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**ICANN  
Transcription  
GNSO New gTLD Subsequent Procedures Working Group  
Tuesday, 06 August 2019 at 03:00 UTC**

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ANDREA GLANDON:

Good morning, good afternoon, and good evening. Welcome to the New gTLD Subsequent Procedures PDP call held on Tuesday, the 6<sup>th</sup> of August, 2019, at 03:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you are only on the audio bridge, could you please let yourself be known now?

Thank you. Hearing no names, I would like to remind all participants to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise.

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With this, I will turn it over to Jeff Neuman. Please begin.

JEFF NEUMAN:

Thank you, Andrea. Looking at the attendance, while we have an okay number of people, it seems we are, with one or two exceptions, registry-focused. So I think we'll still have this call. We'll go through the topics and then I'll just make sure that I'll respond, when the notes go out, just to hopefully have everyone read and/or listen to the call and make comments if they have other views. Heather said she's an honorary registry today. Absolutely, Heather. Sure.

On today's agenda, we have actually a fairly important subject, at least – well, they're all important – talking about applicant terms and conditions, not the registry agreement but what was Module 6 of the Applicant Guidebook and then, going from there, if we have time, talking about application queuing. I think we will have time. We'll do those two subjects.

Let me just ask to see if anybody has any updates to their statements of interest.

Okay. Not hearing any. Let me just also start out by saying thank you to Cheryl and everyone else for covering for me last week. Actually, for the first time in a long time, I took a real vacation without doing any work at all. So that was kind of cool. Monday was my first day back. I know there's some action items coming from the last call, so I will ask for your indulgence while we all catch up and while I do the action items for the next time for our next call, which is on Thursday. So thank you for that.

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With that, we're going to start a new subject today, which is the applicant terms and conditions. You have the link from in the e-mail that went out with the agenda, but it would be great – I know Emily is acting solo here. Great. Thanks, Emily, for putting the link into the chat. You will see some changes or things that I made to the document, nothing really substantive at all. Since I didn't get a chance to really review this before the agenda, I just wanted my comments to just be seen by everybody. That's the version that's also up on Zoom.

The background documentation is pretty much similar to most of the other ones. This was part of Sub-Group B initially when we analyzed the comments. The only thing I added was the actual terms and conditions from Module 6 on the top there with a link to what I know is the last version of the terms and conditions. We use the words "terms and conditions" a couple times. I tried to make it a little bit more clear. You'll see why in the high-level agreement section because we tend to use terms and conditions in its generic sense as well as the title of Module 6. So I just wanted to differentiate. I'll go over those when I talk about the comments.

In the policy goal, I think what we're trying to accomplish is pretty self-evident and I don't think is controversial at all, which is to make sure that we're adhering to principles of transparency and accountability. So I don't think there is again anything controversial in that statement.

If we go over then to the next section, which is the high-level agreements, the responses we got to the initial report in the comments were that the commenters generally supported the idea that, unless required under specific laws or the ICANN bylaws, ICANN should only be

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permitted to reject an application if done so in accordance with the provisions of the Applicant Guidebook.

Now, it said “Terms and Conditions” with a capital “T” and “C”, but that’s a little bit circular because what we really meant was that, if ICANN is allowed to reject an application because it doesn’t meet the technical requirements, which are in the guidebook, then that’s we meant by terms and conditions in its generic sense. To read it as the title of the document is circular, basically saying that the terms and conditions can only allow rejection of an application if done in accordance with that same document. The way that was worded seems circular. So I hope that makes sense to everyone as to why I made that change.

Michael says he agrees, so that’s good. Anyone else have any comments on that? I think, when you look at ICANN’s comment later on, you’ll see that, I think, they were a little bit confused and had asked to clarify this point. So I think this does clarify what we meant by terms and conditions. I’m not wedded to the term “provisions” of the Applicant Guidebook, but I just didn’t want to restate terms and conditions even in the lowercase sense. So if anyone has got any better way to phrase it, I’m happy to phrase it that way.

Okay. The second – Rubens is saying, ““Provisions” works for me.” Good. The second high-level agreement is that responses generally supported the idea that, in the event an application is rejected, ICANN org should be required to cite – I put “with specificity” – the reason in accordance with the Applicant Guidebook. Oops, I got – thanks for making it bigger. That helps. Or if applicable to specific law and/or

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ICANN bylaw for not allowing the application to proceed. The reason I put “with specificity” in there was because we don’t just want – I think, from the comments and the discussions – ICANN to say, “We rejected it because it failed the technical evaluation. Period.” I think applicants should be entitled to – we’ll talk about whether it’s confidential or not a little bit later on – have some specificity as to why their application is rejected.

Maxim says, “Due to anti-laundering laws, we need a real short contract to pay the application fee. Are we going to discuss it?” Yes, Maxim. Let’s just finish the high-level agreements part and then, if someone can just take note of that – sorry, Emily, I know you’re doing double duty here or triple duty. But if someone can just remember to put that in as one of the topics to just cover. Thanks, Emily.

So the third one. Responses generally supported the idea that – I added a clause here – that, in addition to applicant’s [inaudible] accountability mechanism set forth in the current ICANN bylaws. If the covenant not to sue remains in place, there should be an appeals mechanism in place that can look into whether ICANN or its designees/contractors acted inconsistently or failed to act consistently with the Applicant Guidebook.

Then really more details on the appeals is going to be saved for when we talk about Section 2.8.2. So we’re not going to talk in detail about the appeals, just the notion of having an appeals process.

The reason I added “in addition” – oops. It should say “to.” “In addition to an applicant’s rights.” Sorry for the typo there. the reason I added

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that was because I didn't want to lose the notion of the accountability mechanisms for appropriate actions or inactions with accordance with the ICANN bylaws.

Rubens has a comment – oh, sorry. Maxim has a comment. “Terms and conditions should be a part of it, referenced to there. It's also a recommendation of Maxim's organization.” We'll get to that, I think, in one of the later areas. These are just the areas where we thought there was high-level agreement. We'll get to some of the other comments, like yours, Maxim, which is, if there is an appeals process, then those terms should be explained in Terms and Conditions, or at least cite to the one. So thanks, Maxim. The Financial Action Task Force. Thanks. I was not sure what FATF stood for. So thank you for that.

Rubens says, “Acted inconsistently doesn't mention about substance or a procedure appeals. If this is covered in 2.8.2, that's fine.” We'll cover what is covered in appeals when we get to that section in a few weeks' time. Rubens, just make sure that, when we talk about the scope of appeals, you think everything is covered.

Michael asked a question. “So if the covenant not to sue is removed, then we would not recommend an appeals mechanism.” That's a good point because of the way this is worded. We'll get to the point about the covenant not to sue because it seemed like there were some – well, maybe not ... I can't remember if it's a high-level agreement. We'll get to whether we think covenant not to sue should be in there or not. But let's look at the wording. In fact, that's actually a good question because I'm not sure how everyone would respond if there wasn't a covenant not to sue. So let's not lose sight of that question, either. If we can put

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that and make sure we talk about it after we talk about whether the covenant not to sue should be in place. Michael, yeah. I think I got that point, but let's hold onto that question for the comment and we'll come back to it.

The next high-level agreement that we derived from the comments were that the responses generally reported that, if substantive changes are made to the Applicant Guidebook or program processes, the applicant should be allowed some type of recourse, including, if applicable, the right to withdraw an application from ICANN's consideration in exchange for a full refund. A framework for ICANN to make transparent changes to the Applicant Guidebook, as well as available recourse for applicants to change or withdraw applications should be laid out.

There's a bunch of points in here. Maybe at some point it might be worth covering them separately. The work on whether changes can and how those changes can be made really is covered in the predictability model section. I know we still have to discuss that on e-mail, as there is a whole bunch of questions still remaining in that. So I don't want to talk about how changes are made or when changes could be made, just the concept that most people support it, which is that, if there is a change after applications are paid for and submitted, there should be some recourse if changes made through whatever processes which would cause an applicant to withdraw from consideration.

So that seemed to be a high-level agreement as well. Some discussion right now on the chat about the covenant not to sue, which we'll get to in a minute. So we'll come back to that.

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The last high-level agreement that we derived from the comments was: Responses generally supported providing a full refund to applicants in cases where new gTLDs were applied for but later is disqualified because of the risk of name collision.

There's a couple assumptions in here. Number one is the assumption the true risk of name collision will be something that's determined after the application is filed, which may or may not be true, depending on the work on name collisions going on now and other work that may happen.

It also assumes – this should probably be stated – that it's really in cases for which the name collision risk is determined after the application is filed. It sounds obvious, but if, let's say, the guidebook said there can be no applications – I'm not saying it will – for .corp because the risk of name collision is too great or for whatever reasons and someone did apply for .corp, then I would think the normal refund rules, whatever those are, should be in place.

Now, we also talked previously about a system that may actually prevent the application from being filed. So that's a whole different topic, but I just wanted to it to be clear that this is for applications which, after the fact, it's determined to be too great of a name collision risk for delegation.

Going back to the comments, let me – sorry. I know Michael had put a comment in. let me go back. "I think the aspect of the recourse for applicants ties in with what currently exists. If you withdraw at a certain point, you get a certain amount back. I am curious to know if what is being sought here is additional recourse."



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Yeah, Michael, this is additional recourse. In the Applicant Guidebook currently – or the way it was in 2012, I should say – if you applied and there was a change in the rules – or let’s just do this name collision risk. If it was determined that things were a name collision risk, it’s ambiguous as to what the refund would be. It could be as little as whatever stage you’ve already gone through. In theory, if you’ve already gone through everything, including contention resolution, your refund could be very, very, very low because it’s gone through all the processes. So what this is saying is, regardless of where it is in the process, if there’s a name collision risk determined after you file the application, then you should get a full refund because that’s not something you could or should have foreseen. So it’s in addition.

Jim says, “Even if this group recommends removal of the covenant not to sue, does anyone really think ICANN Legal is going to go along with that?” All right, we’ll get there, Jim.

Let me see if there’s any ... okay. Heather says, “I find it hard to support a universe in which the Applicant Guidebook specifically says, “Do not apply for X,” and we refund fees when someone applies for X.” Heather, Google actually submitted three applications, if you remember, which said that you could not apply for, I think, the three-letter strings that matched country-code designations. Google submitted three. Then they had to withdraw that because the system didn’t prevent them from doing it. Their refund, if I remember correctly, was only the portion of the refund that the guidebook said you would get if you withdraw an application after the reveal. So I think that that was so people may do that.

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I'll go to Heather and then Jim.

HEATHER FORREST: Thanks, Jeff. I think Jim might have been before me. Jim, do you want to go first?

JIM PRENDERGAST: Sure. Heather, I think it was just a verbal response to your thing. I think what we're talking about here is not when somebody applies for X and they were told that X wasn't allowed but when somebody applies for X and then, after the application window has closed and the money has been taken, ICANN says, "You know what? You can't apply for X,Y, and Z," and you happened to have applied for Y and Z. So things that changed after the window is closed. I think that's what we're trying to allow for a full refund, through no fault of the applicant themselves.

HEATHER FORREST: Thanks, Jim. I think Jeff's comments ... I actually think there's another situation too here, which is to say it's not just about we specifically identify X but that somehow the AGB is interpreted as prohibiting an application for not specifically X but things in the category of X, if you like.

That said, while I can entirely appreciate the distinction between the two and I realize that what we're doing here is comments and trying to make sense of them, I think where I'm struggling, Jim, in your example is

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that, to my mind, that makes my fear greater in that I really don't want to be encouraging the situation of ICANN ex post saying, "No, sorry. You can't apply for this, this, and this," because that's a slippery slope. But I think none of us want, seeing as how [inaudible]. I don't want to go down that path. So thanks. [inaudible] leave aside the refund with [ease]. [inaudible] see where that is but this contract is unilaterally [alterable] in that way. Thanks.

JEFF NEUMAN:

Thanks, Heather. Jim, did you want to respond to that? Or, I don't know – there's more in the chat, too, so I can go to that.

Okay, I'll go to that. Jim, if you have a response, just let me know. Michael says, "I don't see that happening, but it's still a question that needs to be asked. We are building this policy on thoroughly deliberated principles rather than assumptions." Rubens said, "Jim, the 2012 program parted ways with the GNSO policy in many aspects, but that shouldn't prevent us from saying what we believe should be done." That's on the question of Jim's comment of what Legal would allow.

On name collision risk, do we believe the respondents consider the timing and possibility of a previous knowledge that they might not have considered that? We could say it's unclear if they made such reasoning. The best thing is to have the TLD deployment and then an SSAC letter of the same, being the high-risk name collision string. Jim says, "It's good." "If we're going to do this," Heather says, "and allow ICANN to deny applications ex post, it needs to be explicitly limited to name collision

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risk situations. Even then, I'm not 100% comfortable. But at least that's workable."

In this, we've talked about name collision risk very specifically. The only other thing – that would be an ICANN decision ex post [facto]. The other full refund we talked about – I know we don't want ICANN to change the guidebook certainly willy-nilly for any reason, and we'll get into that more when we talk about changes. If there are changes allowed and that all of sudden makes the application either no longer allowable or so restrictive that it makes – well, I should stop there. I should say if it makes it no longer allowable. Then the question is, what about change that just makes the business model completely changed? Then what was the anticipated? I guess that's the second part to that. We'll get to that in the outstanding items.

As Michael says, ICANN still reserves the right to deny an application. We will talk about that as a point later on in the outstanding items. Let's actually go there now since we are heading there anyway. The first one is the point that Michael was just discussing, and that is that – no, sorry. It's not yet that one. It's – sorry, Michael. We'll wait until the second one. This one is the concept of rejecting applications only under laws, bylaws, or in accordance with the Applicant Guidebook.

The Registry Stakeholder Group actually wanted to more expressly cite the sections in which an application could be denied. That would limit the last part of that: the provisions in accordance with the Applicant Guidebook, not under the laws or bylaws. The Registry Stakeholder Group says that ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law, policy, or

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eligibility an evaluation requirements outlines in Sections 1.2, 2.1, or 2.2, and 3.2.1 in the Applicant Guidebook.

I meant to, before this call, look up what those sections pertain to and why those sections were called out and no other ones were. I don't know if there's anyone from the stakeholder group on the call that can answer that question or at least clarify for others on the call that may not know what those sections are and why there were not other ones included.

The ICANN org concern, I think, went to the circular nature of the statement. So they just asked to clarify the language, which I tried to do with the provisions on the Applicant Guidebook to make it more clear.

Is there any thoughts? Again, this was a new idea from the stakeholder group. Thoughts on that?

Maxim said, "Jeff, read my comments about the guidebook and changing the registry agreement." Okay. Sorry for missing those. While people are thinking, Maxim said that, if the Applicant Guidebook is – I think the words used were "severely changed" – then that should be another reason for a refund. I'm looking – I'm sorry, I'm missing the AGB. Let's see. Sorry, Maxim. I'm missing that – oh, okay. The severe change in the RA. Okay, good.

Let me come back now to the Registry Stakeholder Group comment. There's a question from Maxim as well. "What prevents ICANN from changing the guidebook first and then deny on the new basis?" Maxim, we're going to get into changes to the Guidebook. We've already talked a lot about it through the predictability model. For those discussions,

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which will happen on e-mail shortly, that will play a role as to what changes are allowed and how those changes are can be made.

But I think what we're saying is, if the changes that ICANN makes really change the ability of an application to go forward, then that's really what we were talking about with the full refund. In other words, of course this really wouldn't happen. To use an extreme example, let's say that ICANN said, "We are no longer going to allow applications from applicants whose last name is Neuman," but that wasn't in the initial restrictions and the change goes through whatever process is approved that we recommend and now that wasn't in the initial. Then, if applications were filed by someone named Neuman, they probably should be able to get a full refund because that was not anticipated or pursuant to the terms that they applied under.

Rubens says, "Am I correct in saying that the RySG's new idea would exclude arbitrary refusal of applications by ICANN?" I think the Registry Stakeholder Group comment is saying that ICANN can only reject an application because of where it's prohibited from considering that application under applicable law or policy or the evaluation and eligibility criteria that are spelled out in the guidebook in those sections.

Michael is saying, "I think we need to look at those sections specifically. We want to know [what that changes]." I think that's right. Like I said, I meant to do that before this call. Maybe it's something to ask the stakeholder group, the registries, as to why they singled out those sections and only those section and what would be missing if we adopted—

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KRISTINE DORRAIN: Jeff, this is Kristine. Can I get in the queue?

JEFF NEUMAN: Absolutely, Kristine. Yeah. Please.

KRISTINE DORRAIN: Sorry I'm a late joiner. I'm trying to rack my brain. I'm driving, so I apologize for any background noise. I'm trying to rack my brain. I think Rubens is right. I think really what we were trying to do is limit the universe of even opportunities to make a change to those specific statements in the guidebook as currently drafted, not giving ICANN any wiggle room. Now, I understand you're going to talk at some point about what changes ICANN can make, but I think the ultimate point there was no wiggle room for ICANN. I'm happy to look at my notes after this call and get back to the group. Thanks.

JEFF NEUMAN: Okay, thanks, Kristine. That makes a lot of sense in terms of what was meant by that comment. Yeah, if you could check your notes – not on the road, please. Please drive carefully. But, yes, please get back to us on that. At this point, we're not going to talk about the changes to the guidebook because that's in a different section. I think what you're saying, Kristine, is, when we get through the whole discussion of what changes are allowed and the process by which those changes would be allowed, the Registry Stakeholder Group is still saying that, if there are rule changes which makes an application that was once allowable no

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longer allowable, the registries are not disagreeing with the notion of a full refund. I think that's what you're saying.

KRISTINE DORRAIN: Yeah, you're correct.

JEFF NEUMAN: Thanks, Kristine. So the comment then really is for the changes as opposed to the refund. That makes sense.

Then we'll get to the second that I think was addressed by Michael in the chat. There is a – no. Sorry. That's the third one. The second one actually is an interesting one that we hadn't really considered but certainly some comments did. We said that ICANN needed to disclose a reason for rejecting an application. There was a high-level agreement on that point, but we didn't say to whom ICANN must disclose that, too.

So the registries and FairWinds came back and said that disclosures should be confidential. I'm assuming, since we just paraphrased here, that means confidential between the applicant and ICANN as opposed to confidential from the applicant, meaning it shouldn't be publicly disclosed. Valideus similarly said that disclosure should be applicant exclusively if confidential information of the applicant might otherwise be revealed. So that's on the same wavelength of confidentiality between the applicant and the Registry Stakeholder Group.

Let me ask this group, because this is really not something we did address in our report, what does everyone think? Just to go back to what ICANN did on the last round, ICANN published the results of the



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initial evaluation, which included, I think, the geographic names test and the other evaluation items, and I think very generally stated, the reason why the application failed, if it failed. But it was usually with a one-word or a couple-words description. What does the group here think about the Registry Stakeholder Group idea of confidentiality for the specific reasons for rejecting an application?

I'm not hearing any thoughts one way or the other and am not seeing – we have a comment from Rubens. Justine, I'll get back to your response in a minute. Let me go to Rubens here. "I believe this is relevant and should be added. I prefer the second version, making it confidential only, if it would trigger disclosure of confidential information." But he doesn't have a problem with the first. So Rubens is saying more on the Valideus that the disclosure should not be made if it would result in the disclosure of confidential information.

Christopher Wilkinson, please?

CHRISTOPHER WILKINSON: Hi. Good evening. Actually, good morning, here. I think this confidentiality clause is quite impractical. If ICANN decides that an application cannot go forward because of third-party opposition – there are many grounds for that – that's likely to be quite public. I just don't think it's practical to keep that sort of thing confidential. Thank you.

JEFF NEUMAN: Thanks, Christopher. But what about—

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KRISTIINE DORRAIN: Jeff, can I get in the queue?

JEFF NEUMAN: Yes. Please go ahead, Kristine.

KRISTINE DORRAIN: Thanks. I think what we're referring to here, Christopher, is if the application was denied by ICANN for administrative review purposes. They've gone through and they've said you can't go forward for one reason or another. At that point, it's not public. It's not a contention set. There's nothing that the public is debating. It's just literally at that point between ICANN and the applicant. I don't think there's any reasons for the registries to have to have their dirty laundry aired in front of the whole community if ICANN doesn't want the application to go forward. It would certainly allow ICANN and the applicant to have some better conversations if the community does not participate as a third party. Thanks.

CHRISTOPHER WILKINSON: Yes, but there are whole categories of names that, to date, with due respect to the PDP, you guys have refused to discuss. My political judgment and my long experience in this field is that the opposition to those categories will materialize. If it's not addressed here, it will be addressed after the application guidebook has been published. Thank you.

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JEFF NEUMAN: Thanks.

KRISTINE DORRAIN: Jeff, can I respond?

JEFF NEUMAN: Yeah. A quick response and then – yes, please.

KRISTINE DORRAIN: Thanks, Jeff. So we're still not even talking about categories of applications, Christopher. We're talking about specific applications for specific TLDs. That application could be denied because it's missing Section 13, for instance. The world doesn't need to know about the [inaudible] application or whatever you need to do. But that's not something that needs to be shared with the rest of the community. If there's a big category problem, that is probably a community issue. But we're not talking category problems here. Thank you.

JEFF NEUMAN: Thanks, Kristine. What about the second point, Kristine, which is, what if we said – this, I think, came from the Valideus idea that the general rule would be to disclose the reasoning but only if that disclosure would not reveal confidential information of the applicant. So let's say, if the applicant failed the financial evaluation because the revenue did not – whatever. If that information would be expected to be confidential – the details – it could say, "Failed financial evaluation," but to reveal

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what specifically failed and why might result in the disclosure of confidential information. So that part of it wouldn't be disclosed.

KRISTINE DORRAIN:

Thanks, Jeff. Obviously, I think that's the minimum. But as I recall, the registries were fairly united in their requests on this that, for the applications, the denial reasons be kept confidential. That is what was strongly prefer. Not really hearing any arguments from the community right now for why that shouldn't be. Obviously I think Valideus' position is probably an acceptable fallback. I'd have to ask the registries. Maybe Rubens and Maxim would be able to weigh in more on that. But I think the registries were pretty clear that we didn't think that there was any justification for requiring that information to be made public. Thank you.

JEFF NEUMAN:

Thanks, Kristine. If we can see if the registries – keeping in mind what is disclosed today under the guidebook, it is disclosed (the reason why the application doesn't go forward) and that is made public already. Keeping in mind that that's the existing guidebook, see if the registries would support something like the Valideus position. Again, I want to state for the record I'm not pushing for the Valideus position. I did not write the Valideus – I work for Valideus, but, as I've stated on many occasions, I specifically excluded myself from the process of filing those comments. So I did not have any part in that. But I'm trying to see if that is a compromise[d] position.

Okay – sorry, Kristine?

KRISTINE DORRAIN: Thanks. I just thought you were waiting for a response. Yeah, I'll take that back and then maybe Maxim and Rubens and I can make sure that the registries get asked and find out if we can tolerate the fallback position. Thank you.

JEFF NEUMAN: Thanks. There's also a question here of what Justine says we should reference to what we mean by confidential information. Justine, there was a number of items in the application that were specifically deemed confidentially, both in the questions – it said "This part will be treated as confidential." Of course, the answers then were submitted with the understanding that that information be confidential. So I think that's what's meant by confidential information. So there were specific sections where it said, "The answers to this would be disclosed. The answers to these would not." Oh, okay. So Justine was just making the point that we should add a footnote to the extent that we adopt something like this. Gotcha. Good point, Justine. We will do that. Great.

Now we're getting to the real meat of the discussion, which is the covenant not to sue. This was the – I refer to this section, I think, in the comments, but I don't see it in the margins on the document that Emily ... I think I referenced the section. There were two sections in – whoops. No, I think a little further down. Maybe I didn't. I'm now losing my mind here. I think, in the applicants terms and conditions, there were two sections that dealt with a covenant not to sue when you read them together. Or maybe it was just one section. But anyway, not really

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relevant at this point. What it said essentially was that you cannot sue ICANN for any reason because of any action or inaction that resulted in the rejection of an application.

So that's essentially, to paraphrase what it said on that, the Business Constituency, [Neustar], Jamie Baxter, and at least one Registry Stakeholder Group member supported removing completely the covenant not to sue. The IPC, ALAC, and other registry members stated that the complete removal of the covenant not to sue may cause problems for ICANN And recognize that ICANN has good reasons to keep the covenant not to sue.

Valideus, INTA, and ALAC also suggest another way to deal with this is that you could limit ICANN's liability to a reasonable level if the covenant not to sue is removed. INTA then asks to make it clear that it does not cover cases of fraud, negligence, or willful misconduct, which cannot be excluded by law.

One registry suggested that, if the covenant not to sue is eliminated or modified, parties could be required to use the IRP prior to initiating a judicial dispute. I'm going to skip the next part – well, not skip it. I'm just going to go see the comments on this. The comments basically are all over the place with some saying we should eliminate the covenant completely and others saying we should keep it but we should limit it in different ways. Just looking at the comments, the chat ... What are thoughts? I think, with the exception of the BC, Neustar, Jamie, and at least one of the registries – I don't know how many that is. So some of the Registry Stakeholder Group. Other than those, the majority of

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commenters stated that the covenant not to sue should remain in place but should be restricted in certain ways.

I guess I probably should have read the next comment, which is highlighted, even though we'll talk about the specific appeal mechanisms later on. At least one Registry Stakeholder Group member opposes creating broader appeals that would look into whether ICANN violated the bylaws by making a certain decision. [STED] believes that the revised accountability mechanisms already in place should be given the chance to succeed. Can we scroll down a little bit more? Sorry. IPC says, "If the appeals mechanisms does not address concerns, add reservation [inaudible] cases of ICANN acting outside of its determination requirements."

Basically – I should also provide a little bit of context for this, too – what we're saying is that, if there's an appeals mechanism – we'll talk about what this is on a later date – then most of the commenters felt comfortable having the covenant not to sue but still wanted some limitations on that. I think, if there are no appeals mechanisms, then the view would be very different from a lot of those commenters that said that they would not object to covenant not to sue.

Any comments on that?

Cheryl is saying she's listening on chat. I'm just going to take one second. I got to open the doggy door for my dog to get out. You'll hear a beep, but don't worry about that.

Okay, thanks. Anyway, sorry about that. There are no comments. [inaudible] surprising.

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KRISTINE DORRAIN: Jeff, this is Kristine. Can I get in the queue?

JEFF NEUMAN: Yes, please.

KRISTINE DORRAIN: Thanks. I realize that the registries are all over the board on this, but let's back it up a level because I'm not sure that we have any indication to form the basis of a belief that a covenant not to sue is even legally valid. If we go ahead and say, "Yeah, let's leave that in there," what do we do with respect to that? I'll just open that up for discussion, I guess.

JEFF NEUMAN: Anyone have any thoughts on that? Rubens says, "The covenant not to sue has been upheld in some legal proceedings." I think what Rubens is referring to is most recently in Ruby Glenn vs. ICANN. It was upheld in the ninth circuit court of appeals. Again, that's just one court. At the end of the day, it may or may not be legally enforceable.

Kristine, what if we stated that we are not making any legal determination – obviously we're not opining on the legality of such a clause – but if this clause does remain, these are the limits we would like to see on it. I'm trying to figure out if there [is a middle] ...



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KRISTINE DORRAINL

Jeff, I understand the question you're asking. My concern, however, is, for those of us who don't actually believe that the covenant not to sue is valid, it's really hard to then say, "Well, let's pretend it is and [inaudible] put it in the guidebook like it is." We feel like the guidebook should be legally accurate and should reflect the state of the way things are. I think ultimately that's the sticking point.

JEFF NEUMAN:

Thanks, Kristine. I totally understand the difficulties. You don't want to argue in the ... sorry, I'm tired now. So I totally understand that point. If it is upheld at some point, I think what the group had come out with that was in Work Track 2 – I think that was in Michael's group. So, Michael, if you are still on and can jump in, I think that that group recognized that ICANN would probably insist on that provision. I think the way the group had discussed was to make sure that there were limits placed on that provision. So I'm looking for – okay, Jamie has got his hand raised.

JAMIE BAXTER:

Thanks, Jeff. Sorry for joining late tonight. Because I wasn't part of the original development of the Applicant Guidebook many years back, I'm curious as to why this provision to not sue was even included or what was the rationale behind it. Is there any background that can be shared here as to what put that in place to begin with?

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JEFF NEUMAN:

Yeah, sure. It was always discussed that there would be terms and conditions governing an applicant when they filed the application because they wouldn't be covered by a registry agreement until that point in which they were able to sign the registry agreement. So at the application stage, ICANN had discussed that they would have an agreement. The community came back and said, "Well, we want to see that agreement upfront." I'm not sure which version of the guidebook this agreement first showed up in, but it showed up. The community, as you can imagine, argued strenuously against this provision because of the legal points that Kristine is raising – that is seemed to be unconscionable and not enforceable – but ICANN insisted during every revision to the guidebook that this remain and that it needed this.

Again, I'm not offering an opinion as to whether I agree or not. If you go back and read the different versions, they'll say that they need this as a non-profit organization, that they subject themselves to unlimited liability or claims in court out this process and that there's bound to be parties that don't agree with decisions made by ICANN and don't want to be going to court all the time.

So that was the rationale. It was fought on many occasions. I can tell you personally that, in my previous employment, I certainly fought that tooth and nail, but at the end of the day, it was something they insisted on. So that's why it's there.

Any thoughts or questions?

Rubens says, "So it's not" – oops; sorry, just got scrolled – "only ICANN org that seems to favor the existence of the" – right. Just to clarify, it's

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not just ICANN org that seems to favor the existence of the covenant not to sue. There were some commenters in there that said that, if there's an appeals process, that's acceptable to the community and that they did see reasoning for the covenant not to sue to protect ICANN as an organization. So Rubens is correct that that were comments in favor of that as well.

Let's then move on to the next set of bullets. I think the next set of bullets – the next two sets, which are highlighted. There may be more than two sets. If we can scroll down ... yeah. Those two sets – the ones that start with "Recourse if substantive changes are made to the Applicant Guidebook or program processes," and then the refund, which we talked a little bit about before – I think really are appropriate to be referred to other sections that we talk about. So the recourse if there's substantive changes to the guidebook we'll discuss when we talk about the predictability process and when changes can be made and how changes can be made. The refunds we did talk about just before. But we will have to address the whole refund schedule at some point later on in our conversations.

If we skip then to the additional suggestions, two of those I highlighted because I think – well, actually, let me go to the first one first. The ALAC had a new idea that said that the terms and conditions should specify all applicable routes, procedures, costs, and timelines for any challenge or appeal mechanism.

A question to the ALAC is as to whether that means that this terms and conditions Module 6 needs to specify all the routes or just whether it just needs to be in the guidebook in general. If we can just get their

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response to that. My assumption was that it was the guidebook in general, but I may be wrong on that.

The other two comments that came out was that, from the BC, applicants should transparently declare whether they intend to operate the registry or whether they anticipate selling pending applications to others. The registries state to specify the procedures and timeframes for handling excess application fees. Both of those, I think, are covered or should be covered in other sections that we talk about.

I think what the second comment goes (the BC comment) – I wrote this in a comment – was really about the transferability of an application. The terms and conditions already do state that an application is non-transferable. I don't know if you can scroll over, Emily, to the comment. I put in what the T's and C's do state. The applicant may not resell, assign, or transfer any applicant's rights or obligations in connection with the application.

Maxim is saying, "I think there referring to post-registry agreement." I think this does only refer to applications because it does use the word "applicants," although you're right: it does talk about intending to operate the registry. So I guess there's two parts. The non-transferability of the application is in the terms and conditions, and then any changes after that is governed after the registry agreement is signed. So there's that.

Let me ask if there's any comments.

Jamie, please?

JAMIE BAXTER:

Thanks, Jeff. Just looking back slightly from the discussion we were just having, for those who supported keeping the covenant in place to not be able to sue, I just want to make sure I have a full understanding that the assumption – and they would still not be able to sue, assuming that there's some sort of appeals mechanism. Is their understanding that the appeals mechanism involves an independent review? Or it just stays in the same line that all of the current accountability mechanisms due where ICANN ultimately makes all the decisions? I'm curious to know if that was part of that discussion, part of that assumption, or if it wasn't.

JEFF NEUMAN:

Thanks, Jamie. Good question. My interpretation of how the way that Work Track 2 had operated – Work Track 3, I think, dealt with appeals – and what we stated in the initial report was that the appeals mechanism was in addition to the accountability mechanisms. The accountability mechanisms, the scope, and procedures are defined in the bylaws already. It was recognized by Work Track 2 or 3 – sorry, I'm blanking on which one – that substantive issues of whether the evaluators got something right or wrong was not necessarily covered in the scope of the ICANN bylaw accountability mechanisms. So the assumption was that the covenant not to sue would be okay – nobody liked it, but it would be okay – if there was a substantive appeals mechanism that was in addition to the accountability mechanisms already in place.

I don't want to get too deep into that because I generalized and it is a little bit more specific than that. We'll talk about that when we get to

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the appeals. But, no, it was not just the accountability mechanisms under the bylaws today.

Rubens says, “Some commenters were willing to have the covenant only if the appeals mechanism was there, while some others did not put that requirement. So a possible composite recommendation would have to include such an appeals mechanism to achieve consensus, in my personal non-leadership view of such consensus.” Rubens, I think that is an accurate statement. As I said earlier, I’m not sure that those that initially supported or would be okay with the covenant not to sue language in there, if there was no appeals mechanism other than the accountability mechanisms – I’m not sure that those supporters or non-objectors to the covenant not to sue would still be not objecting to that covenant not to sue. Hope that made sense.

Okay, good. So I think we’ve made some progress there. I do want to start the – let me check the queue; okay – next one, which is application queuing.

KRISTINE DORRAIN: Jeff, this is Kristine. I have a question.

JEFF NEUMAN: Sure. Go ahead, Kristine.

KRISTINE DORRAIN: Thanks. Just to make sure – I think I heard you properly – the comments that people were making about the appeals mechanisms and the

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covenant not to sue is still tabled, right? We haven't exhausted that topic? I was holding my comments.

JEFF NEUMAN:

We haven't exhausted that because I think the two subjects – appeals and this one provision (the covenant) – go hand-in-hand. So, to the extent that we can figure out or come up with consensus on the appeals mechanism, we may then want to address – well, whether not we can come to consensus on appeals, we probably want to circle back to this.

KRISTINE DORRAIN:

Okay. Thanks. Then can I just make my comment to you since others have? I appreciate it. I just wanted to note that one of the concerns is – yes, we have existing accountability mechanisms and, yes, there's currently a covenant not to sue – we're creating an appeals process that handles all of the concerns: staff issues, bylaw issues. It's duplicative of the fact that there's already a new IRP rule. So I think that we just need to consider, before we rush off to say, "Okay, great. We'll create an appeals process. It will solve all of our problems. We win." ... Let's be careful. We just created a whole new IRP process. Why create a second thing (appeals) on top of it when we haven't figured out if the IRP process works yet? So I just want to make sure that's in the record while we're talking about this issue. Thank you.

JEFF NEUMAN:

Thanks, Kristine. Thanks for getting that in the record. I think, when we get to appeals, it seemed to us that there was high-level agreement that

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the appeals mechanism was not to be a substitute for the accountability mechanisms. There seemed to be agreement at a high level for the appeals being limited to only certain types of, I guess, claims. Is that the right word? So I think that you'll see that reflected when we get to appeals, but I didn't want to get into the substance of that section. But I think your comments are put in and I think will come up again when we do talk about appeals.

Justine says, "Before we start application queuing, could you reply to my earlier question" – oops – "which was whether we need to revisit terms and conditions after we get through applicant change request?" Justine, I'm not 100% sure we need to revisit the full terms and conditions after we get through the change request because the provisions here make an assumption that we come up with an applicant ... So this is not for applicant change requests. The change request referred to here was ICANN's changes to the process or the guidebook after application are filed, not an applicant making a change request.

I hope that makes sense. There's a difference there. So it's not an applicant saying, "I want to change my application to have a different backend provider." I don't know. Something like that. This is changes by ICANN to the guidebook or registry agreement from that side. I hope that makes sense. It's not applicant change request.

I'll just give a second to respond to that.

Justine is saying, "Sure. So as long as applicant change request does not then result in any changes ICANN makes to the terms and conditions." Yeah, I'm not sure how an applicant change request would result in



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ICANN making a change to the terms and conditions, but we can put a footnote there to see if that comes up or how that might come up.

There are some comments here on the appeal process. I'll ask that you hold those until we talk about the appeals process.

Let's go on then to the queuing section. On this one, the policy goal is pretty, again, non-controversial, pretty clear. Any processes that are put into place for application queuing should be clear, predictable, and established in advance. I'm not going to read Rubens' comment. If you want to read that, you can do so on your own time. So the high-level agreements on this ... oh, is anyone [inaudible]? Kristine?

KRISTINE DORRAIN: Yeah. I was just going to ask you to humor us.

JEFF NEUMAN: All right. Rubens' comment says, "Make digital archery great again."

KRISTINE DORRAIN: Excellent. Thank you, Rubens.

JEFF NEUMAN: So there seemed to be high-level agreement on the following four ideas. One, ICANN should not attempt to create a skills-based system like digital archery to determine the processing order of applications. Two, ICANN should apply again for the appropriate license to conduct drawings to randomize the order of processing applications. Three,

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ICANN should include in the application amount the cost of participating in the drawing or otherwise a prioritization number during the application process without the need for a distinctly separate event.

Maybe to include some of the comments or the clarifications that what we were talking about was that applicants could include the payment in with the application fee initially. So I think we need to clarify that that's really what's in there and that it's not mandatory to participate in the drawing. Because I know we had that discussion in – I can't remember if it was Kobe or Marrakech. We had that discussion somewhere, so we'll make sure that that's reflected.

The last one was: All applications submitted in the next round, regardless of whether delegated or not, must have priority over other applications submitted in any subsequent rounds' application windows, even if the evaluation periods overlap. That seems to be most of the commenters did support.

Now, going into – let me see if there's any questions on those, actually. Comments/questions?

All right. Getting down to more specifics, application draw. This is on the items to discuss. These comments refer to the method that was used in 2012 or that was eventually used in 2012. Some support for maintaining the same application draw method ultimately used in 2012 with the optional purchase of a ticket for the prioritization draw. That was supported by the BC, the BRG, and the ALAC. ALAC did want to make sure, however, that the cost of the ticket would not be cost-prohibitive. Mark Monitor's was the only comment that we could see that diverged

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completely from that, which said that all applications should be randomized regardless of, I guess, paying to be in the draw.

Is there any support, other than Mark Monitor, just thinks all application should be randomized regardless of whether they purchase a ticket [inaudible]?

KRISTINE DORRAIN: Jeff, this is Kristine. Can I ask a question?

Jeff, this is Kristine. Can I ask a question?

UNIDENTIFIED FEMALE: Jeff I show that your mic is unmuted, but we are not able to hear you right now.

One moment, please. It looks like we did lose him.

Give me just a moment – oh, here he is. Are you back, Jeff?

JEFF NEUMAN: Yeah. Sorry about that. I don't know why my computer just decided to spontaneously reboot.

UNIDENTIFIED FEMALE: Uh-oh.

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JEFF NEUMAN: Thank you, Microsoft. Sorry. Where did I lose you?

KRISTINE DORRAIN: I was asking to ask a question.

JEFF NEUMAN: Cool. Ask the question.

KRISTINE DORRAIN: Great. It's a clarifying question, I think. I think, drawing from my recollection of the registry comment, when we're thinking about randomization, we were in favor of the fact that there was an initial randomization, as I recall. I beg people to jump in if I'm wrong. From there, there would be a limited opportunity if you wanted to pay to buy an earlier spot in line – not necessarily an endless but a limited opportunity for that. From there, you could choose not to because not every applicant was ready to go on Day 1. So you didn't need to be the first one out of the gate, whereas other people were farther along in their business plan. So I think we wanted to maintain the flexibility.

So I just want to make it clear. When we're talking about buying a ticket, we're not talking about a purely ticket-based system. We're talking about a feature or an enhancement to what would be the baseline of a randomized system. Is that the correct understanding?

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JEFF NEUMAN: I think what we are talking about here – sorry I’m not online. I’m on my mobile phone, so I’m not seeing the chat. We are just talking about the way that it as in 2012, which was essentially that, putting aside the priority for IDNs at the moment, if you wanted to purchase a spot in the draw, then you were included in the draw. If you didn’t, then you were included in a second – I’ll call it, for lack of a better word – batch. First, they randomized all the applications for those that participate in the draw and then afterwards they randomized the applications for those that did not elect to be in the draw. Those all had priority numbers after the ones that did purchase a ticket to the draw.

KRISTINE DORRAIN: Thank you, Jeff. I appreciate the clarification.

JEFF NEUMAN: Emily, is there anyone else is in the queue right now that’s got a question? I’m just trying to ...

EMILY BARABAS: Hi, Jeff. We don’t have anyone in the queue, but we do have some comments in chat. Would you like me read those out?

JEFF NEUMAN: Yeah, please. Sorry about this.

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EMILY BARABAS:

That's okay. Heather says, "It seems to me that our options in discussion here are limited by California lottery law." Justine agrees. Rubens said, "You asked people if someone agreed with Mark Monitor. It seems no one agreed." Jim says, "I assume ICANN has all the legal work they did from the last round that would help speed things up." Heather agrees and says, "I just don't know how to respond as to whether I agree with Mark Monitor because I don't think we know the full extent of what is legally permissible." Jim says, "I think we should get an understanding from ICANN Legal as to what might be allowable now as opposed to in 2012, if any changes have occurred since 2012. Rubens says, "Just to make Jeff's life easier, another idea not listed is for applicants to choose from "I want to participate, and I want to go as early as possible," or, "I want to participate, and I want to go as late as possible."

From the staff side, just a reminder that I think there was an informal question put out to ICANN Legal about whether the same process could be possible in future subsequent procedures. I think preliminarily ICANN Legal said, "We haven't done a full new analysis at this stage, but there's no indicators initially that something would need to be completely different. But, indeed, a more in-depth legal analysis would need to take place before anything could be set up for Subsequent Procedures." Thanks.

JEFF NEUMAN:

Thanks, Emily. Thanks for pointing that out. I was going to say that as well. As someone who, unfortunately, again, is from the previous employer viewpoint, I know the California lottery laws probably better than I should. I could tell you right now that lottery laws do not change

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very often. In fact, these same laws have been in place since, I think, the mid-1900s. So, while in theory there could be some changes, my assumption is that law probably has not changed to such a dramatic effect. But, yes, ICANN did respond and say that they informally did not see an issue.

Justine says in the chat – I just had it pop on my mobile device ... Actually – now it just went away – Emily, can you read Justine’s comment?

EMILY BARABAS:

Sure, Jeff. Justine says, “Jeff, good to know. Can we get that confirmation from ICANN Legal, please?” So I think there’s a little bit of a, just from the staff side, little bit of a chicken-and-egg situation, where there’s a final legal analysis that needs to be done before anything can be implemented and then there’s the initial feel from legal that they’ve provided to guide some of the policy discussions. So I don’t think there’s going to be a final answer from ICANN Legal on exactly how things can be implemented under the law until we get closer, I think, to the implementation phase. But if there is specific questions that need to be formulated between now and then, we can certainly pass those along.

JEFF NEUMAN:

Thanks, Emily. I was going to say something similar: we’re not going to get any other kind of response from ICANN Legal at this point, other than the one response we’ve already gotten. So I think we need to just go into this with the assumption that it will again be doable and we could reserve the right: if, during the implementation phase there are

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reasons for which this method cannot be employed, then we may need to then do some quick policy development work on another. But I don't think we should spend a lot of time at this point discussing a contingency that we don't know would or would not exist.

Any other comments in the chat on this?

EMILY BARABAS: Nothing at this time.

JEFF NEUMAN: Okay. I think this is a good spot then to leave off on. We'll try to discuss some of this e-mail. I think the biggest issue that's still remaining is the new idea on whether priority numbers can be transferrable. Long story short, it did have some support from some groups. In other words, if you were given a priority number and you apply for 100 applications, you could change around the order. But there was substantial disagreement with that from other groups that were worried that it could be subject to gaming. So, long story short, at this point, I don't think that idea has consensus or is likely to get consensus. But we can discuss more on the e-mail list. If it looks like it has a chance to get consensus or additional support, then we could include that in a subsequent discussion.

Emily, I don't know if you've already done this because I can't see, but can you just post when the next meeting is on Thursday? Emily, can I give it to you to close it out? Because I think that's it.



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EMILY BARABAS: Hi, Jeff. I'm sorry. My dog is scratching her cone of shame at the moment after some surgery.

JEFF NEUMAN: Uh-oh.

EMILY BARABAS: Our next meeting in August 8<sup>th</sup> at 20:00 UTC. I just wanted to note that there are a couple of final comments in the chat, one from Rubens, saying the priority transfer is sure to be controversial. Justine said, "So any recommendations that this group makes on new ideas will be subject to it being permissible under California lottery law."

If there's not anything else – no AOB – then we're at the end of the call, so I'll pass it over to Andrea to close.

ANDREA GLANDON: Thank you. This concludes today's conference. Please remember to disconnect all lines and have a wonderful rest of your day.

JEFF NEUMAN: Thanks, everyone. Bye.

**[END OF TRANSCRIPTION]**