meeting for the month. So excited about that. Hopefully, everybody else is as well.

Before we start, let me just see if there are any updates to any statements of interest.

Okay. I am not seeing any hands raised. Not seeing anything in the chat. So I think we're good to go.

What we have left to do today is to finish up the can't-live-with comments on the mechanisms of last resort and private resolution, auction—all that stuff—and then go over a couple of the highlighted questions on the change analysis document that we went through or at least discussed the notion of going through today on today's call. Once we get through with that, then we can show you a copy of the survey tool because now everything, at least with all of the stuff that's been finalized to date—all the questions—have been put into the survey tool. So we have a draft PDF that we can then and will provide after this call with any changes.

Any questions? Oh, I should put as Any Other Business just a list of the topics that we will have talked about addressing during the public comment period. So let's put that as an Any Other Business.

Yes, Paul, we'll put those links as we start into the chat. In fact, why don't we put that link in the chat at this point for the mechanisms of last resort private resolution?

Great. Emily has put that into then chat. Then I believe ... Not sure who's got control of the screen. Actually, if we go to—no. So is it Julie or Emily that's got—or is Steve, actually? It could be either. Who's got control of the screen?

Emily. Okay, thanks. So where we left on this is, I think—yes. This is exactly where we left off. We started talking about the notion of the bona fide good-faith intention to operate the gTLD, and we were just about to start to get into ... Actually, before we get in, the last bullet of that recommendation (Rationale 2), which is, "Such portions" ... There's a note in there that says, "Such portions will not be shared or communicated by the evaluator." There was a note on this one. I think we started talking about this. These confidential portions do need to be shared to ICANN, at least those that have a need to know, just simply because, as Jim puts it, these evaluators are temporary and there are other people that need to check over the work of the evaluators. I know there's been some e-mails about confidentiality and the lack of protection, so I want to give a quick opportunity for those that want to explain why we shouldn't put ICANN in here. So it should say, "and such portions will not be shared or communicated by the evaluator and/or ICANN as appropriate," or something like that.

Paul, go ahead.

PAUL MCGRADY:

Thanks. There's just no confidentiality provision in this, and we say, "by ICANN." There's no governance over that. I like ICANN as much as the next guy, but ICANN has a history of not being able to keep secrets. So I had suggested at some point—I believe for this section or another section—the idea that those will only be shared with those within ICANN with a need to know. There was pushback on that. I have no idea why there's pushback on that. I don't know why confidential information needs to be shared with those in ICANN with no need to know. Or we could do what we really should be doing: adding in a confidentiality provision in the terms of service or terms and conditions and making it clear that that portion is enforceable in the courts. I'm happy either way. We either need to control the scope of sharing or we need to build in some protections. Thanks.

JEFF NEUMAN:

Thanks, Paul. If I remember correctly, I think the pushback was ... I can't remember if it was pushback on the confidential portions, but I think there were other things that I know that Jim had filed a comment on to basically say that those—it might have been Justine as well—that do reviews should have access to certain information, but I don't think that applied to the confidential portions. I think that might have applied to ... Well, I'm not exactly sure. "Just applied to the confidential." Let me ask the questions. Is there anyone on the call that wants to respond to that?

I see Elaine is asking about the confidential. I'm just doing a quick search of the ... So what the terms and conditions state—I'm looking at now; this is from the last guidebook, and it's Provision 7—is that, "Applicant authorizes ICANN to publish on ICANN's

website and to disclose or publicize in any other manner any other materials submitted to, obtained, or generated by ICANN and the ICANN-affiliated parties in connection with the application.” Then it goes on to just describe that stuff. However, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential. Then it goes on to say, “Except for information afforded confidential treatment, applicant understands that” ... And it’s all just that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential. So that’s the mention of confidentiality. It’s not, as I’m sure Paul will state or would state, the strongest of confidentiality provisions, but it does say that it will not disclose the—or it implies—the confidential portions.

Jim, go ahead.

JIM PRENDERGAST:

Thanks, Jeff. Actually, I was surprised that there hadn’t already been confidentiality requirements built into the current terms and conditions. I would think that, if those need to be strengthened, that’s the solution. Otherwise, you still have a problem with the actual requirement and the terms and conditions going forward, regardless of what we have in this section here.

JEFF NEUMAN:

That may be a comment for during the public comment period: that we might need to strengthen that a little bit.

Paul says, "Then let's limit evaluator disclosure to ICANN to only those that have a need to know," which is generally what's in confidentiality non-disclosure agreements anyway.

Would anyone object if we state, "Applicants may mark portions of any such responses as confidential if the response includes proprietary business information, and such portions will not be shared or communicated by the evaluator except to those at ICANN who have a need to know"?

Alan, go ahead.

ALAN GREENBERG: Thank you. I think you just said, "except for those at ICANN who have a need to know." Is that what you said? It was a little bit fuzzy.

JEFF NEUMAN: Yes.

ALAN GREENBERG: Okay. Yeah, I think that would probably be fine. I haven't thought about it too carefully. Ultimately, since we have an appeal process, you can't have an evaluator have information which they keep confidential and don't tell anyone and don't put into the record, because otherwise you can't properly do an appeal on the evaluator's process. So ultimately it has to be stored somewhere that's accessible to ICANN and its successive evaluator for an appeal. I just don't see any way around that. Thank you.

JEFF NEUMAN:

Thanks, Alan. I think this works.

I see Jim also says he's okay with it. Paul is the one that suggested it, so I would assume he's okay with it. Then there's, "I like it but I wonder if this—" sorry, this is from Rubens—"should be a general terms and condition [instead of] specific to private settlement outcomes." I think that's right. I think it's probably best so that we don't have to keep restating it to put a note in the terms and conditions section to that effect.

Paul, would that be okay so we don't have to do it universally; if we add something, like a quick note, in the terms and conditions?

Yeah, Paul says, "That's better." Okay. So we will do that.

Sorry. Let me go back to some other things. Jamie is still a little bit worried about that, but there's contractual breach remedies, I think, as [Paul] posted.

Anne would like to add, "to anyone other than the applicant and any appeal evaluators after shared or communicated."

If we just add into the terms and conditions that confidentiality provisions that apply to ICANN should apply to only those that have a need to know, including any third-party contractors providing dispute or appeals services, or something like that, I think we can fix it in there. The point is that those who need it to perform their responsibilities under this program will have access to that information. If we do that, we could say in this bullet point, "Applicants may mark portions of any such response as confidential if the responses include proprietary business information." We can actually send the sentence there because

we're now putting in the terms and conditions section what it means when something is marked confidential. Then we don't have to wordsmith here.

Anne, would that work, instead of putting in all the parties that potentially could need it?

Alan, go ahead.

ALAN GREENEBRG:

Thank you. If this confidential information, for instance, is from an evaluator, it's either got to me done through ICANN or through an escrow agent or something like that. But you can't presume the evaluator is going to be available a year-and-a-half later when the appeal is done, so it's got to be stored somewhere that's accessible, whether it's physically in ICANN or through some third-party contract. It's got to be done. Thank you.

JEFF NEUMAN:

Thanks, Alan. I would label that as something or someone that needs to know [... is] to put in archive purposes. I think we're getting a little too deep into this. I think we solved it, but people are bringing up a lot of new issues that I'm not really sure are that important at this point. I think confidential portions of applications and responses have the confidential treatment under the terms of conditions. We just need to beef that up a little bit to "to those that have a need to know." I think that solves all of these issues, even the ones that Anne has up there.

But, Anne, if you want to get in the queue.

ALAN GREENBERG: Jeff, just a clarification. We may need an implementation note to make sure it's not lost. That's all. Thank you.

JEFF NEUMAN: Okay. Thanks, Alan. I think that makes sense. Let me go to the next issue, which is the non-exhaustive list. There's an e-mail from Mar[c] as well as his comment here. I think we settled it on e-mail, so I think Mar[c] would want to add the word "potential non-exhaustive lists of factors" because I think what we want to do is really put this out for comment to see if these are some of the right ones, whether there's others, etc. So I think Mar[c] has made his comment pretty clear that he doesn't think any of these are factors and that it's going to cause some more confusion, but I think he's okay, at least according to that last e-mail, to at least putt this out for comment to see how others feel.

Just on that note, I see Anne and Paul, so let's go to Anne and Paul and then we'll go on to the second and third bullets here. Anne, are you still in the queue?

ANNE AIKMAN-SCALESE: Yeah. I was just trying to make sure I didn't forget to put my hand down. You asked me about comment on the previous issue. An applicant designating a matter as confidential ... If I were the applicant, I'd pretty much designate everything as confidential under those circumstances. I had sent an e-mail just very shortly before this meeting talking about general ways to disclose the new ownership construct and statements about form or type of

compensation paid to those who surrender their application when a new business organization is formed that it strikes me should not necessarily be confidential or designated as confidential if you're going to be able to establish reviews, as Justine had indicated. So, in that e-mail, I suggested there were statements that should be disclosed and should not be designated confidential, rather than just saying, "Applicant can designate anything they want to designate as confidential."

JEFF NEUMAN:

Hopefully, everyone remembers that the guidebook declares what sections can and can't be confidential. So, if someone is asking for confidential treatment of something that is not eligible to be confidential, they will be aware of that in the terms and conditions and in the form itself.

So I guess at this point I think we're a little bit too far in the weeds. I think we're okay because I think, if an applicant marks something as confidential that should not be, then ICANN would go back to the applicant and say, "Look, this is one of those not-confidential portions of the application. Either you need to resubmit with the confidentiality removed or figure out some way to enable us to do this. If we can't, then we can't consider the information." So what I'm saying is—

ANNE AIKMAN-SCALESE: Are we saying then, Jeff, as a follow-up, that, for example, even the type of compensation that may have been paid to those willing to withdraw their application is easily designated as confidential

because it's not covered in the Applicant Guidebook? In other words, "I'll give you three seats on the Board of Directors if you withdraw your application"? That would, I think, by most applicants ... They could say, "This compensation is confidential, and I want the public to know that." If I say, "Three years from now, I can buy you out," that's confidential. I don't want ICANN or the public or anybody else to know that. "We're going to pay you some cash or whatever to buy you out. That's confidential information." Is that our intent?

JEFF NEUMAN:

The intent here is to not make anything non-confidential that would otherwise be confidential in the application. So, yes. The amount of compensation is something that would be confidential. It can be marked confidential, but if they change the Board of Director seats now, they would have to disclose that because that is a portion of the application that is otherwise not confidential. So I think it just follows the general rules of what in the application is confidential and what's not.

Paul, do you want to add anything?

PAUL MCGRADY:

Yes, on Anne's point, but then I have the point for which I raised my hand, if that's okay.

JEFF NEUMAN:

Yeah.

PAUL MCGRADY:

On Anne's point, it may be marked confidential but the evaluators still see it, and the ICANN-need-to-know crowd still see it. So there's nothing prohibiting them from knowing it and then making evaluation about whether or not what we went down is in the four corners of the bona fide intention requirement. So I think we solved it.

Then, if I can move on to my comment, Jeff, I think that there's two things here. One, I want to make a final run at trying to get rid of non-good-faith intent. I don't know what that means. I still think we should say that ICANN may consider [determining] whether or not the applicant had the bona fide intention to operate a registry because that's what we're asking about. We're not asking about good-faith intent or non-good-faith intent. We're talking about bona fide intention to operate the registry. So I think we should just make that language uniform because maybe other people know what non-good-faith intent means but I have no idea what that means. So I've asked a couple of times and I guess I would like to ask again.

Lastly, because we could eat an entire hour-and-a-half or ten days going through these factors, I wonder whether or not we just make the Factors in Implementation Guidance section and say, "Here are some of the things the working group came up with, but the IRT needs to finalize this," because there's a lot of ideas in here from Christa, from Phil, and others maybe that I can't see right now that may be great ideas, may be not great ideas. We could spend an hour-and-a-half probably on each and every one of

these, but instead maybe we just say to the IRT, “Here’s some things to think about,” and then we move on. Thanks.

JEFF NEUMAN:

Yeah, I think we should put some of these factors out for public comment, though, just to show what people have come up with. Perhaps we can structure it that way. What we could say is, “These are a potential list of factors that members of the working group discussed.” We can put them all in then without discriminating against any of them and just see what comes back in public comment. We may then choose to make some as a matter of policy. We can decide then—that’s what I’m trying to say—what we do with it. Maybe the outcome is to punt it to an IRT, or maybe it’s to include—who knows? Maybe we get some great ideas from the public.

PAUL MCGRADY:

Jeff, but my primary comment really has to do with banishing non-good-faith, and I put proposed language in the chat. Thanks.

JEFF NEUMAN:

Thanks. Yes, we do need to make that consistent. I think we did discuss, and I think everyone was fine, though let me ask one last time if we have it worded the same way, which is the potential non-exhaustive list of factors-- sorry, can you scroll up a little bit? Yes—that ICANN may consider to determine whether an application was submitted with a bona fide intention to operate. So we just want to word it the same way as the beginning of Rationale 2. So I think that’s right.

I like the way that Paul had phrased it because there's so many alternatives here and there was no magic in coming up with the factors. It was just suggested and wasn't as if we really did a deep dive in these factors. Perhaps we could word this as something where the working group discussed the following potential non-exhaustive list of factors and then work all of these in there, whether it was suggested by me or Christa or Phil.

Sorry, Emily. Did you get that? So what we could say is, instead of starting with the potential non-exhaustive list, the working group discussed the following potential and then end the sentence with the—yeah, exactly. Thanks, Emily. You're reading my mind. We would delete that. We can put all of these in there without evaluating any of them right now.

Is everyone okay with that? That would mean we don't have to really discuss these individual components. We're just putting them out for comment.

All right. I'm not seeing an objection to that, so that's good.

If we can scroll down ... sorry. It's a silence because Emily is just putting in some notes here. With Elaine's comment, I think we could put both 4 or 5 in brackets and then, since it's all going out for comment, we're not saying any of these are endorsed. I think that addresses Elaine's comment.

Donna says, "What about Christa's proposal?"

We're going to list that. We're going to put that in there. I don't think we need to discuss it at this point because these are all just going to be factors that we discussed, even though we're not

discussing it, that have been mentioned. So we're going to put all of these in there. Then the public comment.

Donna, go ahead.

DONNA AUSTIN: It's okay, Jeff. Don't worry about it.

JEFF NEUMAN: Okay. Let's scroll down past all of these factors. This bullet point is, "[If] an applicant's string is not delegated to the root within two years —bracketed—of the effective date of the registry agreement." I think that is right. I think that does need to be put in there. I think we discussed that a couple sessions ago.

The next bullet is, "If an applicant is awarded a top-level domain and sells." Here we have Justine's comment. Justine suggested changing "sells" to "attempts to sell" and also stated, "Please include a request input on penalties for identified occurrence of no bona-fide intent." Then she's got her rationale in there.

Let's do the first part. Well, I think "sells/assigned" is probably appropriate. So "sells" or "assigns." The "attempts to sell" is a little bit more difficult to show.

Any thoughts on that? On Justine's comment?

What we'll do, I think, is figure out a way to put all of these in there so we can get public comment on it. So we'll take that offline. Again, none of these—we'll make it clear—are endorsed by the working group.

Then Elaine has that one, which, like the others, we'll, again, put in the list factors that were discussed.

Then we get into an issue that Donna had raised on e-mail. People commented on that one. Donna, you're on the call. Why don't you go through the issue? And then we can discuss that issue?

I think Justine's hand is up. Justine, is this on something before we get to Donna's comment?

JUSTINE CHEW: Yes, it is.

JEFF NEUMAN: Okay. Go ahead.

JUSTINE CHEW: Well, I think you didn't address the second part of my comment, which I also posted in the chat about asking for public [comment]. Since all these potential factors are going out for public comment, don't we think it's also appropriate to also ask for public comment on what the consequences might be if the evaluators or ICANN identify or determine that a lack of bona fide intent existed? Otherwise, what are we doing with these factors? Thanks.

JEFF NEUMAN: Justine, thanks. Give me one sec.

Can we scroll down a little bit, Emily? Is this the last part—this rationale—or was there a part in there that talks about the ... Keep scrolling down. Sorry, Emily. Past the transparency. Sorry, keep going. Okay, we don't have it in there. All right, yes. So we do need to ask a question on the ramifications of this finding. So we will add that to the change differential document and put that into the form.

JUSTINE CHEW: Thanks for that Jeff, because we had a note in the deliberations section or whatever we call it—the rationale—that mentions a discussion within the working group on that but not agreement as to what should happen. So I just think that we shouldn't leave it hanging like that. Thanks.

JEFF NEUMAN: Yeah, agreed. Donna, do you want to go and mention your issue with this next recommendation?

DONNA AUSTIN: Yeah. Thanks, Jeff. Can you hear me okay?

JEFF NEUMAN: Yeah. Can hear you well. Thanks.

DONNA AUSTIN: Thanks. My concern here ... I did see your comment on e-mail, Jeff, and it seems that my comment was misinterpreted. What I'm

concerned about here ... Emily, can you just scroll down a bit so I can see what's above it? Yeah. Thanks. I appreciate that this section is about ICANN's auction of last resort, but what I'm concerned about here is we say that any applicants that wish to compete for their applied-for string in an ICANN auction of last resort must submit a sealed bid for each relevant application, and it seems, based on the sentence beforehand, that that will be done, and the time to do that is at the end of the string evaluation period. My concern is—I guess this goes back to some time ago; perhaps I've misunderstood—I think, because, with an ICANN auction of last resort, it may not be the way that some applicants want to resolve a contention set. But if one of those applicants in the contention set does want to use the ICANN auction of last resort, then that puts everybody in that bucket. That's the path they have to take. But my concern is, at what point do those others that are in the contention set become aware that the contention set will be resolved by an ICANN auction of last resort? And at what point in the process do they actually submit their sealed bid? Because my understanding was—this goes back to a conversation we had a long time ago—that we weren't going to do the sealed bid at the time the application was submitted, but we would do the sealed bid once all applicants knew whether they were in a contention set or not, and there will be some information about that contention set, which is basically just how many others are in that same contention set. So it's really a process question. Is there anyone where else in this section where we spell out the points in the process where a sealed bid has to be provided? Because, if you don't intend to go through the ICANN auction of last resort, then your assumption is you don't have to submit a

sealed bid at this point in time. But I would think, to be fair across the board, anybody in a contention set is going to have to submit a sealed bid at this point in time. It may never be used if their contention set is resolved without going through the ICANN auction of last resort. But, if it does end up there, then the sealed bid has to be submitted here. So that was my confusion.

JEFF NEUMAN:

I think there's a word missing here that may clear things up. At the beginning of the bullet, it should say, "at the end of the string similarity evaluation. Applicants are informed of the number of applications in their contention set, but no other information regarding the other applications will be shared." This is the point at which they have to submit their sealed bid. All of them. So it's not at the end of the full evaluation. It's just at the end of the string similarity evaluation because that's where contention sets are determined. Does that help?

DONNA AUSTIN:

No, Jeff, because it goes on here to say, "Any applicants that wish to compete for their applied-for string in an ICANN auction of last resort must submit a sealed bid for each relevant application," but it's every applicant that has to submit a sealed bid at this point in the process.

JEFF NEUMAN:

Well, no one has to participate in the ICANN auction—

DONNA AUSTIN: I know, but—

JEFF NEUMAN: So if they don't want to submit a bid ... But we can[t]—

JEFF NEUMAN: No, but Jeff, they won't know whether they're going to end up in an ICANN auction of last resort at this point. So nobody knows at this point how the contention set is going to be resolved.

JEFF NEUMAN: Well, they have to assume it's going to be resolved within ICANN auction.

DONNA AUSTIN: But why can't we be explicit here? Because otherwise you're going to have people saying, "Well, we didn't know." Why can't we just be explicit about the process that's going to be followed? It's not fair to make assumptions through this process because it's going to be a pretty substantive Applicant Guidebook. So can we please be explicit about what the process and the expectations for each applicant is going to be and don't leave anything to assumption? We should be explicit, particularly on something like this.

JEFF NEUMAN: Yeah, I think that's fine. So I think what we say is—

CHERYL LANGDON-ORR: Let's see what Susan wants to say, Jeff. Susan thinks she's got a word for it.

SUSAN PAYNE: Yeah. I was just going to say I think the problem is—I'm pretty sure this is what Donna is saying—it's not all applications in the contention set who want to participate in an ICANN auction because some of them maybe don't want to participate. So what it actually is is: any applicant in the contention set who wishes to contest the contention has to submit a sealed bid, which will be held on file in case required for an ICANN auction of last resort. Obviously, if the parties all then get together and decide to do a private resolution, then those bids go in the bin. But they've got to do it at that point because, whether they want to do an ICANN auction or not, they only have one opportunity. I think that's the problem Donna is trying to highlight: implying that you only do it if you're interested in an ICANN auction has the prospect of some parties missing out.

JEFF NEUMAN: Correct. So what I was going to suggest, which is in line with that, was we have all applicants—I think you said[, Susan, which I like, they "contest" for it, right?—] must submit sealed bid for each relevant application to participate in the ICANN auction, blah, blah, blah, or whatever [it is] there. Then the next sentence, I think, should be explicit, which says, "Any applicant that does not submit

a sealed bid at this point in time will be deemed to have submitted a bid of zero,” or something like that.

CHERYL LANGDON-ORR: [inaudible], Jeff.

JEFF NEUMAN: Yeah. Alan, go ahead.

ALAN GREENBERG: Thank you. I think that addresses the issue. What I was going to say was, if we’re silent, then there’s two implications. Either everyone has to submit a bid and we have an infinite amount of time—because I don’t know how you compel someone to do it within a certain amount of time, and there’s clearly got to be a time limit so this proceeds—or, by not submitting a bid, they are saying, “If it goes to an ICANN auction, I’m not participating. I’m giving up the application, and I’m not participating.” Your solution of deemed to have submitted a bid of zero is equivalent to that, so I’m fine with it. But I agree with Donna that you do need to be explicit on what happens if you don’t submit a bid within the specified amount of time, and I presume there will be a specified time limit. Thank you.

JEFF NEUMAN: Yes. Thanks, Alan, and Susan, and Donna. Donna, would that address the issue then? The way it is now? Something like that?

DONNA AUSTIN:

I think it's okay. I think it could be worded better, but so long as the intent is there.

Something else, Jeff, in that e-mail thread that you brought up is that, at this point in time, an applicant can withdraw from the contention set. I think there was something else that you mentioned. I really think that we need to make those parts of the process explicit, too. So, at this point, an applicant can withdraw their application if they don't want to move forward in the process, understanding that they're now in a contention set. I think it's important that we bring those things out and be sure that it's clear to the applicant what happens next.

Yeah, exactly, Christa.

JEFF NEUMAN:

Thanks. Again, I agree with all of that. I agree it all has to be explicit. But remember we're not writing the Applicant Guidebook here. So I think this sentence is fine. I think the team that writes the Applicant Guidebook—the implementation team—should fill in all of these details. I don't disagree with any of this. But the question is, do we really have to ... This is not the guidebook.

Justine, no, a bid of zero does not equate to a withdrawal because you can remain it and you get evaluated. You can be a community application, right? You can go and, if you win community, then you would never had to submit a bid in the first place. So, if you submitted a bid of zero or didn't submit a bid, you're still fine. You're still fine to go through the rest of the process. The point

was you can elect not to participate in the ICANN auction of last resort if you don't want to.

So we've got all this stuff from the chat. It's all captured. I want to go to Phil's text because I think Phil's is the opposite of what we were discussing.

ALAN GREENBERG: Jeff, it's Alan. I had my hand up on the previous item.

JEFF NEUMAN: Okay. Sorry. I thought it was old. Go ahead.

ALAN GREENBERG: No, not old. Paul made a comment saying, "If you withdraw your sealed bid"—so your comment on, "If you don't submit a sealed bid or if you withdraw it, then it's deemed to be zero." Just add that extra phrase.

JEFF NEUMAN: No, I think, if you withdraw it, there's no bid at all. Right? I think withdrawing it is a specific thing—

ALAN GREENBERG: You're not withdrawing the application. Withdraw the sealed bid.

JEFF NEUMAN: Okay. I think this is too detailed here.

ALAN GREENBERG: Okay.

JEFF NEUMAN: But, yeah, I understand what you're saying.

ALAN GREENBERG: If bids can be withdrawn, then we need to cover the case in a simple three words or whatever covers it there. Thank you.

JEFF NEUMAN: Okay, thanks.

Phil is asking in the chat about the opposite situation, but, Phil, any applicant can decide to refuse to resolve in private resolution. That is correct. That's what we've always discussed: if one applicant doesn't want to do private resolution, then everyone goes to ICANN auction. That is exactly what we're saying.

Jamie, go ahead.

JAMIE BAXTER: Thanks, Jeff. You raised the issue about community applicants not putting a bid in. Obviously, the assumption there is that they would win CPE and avoid any sort of auction or contention resolution that involved discussion with the other applicants. But it also, when you said that, dawned on that, if you're a standard applicant and you do not put a bid in, it seems clear that you're only intent is

to go through a private resolution. That seems contrary to the statement that you truly want to operate the registry because, if you truly want to operate it, wouldn't you go to any length, including an ICANN auction of last resort, to resolve it? So would that not be a big signal that you're truly just in it to make some money, potentially in a private auction? I don't know. Maybe I'm overthinking that, but it just seems a little bit odd that all applicants—potentially not communities, because obviously that's a completely different path—would be required to submit some sort of a bid because, in the case of a contention, it potentially has to be resolved through an ICANN auction of last resort. Thanks.

JEFF NEUMAN:

Yeah, it could be one of the factors, and it could be part of a comment. But it could also mean, "Look, I want to run it. I know I'm not going to be able to bid anything more than this application fee. If I can resolve it by negotiating or being part of the group that runs it, I'd be happy with that. There's a ton of things that it could mean. We can add it as one of the potential factors, but I don't want to make assumptions that someone who doesn't want to participate in an ICANN auction automatically is only interested in a private auction.

Paul and Alan.

PAUL MCGRADY:

Thanks. What we're running into is one of the—I don't want to revisit it because I think it is what is—problems with the sealed-bid approach: it really ties the hand of dot-brand applicants

because you have to put in to a sealed bid what you think the value of your brand is, and you can't go up in the event the other party thinks your brand is worth a whole lot more than you think it's worth. So I don't see dot-brand applicants putting in sealed bids at all [and] participating in this. I think the sealed-bid approach is going to result in ... When a dot-brand applicant is in a contention set, maybe they'll use the rights mechanisms. We didn't really improve it, so maybe they won't. It's just going to be a whole lot of people suing everyone else because of the sealed-bid process. There's no way in the world that a mega-brand is going to put a finite dollar amount on the value of its brand. If it can't do an ascending auction, it's simply not going to do that. It's just going to be Litigation Central. So that's the reason why somebody would have a bona fide intention to operate a registry but not do a sealed-bid approach: it doesn't really fit dot-brands at all. Thanks.

JEFF NEUMAN:

Thanks, Paul. Alan, go ahead. One last comment on this and then I'd like to get to the next one. Go ahead.

ALAN GREENBERG:

Thank you. Jeff, you pretty well covered what I was going to say: I don't think you can presume that, because you're not willing to participate in an auction, you have no intention of running the registry. But, if you have limited resources? There's a whole host of other reasons that you just may not want to go into that game, but that doesn't mean you're not serious. Thank you.

JEFF NEUMAN:

Thanks, Alan.

Let's go on then to ... We have Phil's statement in there. This would be a drastic change. So it's not really a can't-live-with item, Phil. It's certainly something you can file a comment on, but this is not something that ... This is so radically different than what we have discussed.

The next one is a question from Christa: "How are the needs of applicant-support applicants being considered?"

It's a pretty broad question here. This part is just talking about the normal application. I don't think applicant-support applicants have ... Well, the deposit is not due—because we talked about that—until the actual auction. So I don't think that's an issue. I think it's a good question in terms of communication plan, but I don't think any of this changes, except the question of ... So I guess the question here is that ... I'm just trying to see how it would fit in because there's a couple things that are highlighted here.

Can we go to the next highlighted portion? Just so we can be more specific. Okay. This is from Jim: "Proposed eliminating the opportunity for new bids, enforcing parties to rely on previously submitted bids."

I think, Jim, that we spent a bunch of time discussing this. I think this is a good thing to file a comment on because I think this is the same as the last version we discussed. I think we've had those discussions in. So, yeah, please, Jim, put a comment in on this one.

Let me just go to the next one: partial resolution. This is from Christa. "Suggested adding a reference, an LOI, which can be provided to ICANN as evidence." Sorry, let me go back to the comment. "In the event of a partial resolution of a contention set through the formation of a business combination of a joint venture and a corresponding withdrawal of one or more applications, the remaining application and existing members of the contention set will be allowed but are not required to submit a new last-resort bid. So Christa says: adding a reference to an LOI.

So I guess we don't really see here that there's an agreement that's required. Christa, do you want to explain a little bit? Because I think this sentence isn't specific to say that there's an agreement or an intention. I guess we could say, "In the event of a partial resolution of a contention set through the formation of a business combination ..." Or "the intention to form a business combination." Maybe that addresses it?

CHRISTA TAYLOR: Jeff, can you hear me?

JEFF NEUMAN: Yes. Go ahead.

CHRISTA TAYLOR: I think, in some of the text, there was some kind of reference to an agreement, in which case it was putting the horse before the cart. So I'm not sure if maybe it's been referenced to the wrong section now, but my intent was: if there was going to be some kind of, I

guess, delay or—sorry, it's been a week—something along those lines to be able to provide ICANN with some kind of letter of intent that they are going to be moving forward. I'll try to find exactly the section I was looking at before, so give me one minute. I'll come back in the chat.

JEFF NEUMAN: Okay. Thanks, Christa. I think it may have been when we had the transparency section, where we used to say you have to disclose the agreement. But we changed that now to that certain terms or certain things need to be disclosed. So I don't think we reference an agreement anymore. So that may be just from a past version. If you can look forward, we'll look—

CHRISTA TAYLOR: I'll check. Give me two minutes. Sorry. Thanks.

JEFF NEUMAN: That's okay.

This next one is Justine. "Make some of the edits in bold.

The only question I have about this one is because ... Actually, I don't even have any questions on this one. I think that's right. I think [she's] just clarifying another situation in which a contention set could be shrunk. So I think these changes don't change anything substantive. They're all just for clarity. Is that correct, Justine?

Yes. Okay, good.

I think here we just need to be consistent in how we refer to this, so I think we adopt this comment and we just make it consistent.

Okay. Let's go to these. I think these are clarifications. Well, this first bullet says, "Once payment is received, I think it's fine to add within the specified time period." I think that's just a clarification. I think the next bullet point makes sense as well.

On the transparency section, we had some, I think, just ... So what it says now is that ... Here's where it has agreement. "In the case of a private auction or an ICANN auction of last resort, all parties [and] interests [to] any agreements"—I would count an LOI as a form of agreement—"relating to participation of the applicant in a private auction or ICANN auction of last resort must be disclosed to ICANN within 72 hours."

Someone has now suggested five business days. That was Christa. Christa says, "72 hours does not provide the applicant with sufficient time to meet all of the settlement terms and conditions, legal agreements funding, and ICANN must in turn publish it within ..." So it was just changed to have both be in terms of business days.

The problem with using a term like "business days" is that it's different around the world. The business days in L.A. are different than the business days in China, for example. So I'm much more comfortable using something like calendar days or hours. But either way, this is just being put out for comment. I don't think there was a huge amount thought given to 72 hours or five business days.

Does anyone object to putting five business days or three business days in there?

Cheryl says hours was always her preference. I think the issue here is if it falls on a weekend or non-business day.

CHERYL LANGDON-ORR: Well, some communities have their weekend on Friday, not Saturday-Sunday. So [inaudible] is always safest if you're actually being globally.

JEFF NEUMAN: Okay. The point is to get sufficient time. All right. So I don't know how many hours—five days—would be [inaudible].

All right. I don't want to get stuck on this, so, Christa, let's keep 72 hours in here for now. Then I think you just file it as a public comment, and then we can reconsider when comments come in. Is that okay?

Okay. Then there's a suggestion to use ... The reason, Justine, we have a standard TLD application is that I believe that's the term that's used in the guidebook. But it's different. So that's your point. Okay. So I think your point is well-taken.

Because "standard TLD application" is a term in the guidebook, I think Justine is trying to distinguish this from being that standard TLD application. So I think her change makes sense here.

Look, guys, there's a lot of discussion on the days and hours. Keep it the way we have it for now. We'll get public comments on

that, I'm sure. Then we can nail down what we want after we get comments back.

And I think "applicable law" is fine. That's generally what's said anyway.

This corresponds, I think, to the actual term that's used, so I think it's good to use "contention sets." I think that's the specific term that's used in the guidebook, so I think that makes sense.

If anyone disagrees, just weigh in. I think this has to correspond to the section[s] that we're discussing, so I think ... There's a request here to put in the word "Some in the working group believe." Is it "some believes" or "some believe"? "Some believe." Yeah. I think it's fine to put "some" at this point. It's just, again, this is the draft final. So, once we determine what consensus is, these will change anyway.

"Finally, some in the working group remain concerned that the practice of leveraging financial gains in one private auction to resolve other contention sets has not been addressed adequately. A proposal that would have required sealed bids for private auctions submitted at the same time"... Okay. Jim has asked for this to be put back. I think we can put this sentence in because it is what those have discussed, but perhaps we then just say, "Those"... So, instead of saying as a definitive fact, we would say, "Those that proposed requiring sealed bid." So we just make it clear that it was from these members that remained concerned.

So, Paul, I see this here being okay because this is summarizing the discussion that took place and discussing those in the working

group that remained concerned. So I don't think that's a pre-public-comment public comment. If it were in the recommendation, I would say you're absolutely right—this is—but it's in a deliberation section here.

I think. Then the next one is, "The working group believes that the second-price field bid auctions are preferable to the ascending bid auctions used in the 2012 round—here we're going to put in the proper term, which is the ICANN auctions of last resort—because what we have there was "Second-price auctions reduce the risk of bidding wars," and Jim, or—sorry, Donna ... Is this Donna or Jim? Sorry, can we go back to this? Okay, it's Donna. Donna has added, "This method eliminates collusion and bid-rigging. It is the preferred method used by governments to allocate critical resources. Bidders are forced to value then TLD in absolute terms."

Paul, I see your hand. Let's just do this one real quick. This explains your rationale, but I'm not—

DONNA AUSTIN: Jeff, this is Elaine. This is not me.

JEFF NEUMAN: Oh. Sorry about that.

DONNA AUSTIN: I'm pretty sure it's not me.

JEFF NEUMAN: Okay. Sorry about it. I'm getting confused about this going back-and-forth here. So it's Elaine. Thanks. Elaine has wanted this in there. Elaine, I think this rationale I'm not sure was discussed, so I would put this in a public comment back. I would take out the language here because it wasn't initially in there.

ELAINE PRUIS: Jeff?

JEFF NEUMAN: This I think is a little bit different, but go ahead, Elaine.

ELAINE PRUIS: Thank you. So my suggestion is to add that text only if the text proposed by Susan Payne below is added, so we have a short paragraph summarizing that the working group likes second-price sealed bid. Susan has added some text explaining why others didn't like it. So, if this rationale for not recommending the second price sealed-bid auction makes it in, I'd like some explanatory text above which covers the benefits of the sealed bid. So mine is only in there if this other one makes it in there.

JEFF NEUMAN: Thanks. Thank you for bringing that up. My suggestion was that both be filed as comments.

Let's go to Paul, then ... But I understand and I agree that, if one of them is in there, then the other should be. But these seem to be after-the-fact arguments. Let's go to Paul and then Susan.

PAUL MCGRADY:

Thanks. If we can go back up—my hand went up during Jim’s comment—the problem that I have with that comment and why I think it’s a public comment and not in the text—it’s further up, if staff is scrolling—is the dependent clause. It’s the same problem that I have—I see it now; thank you, guys—with Elaine’s comment below, which is that these are conclusory. So the dependent clause says, “which would have prevented the rolling of funds from one auction to another.” We talked about that at length. It is—I’m trying to find a polite word—optimistic t think that this would have somehow kept a Fortune 100 company or Fortune 500 company or Fortune 3,000 company from not upping a private auction or a sealed bid or whatever. So I think the conclusion which would have prevented the rolling of funds from one auction to another ... We just don’t have any basis in fact to say that we did not conduct any sort of surveys or lessons—nothing at all—that would support that. It is one person’s opinion, but it’s not a fact.

So, if we are going to keep the [A] proposal that would have require sealed bids comment, I suggest we strike the dependent clause, which is a conclusion or an opinion person, but we have no [inaudible] in fact for that, and also ask for a [inaudible] same problem. Maybe it’s being eliminated, so it’s not an issue [inaudible] here keeping it. Again, a conclusion or an opinion of one person. “This method eliminates collusion and bid-rigging.” That is one person’s opinion. Of course, there’s nothing that, in a sealed-bid auction, that does that. Two parties could get together and say, “Okay. How much did you bid? ... Oh, yeah. How much

did I bid? ... Okay. Well, you're going to win it, but I'm going to pay you five million dollars two months from now," or whatever. So all this overworking of the system actually accomplishes nothing, so we shouldn't put in here the conclusion. Thank you.

JEFF NEUMAN:

Yeah. That's why I had suggested, Paul, to put in there to make it clear that it came from those that were concerned. So that was part of it: to say that those people ... I don't want to say "those people"; that's a horrible way to say it ... Because it starts with, "Some in the working group remains concerned. We could say, "Those concerned believe that," and then the rest of it would follow. So that was the point I was trying to make there by making it clear that that was an opinion as opposed to a fact.

Go ahead, Susan.

SUSAN PAYNE:

Thank you. The addition I proposed in Rationale 3 is intended to bring some balance from the perspectives of the working group that came out during the deliberations because I just feel that, at the moment, this section doesn't reflect a true balance of the perspectives. To some extent, that's because you have chosen to incorporate both the rationale and the deliberations of the working group in one section. So what I'm suggesting is part of the deliberations, but there isn't a separate deliberations section, so it has to go in with the rationale, or you have to move all of the deliberation parts to a separate deliberations section. But at the moment you have a rationale for where the working group has

come out with this, but it's not something that's supported by everyone, and it doesn't reflect the balance of the discussions. That's why I think you need to reflect the balance of the discussions and, hence, you have to reflect the fact that there are a bunch of us who don't agree with second price sealed-bid auctions. And we've consistently not agreed. We may have moved on to now discussing other topics, particularly around the private auction discussion, on every single call in the last few weeks. We haven't been still raising this, but I don't think there's any suggestion that those of us who disagree with this path have changed our position. We still feel that way, and it's not being reflected in the text.

JEFF NEUMAN:

Thanks, Susan. But this is something similar to what we said to others, where there's a few people that don't agree with the recommendation that we summarized the discussions that actually took place, which is in there, and then those that feel differently will file a comment during the public comment period, then we do a consensus at the end of the process, and then we'll determine the true amount of agreement. So I think this and Elaine's comment there are more appropriate for public comments. But I'm willing to listen to others, so, please, if someone has got a thought, [inaudible] or to ... Sorry, who was that?

SUSAN PAYNE:

Susan. Can I continue?

JEFF NEUMAN: Yeah, go ahead.

SUSAN PAYNE: My point is you say we summarized the discussion, but actually we don't. The only summary you've given is the bit that supports the outcome that has been decided on. But you haven't summarized the discussion. So the fact that not everyone agrees with that isn't being reflected. That's my point. That's very different to Elaine's suggestion of the [circle] justification for the sealed bid. Our point is just—or my point—is that you just simply aren't summarizing the discussion that we had on this.

JEFF NEUMAN: Okay. I am not ... okay. Let me ... hold on. Scroll down a little bit. Can we scroll down a little bit, Emily?

CHERYL LANGDON-ORR: Jeff, is there a downside in adding Susan's proposed text? I mean, what are we talking? 40 words in a 400-page document?

JEFF NEUMAN: The downside is we've basically been, for a lot of other sections, not putting in what others would consider to be more minority-report text. This would be a little bit of an inconsistency.

CHERYL LANGDON-ORR: Understood. Well, but let's look at ... Her words were only saying not everybody agreed. [inaudible] That doesn't say much more

than that. I'm just saying it doesn't sound like a minority report. It sounds more like an observation of appearances, which was very, very controlled with the proposed language. That's what I was saying. Just wanted to put it out there. We've got [great] [inaudible].

JEFF NEUMAN: Okay. Greg, go ahead.

GREG SHATAN: Thanks. As I alluded to in the chat, I think we need to avoid a history-is-written-by-the-winners approach to discussing the work of the group. The outcomes may be what they are, but when we're referring to deliberations, I think we do need to be more reflective of the actual deliberations and not just what might have ended up as the prevailing opinion. In many cases, those won't be minority-report-worthy because it's not necessarily the case that those are going to be made the subject of a non-consensus. Indeed, to my mind, capturing the deliberations fairly is a way to avoid more minority reports and more feeling that the only way that the reflection of how they got there is going to be captured is by submitting minority reports, which is not where we want to end up. Many people, I think, will be satisfied to see their point of view reflected. That also gives some pause for thought to those making public comment so they will see more of what's behind the—

JEFF NEUMAN: Okay.

GREG SHATAN: Thanks.

JEFF NEUMAN: Okay. It seems like there's a bunch of people that are in favor of that, so let's keep them both in. I think that's fine. We just need to make it clear that these are opinions. I think Susan's language does that because she says that some in the working group have argued that. So it's not stating it as a fact. So I think we just need to make sure that those are worded as opinions, which I think is fine. But, at the end of the day, let's remember, when we all come back and convene after the public comments, we need to make compromises. So, as long as people realize that we're going to be in situations where we're not going to agree or initially agree with certain approaches, I'm just hoping that we're all in the right frame of mind at the end of the day that these are compromises. These are not necessarily what everybody likes.

Let's move on to the next. I think there's just some more additions of "some," which I think is fine. I think it's just fine to state all of that. "Some working group members believe [that requiring] material information ...". And then Susan puts in, "However, the other working group members oppose," which I think is fine because I think, again, at the end of the day, we didn't end up with that. But that was part of the discussion. We didn't end up with all material terms. So I think this is fine. Then there should be a reference to the T's and C's, which I think is right as well.

Can we quickly go to the—I know it's going to be a couple minutes over, but I don't think we should have a complete extra meeting on Thursday for this when we should be in a position to release the report—four questions which were added, which we—there'll be a fifth one now that we talked about with the ... Obviously, we don't have the words for it yet, but we decided on today's call that we would ask about the implications or punishments—whatever you want to call it—for not having a bona fide intent to operate the TLD. So that'll be a fifth one. This document is here. So we had four in there. These were ... We got no comments over the last couple days, but it's basically asking about the Applicant Support Program.

The next one deals with asking a question about—this is the closed generics, so this is the question we'll put in there—reviewing the proposals with the links. So we will, as we discussed the last time, have links to those proposals.

This one here is the ... We consider proposals for specific changes to the community priority evaluation guidelines, but we didn't recommend any changes. And then these are ... And there's a link to the guidelines. So this is where we ask the question about public comment on those specific guidelines that were developed.

The reason the auction one ... This is going to be the fifth one. Sorry, scroll up a little bit. So this is where we'll put in the question—in that string contention resolution line at the top there—about the implications of not having a bona fide intent.

Then we talk about here, in the base registry agreement, the code of conduct exemptions. We talk about the registrar as a good-faith effort to get registrars to carry a TLD. But then we say that, if a registry is unable to get registrars to sign up after this good-faith effort, then they should have the ability to get a code of conduct exemption. So we asked a question of, what standards should be followed or what evidence should be required of the registry in evaluating whether it's made a good-faith effort to get registrars? So that's essentially that question.

Then the next one is on the fraudulent or deceptive practices. We agreed that we should put that in the agreement, but there was a discussion of whether this is more appropriately a PIC or something that's in the agreement itself. So here's the question where we ask where the appropriate place should be.

As Emily said, we're going to update this to correspond to the actual topic numbers as opposed to the section numbers here. So there'll be that correlation.

On Anne's question—"Did you say, Jeff, we did not recommend any changes to the guidelines?"—I didn't meant to say that. We didn't recommend any changes, but there were supplemental guidelines—do you remember, Anne?—that we basically are asking for comments on. So we may have made one or two changes, but I think, for the most part, we did not touch much of the guidelines document. So that's what we're asking.

Any questions on that?

All right. The final thing is that we've now taken at least all the questions that we have that we didn't discuss today. Obviously, those have to be incorporated. But we have a PDF of all the survey questions and what the survey will look like.

There's a comment from Justine on some language, which we'll look at after.

On this document—the PDF that we're going to send out after the call—has all of the questions the way you would see them on the form. Just so you know, we've grouped them in questions of five or five topics. Before you can actually save it, we noticed that there is a slight bug in Google Forms, where, if you save something too many times, for some reason it gets buggy. I think that's the word that was used. So the way we've set it up is we put in the form—you'll see this in instructions—that we strongly advise doing the answers in a Word document and cutting and pasting. We're also trying to work through that bug issue, but we're not confident that that will be resolved by Google. So what Julie says here is we're testing the survey to avoid bugs, but sometimes some people within ICANN have found, if you save a document too many times, it gets a little buggy. So we're working on that. And we got Justine's comment.

Any questions? I know we went through that really quick, but you'll see the form. We're going to send it around. What we're going to ask is, if you have any questions on the form itself, if we can have that within 24 hours, these are just are overall questions. You shouldn't have questions on the way things are worded because that is worded the way it is in this document here, which you've had a week or more with most of these questions, with the

exception of four. But we'll put out the fifth question to you so you can have some time to comment on that. Any questions? I know we went through this end part really quick, but it means we don't have to have a call on Thursday. Comments? Questions?

I know I wanted a little time to discuss the topics. I'm going to put that in e-mail. So the schedule going forward is we will put out the draft final report this week. We will close the comment period at the end of September. We will start up our working group meetings again at the beginning of September—so the first Thursday, which is, I think, the 2nd—and we will continue meetings then. We'll talk about the topics that ... I'll send an e-mail around, but we have the rest of the month off, so hopefully everyone will have a relaxing couple of weeks.

Cheryl, what do you want? [inaudible] want. Sorry. What do you want to ask?

CHERYL LANGDON-ORR: What do I want? Trust me. There is no way, Jeff, you or anyone else could give me what I want on this call. [inaudible]. That's all right, dear. The whole team, in my very humble view, deserved a moment of thanks from all of us on the leadership team for really pulling together and doing their damndest, along with our staff, which have been fabulous, to get us to think point at this time under, I think, some really impressive circumstances. We're going to make our deadlines. Thank you all . I just wanted that on the record. That's what I want, Jeff. Back to you.

JEFF NEUMAN:

Thank you. Sorry. I feel like that came out so wrong when I said it. So thank you, everyone. Cheryl is right. You guys did an amazing job going through everything. It's a lot of material. It's going to be a lot of material for the community, so hopefully you will go back to your stakeholder groups, constituencies, advisory committees, etc., to help them walk through it all and let them know the discussions that have taken place. I'm looking forward to seeing the comments that come back. So thank you, everyone. I think Justine sums it up: all we want is for Cheryl to be happy. So thank you. For that. Thanks, everyone. We'll talk to you September 2nd. Thanks, everyone.

CHERYL LANGDON-ORR: Thank you, Justine. Bye.

[END OF TRANSCRIPTION]