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**ICANN Transcription**  
**GNSO New gTLD Subsequent Procedures Working Group**  
**Tuesday, 10 December 2019 at 03:00 UTC**

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JULIE BISLAND: All right. Well, welcome, everyone. Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures Working Group call on Tuesday, the 10<sup>th</sup> 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?

KAREN LENTZ: Hey, Julie. This is Karen Lentz. I'm on the phone for the next half hour, and then I'll join the room.

JULIE BISLAND: Okay, great. Thank you, Karen.

KAREN LENTZ: Thank you.

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

JEFF NEUMAN: Thanks you very much, and thanks everyone for joining. I'm in a hotel room, so I've given Julie my phone number in case the reception goes bad on my computer. So, hopefully, that won't pose a problem.

Today, we're going to continue on discussing the limited appeals mechanism, specifically focusing more on objections, since we spent most of the time last week on the limited appeals with respect to evaluation results. So then we'll move on to the predictability framework which is something that we talked about ... Well, we talked about it a number of times but the last time being at ICANN in Montreal. So, we'll continue that conversation.

Before I move on to that agenda, though, let me just ask to see if there are any updates to any statements of interest. Okay, not seeing any hands come up or anyone speaking. I'll assume there are no changes.

Also, before we get started on the limited appeals mechanism, I want to thank Jessica who sent around a Microsoft Visio document, also PDF, of an auction mechanism—the Vickrey auction—and how that would interface or could interface with the other processes and procedures, a lot we're not talking about the auction

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mechanisms on this call tonight and we may likely pick that up again later this week.

I just wanted to thank Jessica and encourage the dialogue on this topic on the email list and make sure it continues. I think it's a really good discussion and we're still trying to—we being the leadership team and ICANN policy staff are trying to—digest all of the good comments that have come in. Lots of good, substantive comments and so hopefully when we discuss that next we can have a better, more informed discussion.

Other than that, is there anything anyone wants to add under any other business? Okay, then let's get started on the limited appeals mechanism. Steve has posted the link on the chat, so anyone that wants to follow along directly on Google Docs can do so.

What we'll do is we'll start on just going over a little bit of a recap of where we were on the evaluation procedures and what changes have been made since our last call but we'll spend the bulk of the time talking about the appeals from the objections.

I'm just looking at the chat. Justine asks if we have the alternative flow charts. I think that was with respect to the auctions, if I'm not mistaken. So yeah, we will aim to have those flow charts when we next discuss that topic. Cool.

Okay. So, on the evaluation procedures, these are limited substantive appeals on the specifically things like background screenings, string similarity. Hold on one sec. I'm actually going to go to the Google Doc, too, because I find it easier to read.

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So, it also includes the community priority evaluation, geographic names to the extent that ... As you recall, there still is, and even with the new recommendations, the concept of a geographic names panel and of course DNS stability evaluation, financial, technical operations, etc. So, these are the different types of evaluation processes that occur to which these are outcomes that might warrant—and you can see we've change the word appeal in column B to the word "challenge". In fact, we made that change as well in column E and F.

So, this is one of the changes we've made since the call. It was suggested ... I think it was suggested by Anne Aikman-Scalese and I think it was a good suggestion to call these evaluation appeals, to actually call them challenges, to help out with some of the terminology. Let me just check the ... I'm looking at the chat list.

Okay. So, everything we see here in red are the changes. There's not too many changes that you'll see here. We did fill in the geographic names process and challenges since, in the original spreadsheet that we showed prior to the call last week, these weren't filled out. They were more to be determined because we hadn't yet gotten the final report from the work track 5. But now that we have that report, we filled this in the best we could, so maybe that's a good place to start since we really didn't discuss that too much on the last call.

So, the three types of outcomes that we can foresee challenges would be ... The first instance would be if a term is designated as a geographic name. This may be something that the applicants may not have wanted. The arbiter of such a challenge like the others would—although this is topic is still under discussion and I think we

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will still need to complete that as to whether it's okay for the existing evaluator as a company, or organization, can review that challenge or whether we would need to mandate a separate complete entity to look at these types of challenges. That is still an issue.

But regardless of the arbiter of the challenge, if there is a successful challenge, then that would mean that the decision of the geographic names panel would be reversed and the cost would be borne by the applicant for this challenge and there's still a question that we'll need to discuss overall as to whether a successful challenge should result in a partial refund.

This stems from the notion that ... Well, a couple of different things. In the objections that we'll talk about—appeals from objections—we have a loser pays model for them and we'll go through that. But for evaluations, because evaluators come at a significant cost to ICANN and ultimately are paid through the application fees, if there is a successful appeal, there technically is no loser because it's not one party challenging another party. So, the ability to provide full refunds, or even partial refunds, are hindered a bit because it would be tough in theory to find an evaluator who would be willing to take on this role, only to then have to either do the appeal for free or willing to refund money as a result.

So, though that's still not off the table, and in fact, a number of evaluators when there were a few challenges that were ordered by ICANN—there weren't that many but where there were some challenges—that was funded by either ICANN really the evaluators themselves. So, the applicant was not forced to pay a fee. But again, that was really rare that there was a reevaluation and really only came about because of a reconsideration request or

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something or an accountability mechanism that ordered the reevaluation.

So, the second type of challenge could be where the string is not designated as a geographic name but where the applicant wanted that initially ... Either the applicant—sorry. I don't think the applicant ... Well, I guess it could be the applicant designated as a geographic name or the applicant didn't designate as a geographic name but perhaps governments or public authorities have expected that to be designated as a geographic name according to the guidebook.

Where that happens, you potentially could have appeals—sorry. I've got to use the right terminology. You could have challenges by the applicant where they wanted it to be designated a geographic name or you could have a challenge by perhaps a government or public authority where they had expected it to be designated as a geographic name. Same arbiter issues that we were talking about before. And if there were a successful challenge by either of those two parties, then the name, the decision, the outcome would be to designate it as a geographic string.

And then the question is who would bear the cost, and like the previous one, the cost would be borne by the applicant if it was the one the challenged or the government or public authority if they were the ones that challenged. And we still have the question of a partial refund.

So, thanks to Steve for updating this as we go along. I'll note that Steve is alone tonight from ICANN policy staff because Emily and

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Julie Hedlund were not able to make it tonight. So, thanks, Steve. Okay, not seeing any hands or questions.

So, the third type of potential challenge would be a definition of relevant governments are disputed or there's some other deficiency in documentation.

So, this is, again, if a name is designated as a geographic name and it requires either consent or non-objection from the relevant government, then a letter is required according to the guidebook. And this is the case where the evaluation panel finds that either the consent or non-objection was deficient or that there was consent or non-objection from a non-relevant government, I guess.

So, the two potential parties that are affected would be the applicant again. And same as the last one, relevant government or public authority, and they would be parties. The parties [withstanding]. The likely result, if a challenge is successful, would be to either approve of the letter of consent or non-objection which was initially not [inaudible] or to revise the finding that the letter of consent or non-objection was reverse the finding that it was not approved—or sorry, it did not receive a letter of consent or non-objection.

So, I realize that's a lot to say but essentially that would be the two types of potential results if there was a successful challenge, and I think, like the other two that we talked about, the cost would be borne by the challenging party and we would still have to see whether it would be possible to do a partial refund if the party that bears the cost succeeds.

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Steve, you don't have to make it now because I know it's just you but I think those should say, "Should there be a partial refund if the challenging party succeeds," as opposed to just applicants and some of these have potential challengers that are not necessarily the applicant. Cool.

CHERYL LANGDON-ORR: Paul's hand is up.

JEFF NEUMAN: Thanks, Paul. Sorry. Thanks, Cheryl. Paul, please.

PAUL MCGRADY: Thanks. So, in a case like that where the applicant didn't think it was a geographic name and the geographic panel in the first instance agrees with them, and then a government entity or relevant government or public authority files a—I guess this is an appeal. Or is it a challenge? Anyway, they file whatever the magic word is. And say the government then prevails on that. Will the applicant be given a chance to amend their application and get whatever they need to get to have the application move forward?

That sounds to me like if the applicant doesn't think it is and the geographic panel, at least in the first instance, doesn't think it is, then it's a close call. Or are they just screwed? Thanks.

JEFF NEUMAN: Yeah. Thanks, Paul. Really good question. Let me throw that out. It would seem, as a matter of fairness, that it would seem



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that the applicant who did not think that it was a geographic name should have a period of time to then get that letter of non-objection or consent. That seems like the most fair thing to do. But let me throw that back out and see if anyone disagrees with that. Or agrees. Either way.

So, from Paul in the chat says, “Yeah, they should have time and we should bake it in this.” So, I think that sounds right. Steve has got his hand up. Steve, please.

[STEVE]:

Thanks, Jeff. This is Steve from staff. I’m sure Karen will correct me if I get this wrong but the way that the geographic names evaluation took place in the 2002 round. Every single name or every single string that was applied for was evaluated to determine whether or not it was a geographic name or not. So, in the instance where the applicant did not designate it as a geographic name but the panel did determine it is a geographic name, it essentially works the way that you guys were just talking about, that the applicant would get some time to get the required documentation as applicable. Thanks.

JEFF NEUMAN:

Yeah. Thanks, Steve. And perhaps after this call, Karen or you could send around, whether there was a standard amount of time that was given or something like that and then we can bake that into the guidebook if it’s not already in there.

I guess the other thing, though—I think this would be rare but if there are certain names that are designated as geographic, was it possible that some of them could have been designated as one that

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was not eligible to actually be applied for and I'm thinking country names, a lot that would be pretty obvious to an applicant, I think, if it was a country name. Or I guess potentially a capital city name, although I think those might have just needed ... I can't remember if those were banned, sorry.

I guess overall the question I have or comment I have is that there may be some geographic names that if it's found to be a geographic name in one of those you can't apply for categories, then I guess there would obviously be no time for an applicant to get that letter because that wouldn't be accepted. But I think that ...

What Rubens says in the example, three-letter country ... Yeah. That was at the very beginning where those were ineligible strings. I guess that would be probably at the very beginning that it would be realized that they shouldn't have applied for it. I'm trying to think if there could be an example where a geographic names panel would make a decision and it would put an application into a category where you weren't allowed to apply for and I'm not sure that was possible. But Paul's hand is raised, so Paul, please.

PAUL MCGRADY:

Thanks. But I don't think those are ... Those are on [the closed calls] right? Those are somebody applies for something that's on a clear list of words that people aren't allowed to use and they don't designate it and they don't submit the proper papers from the appropriate government. The geographic panel bounces it out. That's different than somebody really thinking, "Gee whiz, this is not a geographic name," and the panel is saying in the first instance, "Gee whiz, this is not a geographic name," and then the government

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coming in filing a challenge and providing some sort of information that the neither the applicant nor the geographic panelist had. And then the panelist says, “Oh, gee whiz, I guess it is a geographic name.” Then there needs to be some fair amount of time for the applicant to go back to whichever government complained—or go to a different, friendlier government because a lot of these names are repeated all over the place, right? But that’s sort of different than just somebody not reading the list of words that everybody has already said they can’t use. Thanks.

JEFF NEUMAN:

Yeah. Thanks, Paul. And I think as you were explaining it and talking—rambling—through it, since this is the first time considering the question, I think you’re right. I don’t think it really would be likely or even a close case where it turns out what I said could happen. So I think that’s right. Okay. Any other questions or comments?

The rest of the elements on ... Let me double-check before I say that. I believe the rest of the elements have been discussed except for the last item that we added. It would be row 18? We had mentioned it in a discussion last week but didn’t fill this out, this row. This is where the registry service provider is applying for preapproval in the preapproval process.

If it somehow fails the evaluation and therefore would be unable to ... I’m not sure of the words. It says “unable to participate in the program.” I think if it fails preapproval it’s, essentially, unable to get preapproval but it still could participate in the regular evaluation process. I think that would just need to be changed to ... Really,

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“unable to be designated as preapproved” would be the outcome that might warrant challenge and the potential affected parties not ...

Well, it wouldn't be the applicant. It would be the RSP. And then the rest is pretty self-explanatory that if it challenges and is successful then it would be designated as preapproved in accordance with the program. And I think, at the end of the day, the same issue about who bears the cost, in this case, would be the RSP. And whether there's a partial refund is something that would need to be considered further.

Just going back to the chat. Justine says, “Jeff, when you're done with RSP preapproval can we go back to the background screening?” Yes, we'll do that, but let me just look at Rubens' comment here. “RSP plus applications plus applications in contention.” So Rubens, are you thinking that these other parties ...?

The preapproval program is going to be a separate program before the actual applications for strings are accepted. So I don't think applicants or those in contention sets would be affected because it wouldn't yet be known who the applicants are that may select that RSP. And certainly, it would be before the strings are revealed so you wouldn't even know that contention set. I think it's right here in the chart where it says, “RSP is the affected party and the party withstanding.”

Okay. Rubens says, “Yeah, it depends on timing.” Yeah, and we'll have to think that through. I think the current recommendation is to do a preapproval process prior to the beginning of each round

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because you are preapproved for that particular round but not necessarily preapproved for future rounds. I think that that makes sense but when we review the preapproval program we'll have to just make sure that we keep this in mind.

And Justine's agreeing with the explanation I gave. Great. Any other comments on the preapproval? And then we'll go back to the background screening. Okay. Why don't we do that now? If we could just scroll up? Justine, please, if you have access to a mic and can give your question?

JUSTINE CHEW:

Sure. Thanks, Jeff. Last week, I think it was towards the end of the last call, I suggested that one potential affected party could be third parties. I just wanted to go back and explain what I meant. It was in the context of the background screening and whether that covered the criteria under eligibility, which is stated in the AGB, section 1.2.1.

The first question was, does background screening cover eligibility checks? Okay. And assuming that it does, which in my understanding of the AGB the answer would be yes, then that's where the third parties would come in. And going back, again, to feedback that was given to show our response in terms of setting higher standards for applicants, where we brought to light again two incidences of background screening failures, if I could put it that way.

For example, one of the applicants clearly failed UDRP decisions but the applicant didn't fail the background screening despite having

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more than three UDRP decisions against that person. In that situation, I wanted to ask whether that would provide grounds for a third party to raise a challenge on the background screening outcome. Thanks.

JEFFREY NEUMAN: Yeah. Thanks, Justine. I think, to give more context, the background screening would include the criminal background checks as well as the cyber-squatting UDRP ones that you just mentioned. I think that was one of the examples that Paul had brought up and that was what we were talking about covering if we were to allow the third-party challenges.

I think that it's in red because we added it to that. That's the third party suggestions. That was made the last one and it does seem to make sense, at least for the UDRP and cyber-squatting portion of that, to allow the third party to make that kind of challenge.

So if we go through that, then, the impacted party in red is that third party that believes that it should have been refused on the background screening. That would be a party that would have standing. I think the rest would apply in that row three that we're talking about. Yeah. Thanks, Justine. That makes sense.

JUSTINE CHEW: Yeah. Sorry, thanks. Just to follow-through in terms of who bears the cost. In that situation, if a third party raises the challenge, who bears the costs?

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JEFFREY NEUMAN: Yeah. Another really interesting one because on the one hand, it was something that the background evaluator should have found. And then to make a third party pay for that kind of challenge seems to be difficult. But Paul puts in the chat, “Perhaps that’s kind of a ‘loser-pays’ model because it is one party against another party in a sense like the objections.”

Let’s think about it. It seems to make sense that that could be a loser-pays kind of model. It’s probably something we should put in the notes and give it some more thought to see if we’re missing something where it wouldn’t make sense. I think Paul’s suggestion does make sense, at least upon thinking about it as a first impression. We’ll put it in like Steve has, in brackets with a question mark. Let’s give it a thought to see if that makes sense. Paul, please.

PAUL MCGRADY: Thanks. The reason why I think it should be loser-pays is because, very simply, a third party could file. They may know something that the background examiners may not know. That could be put to the applicant very clearly. “Third-party X has said this about you. Is it true?” If the applicant denies it then it would go to the panel. And if it turns out to be true then the applicants should pay and the application should be bounced. If it turns out not to be true then whatever third party brought the challenge should have to pay because we don’t want frivolous challenges. That’s a way to deal with both frivolous challenges and frivolous defenses and not put the evaluators in the line of fire. Thanks.

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JEFFREY NEUMAN: Yeah. Thanks, Paul. That does make a lot of sense. Let's give it some thought to see if there's, maybe, something we're missing. But it sounds right to me and it seems like it may sound right to others. We'll go with that and if we don't hear of any potential area where that would not result in something ideal then we can revisit it. But otherwise, I think that makes a lot of sense.

Great. Okay. Any other questions on the challenges to evaluation results before we move onto objections, which I'm hoping are more straightforward? Okay. Then, if we can click on the objections tab in the same document? Again, I think these, at least in my mind, are more straightforward in the sense that there's clearly one party objecting against another party's application. It's not challenging an evaluation result necessarily but it's one party challenging something about the application of the other party.

And so the first one we have on here is the string confusion. If you recall, there are three types of string confusion areas. The first thing that can be challenged is if there is a determination that there is a string confusion with an existing TLD. Then, if you'll recall, the result of that would be that the application is thrown out. If there's a finding that it is confusing or if the applicant is the applicant it could challenge a determination that a string is confusing with another application, in which case the result of the objection would be to put it in the contention set.

So an applicant can appeal these things. It would have standing to appeal those and the results of a successful appeal in the first case ... So if there was an objection, the string confusion objection found in favor of the challenger, and the challenger was an existing TLD operator, the opponent could challenge that. If it succeeds, it would



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then have its application reinstated. Let me just check to see. Sorry, I'm going back and forth with the Google Document, here.

If that is the case, where the applicant succeeds in its appeal, then we're saying that, since it would be a loser-pays model, the original objector who won the original objection but is now defending the objection results would be the loser in this case and they would be the one that pays.

Let me go to Justine's comment. "On objections, the ALAC has made it clear that loser-pays is not feasible for two types of appeal that it has standing for." Okay, so when we get there, Justine and others, remind me. That would be for the community objections and the limited public interest objections. We're not there yet but someone remind me when we get down to those objections.

Okay. So then, still with string confusion, let's say that there was a string confusion objection that was filed by the existing TLD operator and the objection results in a finding for the applicant. In other words, the objection panel has ruled that the string that was applied for is not confusingly similar to the existing TLD.

Then the potential applicant, there, would be the existing TLD operator. It would have standing. And if they succeed on the appeal then the objection decision would be reversed, which means that the application would not proceed because this is the existing TLD objector, not another applicant.

I should also say, because I forgot to mention it, we should put a time period – this is in the notes – as to when the objection must be filed in order to be heard. We had suggested 15 days. It's in red. I

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don't know if that's the right amount of time but something to think about, whether it's 15 or 30. It probably shouldn't be anything longer than 30 to avoid delays of the process. But something to think about and maybe get some comments on e-mail.

For all of these, you'll see "15 days from the notice of the objection decision." I would think the time period should be similar for each of the different types of appeals but perhaps there is a reason to have differing days. Again, something we'd like to see some comments on if anyone disagrees with 15 days.

Okay. The third type of string confusion appeal could be filed by another applicant objector in the case where there was an objection filed by another applicant and that objection stated that they believed that the applied-for string is confusingly similar to the application that the other applicant applied for. And therefore the remedy, if the objection succeeded, would be to put the application in the same contention set as the objector applicant.

If the objection finds in favor of the original applicant, meaning that the objection panel finds that the application is not confusingly similar to the other application, then you could have the other applicant objector not satisfied with that decision. That other applicant may want to appeal the results of the objection. And in that case, if the appeal agrees, or the panel that decides the appeal, agrees with the objector, the result would then be to reverse the objection result and put the other application in the same contention set.

Those are the three possibilities for appealing the results of a string confusion objection. And while you're thinking about that, Rubens'

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chat message says that, “Perhaps we do something like 15 days to signal your intent to appeal and then giving another 15 days, or something like that, to pay/file the appeal.” That’s also another possibility, to have a certain time period to give your notice of intent to appeal and then an additional time period to actually file that appeal. That is certainly a feasible option as well.

Any questions on the string confusion objection appeals? Okay. I'm just trying to think if we covered the instance where, if there was an objection filed by another applicant, the objector succeeds and therefore it is placed in the same contention set. Oh yeah, I'm sorry. We covered that in that second item. Yeah. That’s it, sorry.

There are actually four scenarios. Two involve the applicant and the other two involve either the existing TLD objector or the other applicant. Sorry about that. That was my own confusion but I think we’re good.

Okay. Legal rights objections. This is in the case where there’s an objection where there’s a third party that objects to an application because it believes that the application that is filed in some way infringes on the legal rights of that third party. I may not be using the exact, correct terminology. But if that objection finds that yes, in fact, it does infringe on the legal rights of the third party, you can imagine the situation where the applicant would not be happy with that result because that result would mean that the application is thrown out.

If an applicant appeals that and is successful in an appeal then the application would now be reinstated. On the other hand, if the original objection result finds in favor of the applicant, the third-party

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objector may not be satisfied with that decision and may want to file an appeal. If it files an appeal and succeeds on the appeal then the application, which was originally allowed to stay in, would now be removed or would be rejected.

There's a question in the chat on the independent objector. I think we'll get to that when we talk about limited public interest objections and community objections because those were the two types of objections that the independent objector was allowed to file. As Justine says, there's no standing for the independent objector on those and it does not seem like we are going to make a recommendation that that changes.

Okay. Well, let me ask. Are there any other comments on the legal rights objection appeals? Okay. Now we get into the more difficult and interesting types of objections because of the independent objector and the ALAC who have standing for these types of objections. The first instance is where there was a limited public interest objection that found in favor of the objector, whoever that is. Whether that's a third party, an independent objector, or the ALAC.

If any of those objections are successful the result is the same, which is that the application is thrown out or does not proceed. In all of those cases, you can imagine the applicant not being happy about that and would want to appeal. If it does appeal and it is successful then the application would be reinstated. And again, we're contemplating the loser-pays model in this case.

Now, let's assume that the limited public interest objection was filed by a third party other than the two that are mentioned below. If that

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third party does not succeed in the original objection it would have standing to appeal the unsuccessful objection. If it succeeds, then the application would not proceed. That's pretty straightforward.

Okay. Now we get to the independent objector. The independent objector, if you recall, was given its own budget. It had some fees. Essentially, the budget was given to it by ICANN. ICANN did not exert any type of control over the independent objector in terms of if any objections were filed, who they were filed against, or the grounds for such an objection. If the independent objector loses the objection, in other words the applicant prevails and the independent objector wants to appeal, the real question here is ... Or maybe it's not a question.

But since we have a loser-pays model the independent objector would have to have an adequate budget in order to pay for an unsuccessful appeal. In other words, whoever files the objection needs to essentially demonstrate that it's got the funds to cover a loss if it loses the appeal. Does everyone agree with that outcome or with that?

What it does mean is if the independent objector does not have the finances to cover an appeal then the independent objector may not file an appeal of an objection that it doesn't agree with.

Before we get to talk about the ALAC, I just wanted to make sure that everyone is on board, at least on this call. Justine is going to rephrase it probably much better than I said it. On the limited public interest objection and the community objection, because I think it is the same ...

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Oh, sorry. You're doing the ALAC. Sorry, not there yet. We'll get there in a minute. But you say, "Okay, the same does apply to the independent objector." So what we're saying for both those types of appeals is, if the independent objector does not have funds available to it in its budget to file appeals of a decision it disagrees with, either on a limited public interest objection or a community objection, then it's out of luck. Essentially, it cannot file an appeal.

Paul agrees with that in both cases. I'm trying to see if there's anyone that disagrees with that. I know we don't have everyone on this call but certainly to the extent that it would be good if anyone, at least on this call ... It's not the most desirable outcome, in a sense. I can foresee people may not be 100% thrilled with that but I think in this case it's one of those realities we have to deal with.

Because if the independent objector doesn't have the budget for it then the funds would need to come from somewhere else. And remember, this is the case where the independent objector has lost the original objection and now is appealing that decision. Okay.

Now I think we come across the one that Justine is talking about and certainly a difficult one to think about. But decisions have to be made, of course. This is in the case of the ALAC. At the end of the day, prior to the publication of the Applicant Guidebook, the ALAC was given the ability to file community-based objections as well as limited public interest objections. I believe it still had to meet the standing requirements so it was not given automatic standing in cases of these types of objections. But if it had the standing, ICANN had agreed to fund those objections.

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What we're talking about now is whether ICANN should also fund appeals of those objections where it disagreed with the results. And if it were allowed to appeal and lost, that would mean, essentially, ICANN would be paying twice for that objection. In other words, the ALAC was the loser in the initial objection so ICANN had to cover the costs, because that was a loser-pays model and now, if the ALAC loses an appeal, ICANN would then have to pay twice.

And ICANN itself as an organization did not have, or would not have at least in this current scenario, the discretion to say, "ALAC, we don't think you should file this appeal," so it would not be given any kind of review of an appeal that was filed. And maybe that could be a potential compromise.

Paul asks, "Did the ALAC file any?" The ALAC filed objections in .health. They filed an objection against three of the four applicants under community objection grounds and, I believe, limited public interest objection grounds. They lost, so ICANN was forced to cover those costs. It was fairly substantial because the costs for those objections, as you all know, was not cheap.

The reason why the initial group that discussed this issue said that the ALAC should not get reimbursement for appeals was because, in essence, ICANN would be double-paying without any kind of review. So if ICANN as an organization were to believe that the ALAC didn't have a case it would still have to pay for an appeal.

So perhaps one middle ground would be that the ALAC would have to, potentially, convince ICANN that it had an appeal that it would be likely to succeed on. And if it were able to do that then ICANN would reimburse. But if it were not able to convince ICANN that it

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had a likelihood of success to appeal then, perhaps, the ALAC would not be funded on an appeal. That's something new I'm throwing out there as a potential middle-ground. I would love to hear some comments, at least at first glance. But obviously, we'll discuss this more on the list. Paul, please.

PAUL MCGRADY:

Great. Jeff, I didn't raise my hand to respond to that because I wanted to say something else about this. My initial reaction to that is that then we've put ICANN in the weird spot of picking a winner and a loser there, instead of the appeals panel, and I'm not really sure that's where we want to end up. I'm sorry to poo-poo an idea because, ideas? We need more of them.

But my thought on this one was, since ALAC doesn't have any other revenue streams other than ICANN, it may not be so much of an issue of whether or not they have to ask ICANN and convince ICANN that they'll prevail but rather, why not some sort of numerical limit on the number of appeals that they can file that will be funded by ICANN regardless of what ICANN staff or board may think of the chances?

I don't know what that would look like. One appeal for 100 applications, I'm not sure. But is there a way to deal with it that way to make it predictable and limited rather than ALAC having to go hat in hand and prove substance? Another reason that the problem with having to prove substance or merits is that you only have 15 days and getting ICANN to do anything in 15 days is hard. And then if the staff or board say, "Yeah, we'll fund that appeal," then whoever



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they're about to fund an appeal against can just file a complaint based upon ICANN Board staff's action and then off we go.

Lastly, and I've only got 13 seconds left so I'm talking fast, if ALAC doesn't have the ability to appeal or fund appeals then all you have to do to overcome an ALAC an objection is just lose and then file an appeal. Since ALAC won't be able to do the appeal without getting IPN permission then basically all you have to do is wait it out and then you win. Thanks.

JEFFREY NEUMAN:

Yeah. Thanks, Paul. I did not think of that. It's good to have those comments. That would be an interesting strategy, too. Although, if you lost the first appeal you would have to pay those costs, which are fairly substantial. Sorry, if you lost the initial objection.

I see the comments that Justine has said. I think Justine's agreeing with Paul about a potential conflict of interest. Justine, please. Actually, your hand is up so, please.

JUSTINE CHEW:

Thanks, Jeff. I just wanted to reiterate the points that Paul has made. He has definitely put it more eloquently than I did in the chat. Also, to note that I am happy to take any suggestions raised here, in particular by Rubens and Paul. Back to ALAC for the input. Thanks.

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JEFFREY NEUMAN:

Yeah. Thanks, Justine. The other thing we need to think about as well is, remember that objections or appeals can be filed on these grounds by a third party or an independent objector even if the ALAC is not able to pay for those initial objections or appeals. It's not as if there's – I'm trying to figure out a good way to say it – not an opportunity to have objections heard or even appeals of these types of cases. Maybe Paul's right, some sort of formula or limited budget for that.

The issue there is that appeals are on a rolling basis. Yes, you have 15 days, but the decisions of appeals could come out years apart. And so for the ALAC to make a decision, or anyone to make a decision with a budget, or let's say one out of every hundred or whatever it is, it's tough when you don't know what you don't know yet because there are so many cases that have not yet been heard, decided, or even at that stage.

Like I said, this is a difficult issue. And what makes it difficult, again, is because you're sort of forcing ICANN to pay for these objections and appeals to which it has no ability to even do a quick-look or anything like that, to see if there's a case there. You're basically forcing it to pay and there are no other limits on the ALAC for the amount of objections it files. There's definitely a resource constraint, or could be.

So we do need to think of some balance between those, whether that's some sort of formula or another type of mechanism. What we're not saying, and I hope it's not being interpreted this way, that these aren't important or that we're trying to somehow devalue the objections or appeals filed by the ALAC. But we do need some way to provide some sort of balance.

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And so Justine says that she's happy to take suggestions back to the ALAC. Before we take something back to the ALAC, I think we need to come up with a concrete proposal. I think we do need to brainstorm, if we can, on what that formula would be if there is a formula. Just going back with a, "Let's just get comments," again, I don't think will be effective. We do need to think about a formula. Justine, you're hand's up. Sorry.

JUSTINE CHEW:

Thanks, Jeff. Just a couple of comments and questions. Firstly, I'd just like to say that ALAC has noted the issue of resource constraints. That's why we are, or at least I am, open to taking back suggestions on some reasonable limit on the number of appeals. Whatever the group decides they want to put forward back to ALAC.

The second thing is, I do disagree with the notion of ICANN Org being able to determine whether ALAC should file an appeal or not. I think they would not be a stakeholder in this respect and there would be a conflict of interest if ALAC has to go to ICANN Org for "permission" to file an appeal.

And the third I wanted to ask, Jeff; you mentioned something quite interesting which I want to pick up on which is you mentioned something about a third party being able to pick up an appeal off another objector.

Now, that's not something that I've considered before and it doesn't appear to be an option in the current table because my understanding is if you have filed an objection and you fail then you are party to an appeal and no one else could take up that standing.

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Thanks. So if you could clarify if I understood you incorrectly or correctly, that would be great. Thank you.

JEFFREY NEUMAN:

Thanks, Justine. I'll blame it on me. I may have said that but did not intend that because I was trying to figure out a way to get something across and obviously failed. You're right. A third party could not pick up the appeal of the ALAC. What I was trying to say in a horrible way was that it's not – going back to the original objection – because we've made arrangements for an independent objector to do these types of objections and third parties can bring these types of objections as well. It's not as if nobody would be in a position to raise these issues and either chose not to ...

If I said that, I did not mean that a third party could take up an objection, let's say, of the ALAC. Although, it does bring up an interesting idea of perhaps it's not ICANN that is the arbiter of whether they think there's a likelihood of success.

Maybe it's something like – I'm throwing this out there, I have no idea of something like this would work – maybe if the ALAC wants to file an appeal perhaps there's a different entity, whether that's the independent objector, an ombudsman or something else, where they could look at the potential grounds for an appeal and give the "okay" or "not okay" for ICANN to fund; where it's not ICANN itself as a stakeholder but maybe it's something like the independent objector again. Throwing it out there as a potential idea. It may be horrible. It may not work. I guess I'm just trying to throw out other potential things.

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CHERYL LANGDON-ORR: Jeff?

JEFFREY NEUMAN: Yes, please.

CHERYL LANGDON-ORR: Thank you. Cheryl, taking off her co-chair hat. Help me understand what it is that the working group feels needs balancing in this scenario. As some of the other people in chat have noted, the ALAC, there is no evidence to say that it went wild with this enormous power that it had with its standing. So what is it that we're trying to balance, here? Help me understand because, as ever, I still don't.

JEFFREY NEUMAN: Okay. Thanks, Cheryl. I will now take off my co-chair hat, too, since we can do that. At the time that objections were filed, in one of the cases that I happen to represent, and I know you and I have discussed this and I think we disagree individually, I do feel like those appeals were not the type of appeals that should have been made by the ALAC since they were also made by the independent objector. I feel like there was, in that case, taking off my chair hat, some influence within the ALAC from outside parties. But be that as it may. I don't want to get into that particular discussion.

I think at the end of the day, it's like leaving the independent objector without a budget. I think we all agree that the independent objector

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should have a budget to file its objections and appeals. Because otherwise, we could foresee the objector basically not feeling like it has anything to lose by filing all objections against everything. I think the same type of funding, either a budget or some kind of limit, should also be given to ALAC so it does have to pick and choose which objections and appeals it would need to file and have some accountability for that. Again, that's not with my chair hat on. That's a personal opinion.

I'll now put on my chair hat and say, are there any comments? What I personally believe is not what's going to happen unless it's what the working group believes. I do not want to steer the working group one way or another.

CHERYL LANGDON-ORR: Okay. Well, because we sometimes hear a lot from whoever is chairing a meeting I'm going to reply again. I just want to make very certain, and this time it is with my chair hat on, that the working group recognizes what the problem is it is or isn't trying to solve based on what evidence there is, that there is a risk that needs to be mitigated or balanced. And then it might have a fair and reasonable chance of coming up with whatever throttling or choking mechanism is required. Thank you.

JEFFREY NEUMAN: Yes, thanks, Cheryl. Absolutely, anyone that wants to. And perhaps that will be me, with my non-chair hat on, sending in some thoughts on that. But perhaps it will be others. I think at the end of the day, just taking a step back, whether there was ... Actually, nope. I'm not

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going to comment anymore. Let's work on a formula, as Paul says, to get there, but try to avoid seeking ICANN, IO, or ombudsman second-guessing. Okay. I think that's a good way to go. And certainly, Justine, if the ALAC has any ideas as well that would be greatly appreciated. Now, this would apply both to the community ... Oh, sorry. Go on.

CHERYL LANGDON-ORR: I was going to say just before we start asking the ALAC to simply send back to us, via Justine, a very robust and public process that had developed last time, perhaps we can make sure that everyone who's going to be organizing the think tank for the throttling process is also aware of what it takes for an appeal to even get past the post, to even become an ALAC one. So providing everybody has all the information, including the internal but public processes that the ALAC has instigated before and has no intention of changing to the best of my knowledge, at this stage, that will be great. Thanks.

JEFFREY NEUMAN: Yeah. Thanks, Cheryl. Actually, that's a good idea, too. If someone could find the links to that process and send that around, maybe that is a solution, to formalize that. Because I think that was, if I'm not mistaken, done after the guidebook was put out, the process that it came up with. Maybe that is the answer. Maybe that'll make people feel comfortable, as well.

OLIVIER CREPIN-LEBLOND: Yeah. It was after the guidebook came out, that is correct, because it took probably about seven months to actually go through

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the At-Large community and all five RALOs, to come back to the ALAC, to be endorsed as a process. So it even was a stringent mechanism to develop it. If staff can make that an AI our staff can get back to them very easily. Thank you.

JEFFREY NEUMAN:

Yeah. Thanks, Cheryl. AI, just for those, means action item. Yeah, it should be an action item and I think that's good. I think at the last round certainly a lot of processes and procedures had to be developed after the fact simply because these were first-time ... The first time that we were dealing with these types of things. And that's one thing we're all trying to avoid in the future, to have processes and stuff developed after the fact. Anything that could be provided to the community in advance would be great.

Justine says, "Module three, page 3-13 of the guidebook has some of it." And then Karen Lenzt does cite section 3.3.2, about the funding, advanced payment of costs, and all that stuff.

But I think what Cheryl was referring to was the more robust process that was after where, I think, there was a process of how to raise it, how it needed the approvals it needed, etc. I think it was certainly more details after.

Great. I think the same discussion applies equally to community-based objections. I don't think it's anything different there, at least with respect to appeals. I think it's all the same issues. I'm just reading through to see if there would be ... Now, remember, this is objections filed by a community against an application. These are not appeals of community priority evaluation results.



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That's what we talked about the last time in the first tab under "evaluation procedures." Okay. Questions on that? I think the same thing applies with independent objectors we went through and applicants. I think it's the same issues.

Great. Since we only have eight minutes to go, I do want to ... Steve, if you could just put the link to the predictability model in the chat. Pull it up. We're not going to go through it but I do want to just say that we have attempted to make the changes that were discussed at ICANN66 or put comments in where issues were discussed.

Please do review this prior to the next call. Hopefully, it does contain the notes and the changes that you all remember from the meeting. If not, let us know and we'll start there and hopefully cover ... Because I think we had a really good discussion at ICANN66. I'm hoping to be able to finish the predictability model discussion. We only have one call next week. I'm sorry, we're still on this week. For Thursday. We have another call this Thursday and then one call next week.

So we still have two calls prior to closing up shop for the holidays. Hopefully, we can finish up. We can do the predictability model in one session and then get back to auctions prior to the holidays kicking off.

Thanks, everyone. I know there was not as much attendance as we sometimes have but I think it was a good call. Lots of progress, as Cheryl states. Interesting discussion areas. Please, do keep the conversations going on the e-mail list on this and on the other topics. Thanks, everyone.

JULIE BISLAND:                    Thanks, Jeff. Bye, everyone. Have a good rest of your evening.

**[END OF TRANSCRIPTION]**