

**ICANN
Transcription
New gTLD Subsequent Procedures PDP-Sub Group B
Tuesday, 18 December 2018 at 17:00 UTC**

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Operator: I have the recording started. Thank you.

Michelle DeSmyter: All right. Thanks so much. Well, welcome, everyone. Good morning, good afternoon, and good evening. And welcome to the New gTLD Subsequent Procedures Sub-Group B call on Tuesday, the 18th of December, 2018.

On the call today, we do have Cheryl Langdon-Orr, Christa Taylor, (inaudible) Wilson, Jeff Neumann, Jim Prendergast, Kristine Dorrain, Michael Casadevall, Rubens Kuhl, Susan Payne. If anyone has joined on the audio bridge just now, would you please let yourself be known now?

All right. Thank you. Hearing no names. We do have apologies from Katrin Ohlmer and Justine Chew.

From staff, we have Emily Barabas, Steve Chan, Julie Hedlund, and, myself, Michelle DeSmyter.

As a reminder, if you would please remember to state your name so it appears clearly on the transcription. Thank you ever so much.

And back over to you. Please begin.

Rubens Kuhl: Thanks, all. Just to confirm we are now going to continue Application Submission Period. But it seems that the document is not currently marked what was completed or not. So, we will refer to staff to which items did went last time.

Thanks, Emily. Emily told us that we are at 2.5.3.e.2. That also see what line that is for making it easier to follow in the Google Doc, that is line 39.

Well, it's nice for the responses there, the question 38. 2.5.3.e.2 asked, "Is the concept of a fixed period of time for accepting applications right approach? Why? Or why not?" And asked if that helped facilitate a predictable schedule for submission and objections comments.

The first comments are comments in agreement, from Jamie Baxter of dotgay LLC, Brand Registry Group, Business Constituency, International Trademark Association, and NewStar.

For those with a different approach, we have a comment from ALAC suggesting a new idea, and the specific new idea was that ALAC believed that "batching applications for assessment holds greater importance than a fixed period for accepting applications." So, it's more like a consideration of perhaps there is some number-based; like, as soon as we got "x" number of applications we start a batch. So, this seems like a new idea which should then be referred to the full work group.

Next, in line 45, we had an idea from the Registry Stakeholder Group, a new idea comparing to the report although it's not – it's something that was considered during deliberations – of a rolling first-come, first-served system that would be a continuous process that would be open. But they were open to a hybrid approach which was also most of the Work Track deliberation that shouted (ph) forth: possibly having a window of applications to address pent-up demand and then go for a rolling period. So, this is – and they mentioned something they already mentioned in CC2, which they kindly provided the link to their comment. And even though it was something that was discussed, compared to the report it's a new idea also to be referred...

Michael Casadevall: Michael Casadevall.

Rubens Kuhl: Michael, it seems your audio bridge is open. If you could mute your line, that would – we would thank you for that.

So, we were talking about the Registry Stakeholder Group proposition that was also a new idea.

Any comment on either the agreement items or the new ideas we've had in this item, which is the – seems to be the last item in 2.5.3?

Going once, going twice.

We can now close 2.5.3 and look at 2.5.5. 2.5.5 is two tabs to the right in the Google Doc, and it discusses terms and conditions, a discussion originally from Work Track 2. And the first item we have here is 2.5.5.c.1, at line 3, which stated that Work Track 2 believed that there should continue to be a Terms and Conditions document separate and apart from the Registry Agreement. Although the majority of the terms and conditions contained in the 2012 round were generally acceptable, the Work Track is considering proposing changes that are described in each item of the initial report.

So, here we have an overarching comment from NewStar supporting these recommendations.

And so, now we go to each specific recommendation. At line 5, we had Section 3 of the 2012 Terms and Conditions stated that "ICANN may deny any application for any reason in its sole discretion." Also allows ICANN to reject an application based on applicable law. And to that point, the initial report contained item 2.5.5.c.2, which stated that, "unless required under specific law or the ICANN bylaws, ICANN should only be

permitted to reject an application if done so in accordance of the terms and conditions of the Applicant Guidebook."

We had agreement, comment agreeing with that from ALAC, Brand Registry Group, Business Constituency, International Trademark Association, NewStar, FairWinds Partners, Valideus, and Intellectual Property Constituency.

From the Registry Stakeholder Group, which is the next comment, we have mostly an agreement, but the Registry Stakeholder Group proposes a specific change to the language. And what they said is that ICANN – what they suggested was, "ICANN reserves the right to reject an application that ICANN is prohibited from considering under applicable law or eligibility and evaluation requirements outlined in the specific sections of the Applicant Guidebook." That's a new idea, although agreement, suggesting some different wording, which should then be referred to the full working group.

The next, at line 15 of the overall spreadsheet, is a comment from ICANN organization, itself, that they have a concern, which is more of a request for clarity, that they understand "the intention of this preliminary recommendation to be that ICANN Org should only be permitted to reject an application in accordance with the terms and conditions of the Applicant Guidebook which is within the law and ICANN bylaws. If this is the correct understanding, the PDP Work Group might want to consider revising the word of recommendation for clarity."

So, this is also a suggestion of changing wording, although it doesn't come in with the specific word suggestion, just a suggestion to add clarity. So, that could possibly be handled in combination with the Registry Stakeholder Group (inaudible) to adopt that language, to propose some different language but, over all, to enhance clarity in that process.

Seeing that there is no hands so far, let's go to the next comment, which is 2.5.5.c.3. "In the event that an application is rejected, the ICANN organization should be required to cite a reason in accordance with the Applicant Guidebook or, if applicable, the specific law and/or ICANN bylaw for not allowing an application to proceed."

That received agreement from ALAC, Brand Registry Group, Business Constituency, International Trademark Association, NewStar, Intellectual Property Constituency. And these are the ones with only agreement.

Then we go to some comments where they mostly agree with this. The Registry Stakeholder Group suggested that such disclosure should be made confidentially to the applicant and not published. This is a new idea that will be referred to the full work group.

And this is also what is stated in a comment by FairWinds Partners and mostly what Valideus said, although Valideus was mostly concerned with the possibility that in giving the reason for denying the application that could end up publishing confidential information. So, the two previous comments were concerned with confidentiality in any case, and the Valideus comment is concerned with confidentiality in if the reasoning relates to confidential information.

So, these are the comments we have so far from 2.5.5.c.3.

And we have a hand up from Jim Prendergast. Please go ahead, Jim.

- Jim Prendergast: Thanks, Rubens. Sorry to go back. You moved on before I could get my hand up. Just on that comment on line 15 from ICANN on the previous section. So, what is the path forward on that? Are we supposed to sit down with ICANN and draft language that's clearer? I don't know how we're going to handle that. Thanks. Because it seems like everybody else is in agreement in that state, in that instance. So, I'm just trying to figure out where we go from here.
- Rubens Kuhl: Thanks, Jim. Although this is a matter for the full working group, I can just make an educated guess that any rewriting that the membership believes that made that section clearer would attend ICANN Org in that regard. ICANN Org had the opportunity to make for more elaborate comments, something specifically perhaps proposing some wording or calling our attention to specific lacks of clarity in that, in that sentence. They didn't. So, they end up letting our membership decide what is clear or not. And if they don't find what is in the final report clear enough, they can comment again. It's a lost opportunity by them, but I don't see anything we can do at this point.
- Please go ahead, Jim.
- Jim Prendergast: Thanks, Rubens. I respectfully would disagree with that approach. I understand what you're saying, that they could have provided more detail in their comment. But to me, this just seems like an opportunity for us to reach out and work on this together and get it – everybody – even ICANN admits that they understand where we're going with this. It's just – I think a few people could knock it out with Trang or somebody else just to ensure that there's clarity, and we could table it pretty quickly at the working group level. I think going the opposite way will just lead ICANN to dig in and it won't yield any results.
- Thanks.
- Rubens Kuhl: Thanks, Jim. I hope they read the transcript at least from this session and move ahead.
- So, moving on to the next item, which was 2.5.5.c.4, which is line 27 – well, line 27 are the comments. The initial report section itself, it's at line 26, saying that "Section 6 currently gives ICANN a broad disclaimer of representations and warranties but also contains a covenant by the applicant that it will not sue ICANN for any breach of terms and conditions by ICANN."
- Work Track was not comfortable with the breadth of that covenant of not to sue, and Work Track members disagree with that covenant not to sue comment. But if the covenant not to sue is maintained, there should be a challenge/appeal mechanism established beyond what's in General Accountability provisions, in ICANN Request for Reconsiderations, IRP, complaints office, etc. That mechanism should look into whether ICANN acted inconsistently or failed to act consistently with the Applicant Guidebook.
- While some of these responses are characterized as an agreement, there are – the problem is that this actually is not that definitive. So, we can look at which thing is every comment they're agreeing to, or not.
- Intellectual Property Constituency says that ICANN has reasons to maintain the covenant not to sue. They don't – they actually disagree with the idea of removing the covenant not to sue. But they support an appeals mechanism. So, even though for a different rationale, they end up supporting what's currently in the initial report.
- We have comments agreeing from the Business Constituency and from NewStar.

And we had a comment from Valideus agreeing to that provision but adding a new idea, which would be a limitation of liability on a reasonable level. So, even though they are not supporting the idea of just keeping the covenant not to sue as it is, they are supportive either of a due process or a limitation of liability. So, this is somewhat of an agreement and somewhat of a concern and somewhat of a new idea. And all of this needs to be referred to the full working group.

Next, we have a comment from International Trademark Association, saying that if a covenant not to sue is kept then there should be an appeals process, and they also propose the idea of limiting liability, as the previous comment also did.

ALAC commented that they believe that if the covenant not to sue was supposed to be removed, then a reasonable limitation of liability clause must be simultaneously put in place, which is similar to the previous comments. But they add, "financial stability of ICANN is a core joint responsibility of the ICANN community which cannot be put at risk from an unmitigated removal of the covenant to sue as an alternative program." So, this is more as a rationale to what they suggested.

And we had very diverging comments from the Registry Stakeholder Group, one basically following the – agreeing with what was proposed by the work group. And the other is that the covenant not to sue was key in limiting ICANN liability. So, it goes to the other part. So, the ideas are very diverging among themselves. So, they end up talking by themselves to what they mean.

Susan, please go ahead.

Susan Payne: Thanks. Hi. It's Susan Payne. Rubens, I'm not sure that the comment from Valideus is characterized correctly. My reading of the question or my understanding of the question was that it was asking specifically if the covenant not to sue was maintained, then proposing that there should be an appeal or challenge mechanism. But I think our point was that whilst we agree with that, we were actually also saying we think there should be an appeal or challenge mechanism, anyway. So, to that extent, the bit in green is kind of blue. It's green, as well, but we're actually saying we think there should – irrespective of what gets decided on the covenant not to sue, we think there should be an appeal process.

Rubens Kuhl: Susan, how would you describe what you're thinking it should be interpreted at?

Susan Payne: I'm saying I think perhaps it's – the text that's in green, I think is blue.

Rubens Kuhl: You mean the...

Susan Payne: Yes, yes, yes. That will do. That's good enough.

Rubens Kuhl: Okay.

Susan Payne: Thank you.

Rubens Kuhl: Thanks, Susan.

Oops. Now I was muted.

And I believe Susan is now an old hand. And Kristine, please go ahead.

Kristine Dorrain: Hi. Thanks. This is Kristine Dorrain. I want – I think we are on the Registry Stakeholder Group comment, and I think one thing that's a little bit confusing is that there's a couple

of different viewpoints here. And I think the way that it's been characterized is that the divergence is opposition to a broad appeals in support of a limited one. I think that the red text at the bottom is probably true, but the red text at the top specifically says "no broader appeals mechanism that looks into the bylaws" and specifically recommends "not creating a substantive appeal mechanism and giving the IRP a chance."

And so, I think that while part of this – the Registry Stakeholder Group was really divergent on this comment. So, I think while part of it does say a limited appeals mechanism would be fine, part of it actually says no appeals mechanism at this time, at all. So, I think that the divergence needs to be characterized as two separate divergences here to go to the broader working group. I know we're not going to get into the substance of it, but I just wanted to – I don't think the characterization is exactly right here.

Thanks.

Rubens Kuhl: Thanks, Kristine. Do you think we need to go to Divergence 1 and Divergence 2? Would that be enough?

Not hearing back from Kristine, I'll let...

Kristine Dorrain: Sorry. I said "yes, thanks" in this chat. Sorry, Rubens.

Rubens Kuhl: Oh. Thanks, then.

So, with that minor correction to this line which will be describing the different divergences, we can then move to 2.5.5.c.5, which talks about ICANN's ability to update the Applicant Guidebook. "The Work Track generally agrees to the extent that substantive changes are made to the Applicant Guidebook or program process, applicants should be allowed some type of recourse, including, if applicable, the right to withdraw an application from ICANN's consideration in exchange for a refund. A framework for ICANN to make transparent changes to the upcoming Guidebook as well as available recourse to change applications or withdrawal for applications should be laid out."

We have agreement for that from ALAC, Brand Registry Group, and Business Constituency.

And although we have the next color, though they were listed as agreement, they actually have some concerns that I believe probably are better captured as concerns. One is from FairWinds, that, "However, FairWinds would like to emphasize that ICANN should not be able to make substantive changes without the ability for applicants to object or be offered some type of recourse. Predictability for an applicant should always be a priority."

We also have some restrictive comments from Valideus that they support "applicants have the ability to make changes to their applications to address substantive changes to Applicant Guidebook or to withdraw their application for a full refund." So, this actually goes to two extents. One is to respond to changes to the Guidebook with changes to the application, and the opportunity for a full refund. So, although they are in agreement, they have some conditions after that.

We had also an agreement from NewStar and a comment from the Registry Stakeholder Group, where it was not very clear whether it was an agreement or not. Staff took that as an agreement but providing some new idea, some details that "in those cases, ICANN should offer a time period in which applicants may prepare for or object to winning applicants, any updates in the Applicant Guidebook." They mentioned one part of that

wouldn't be possible for ICANN to change what's being application fees, and characterize that "any legitimate change must have good cause and ICANN should provide reasonable warning to all new gTLD applicants before any updates in the Applicant Guidebook takes effect to allow applicants a level of predictability while also giving ICANN the ability to modify and adapt if the circumstances arise."

And they also make a similar comment as Valideus of "allowing applicants to update their application to have their own opportunity to update their application if they so desire, but limited to addressing that change." So, this is more of an implementation guidance for the overall principle that the Registry Stakeholder Group seems to agree.

And Susan, is that an old hand or a new hand?

It was an old hand.

So, we can now go to the line 42, which is a comment from the International Trademark Association. Well, staff also inferred that they were in agreement, and they have a concern that it would be essential to determine which changes to the Guidebook or to the program have a material impact on applicant situations and would allow the applicant a recourse. They mention it would be "essential also to determine the recourse mechanism, define the extent to which the applicant may be refunded, and if a full refund should apply." So, while they have some concerns, they are probably – they can probably be addressed in implementation. But their concerns need to be noted, as well, which will be for the full working group.

And we have another comment from ICANN Org. And they have a specific request for clarity, that "it would be helpful if the PDP work group could clarify the refund referenced. This preliminary recommendation is in accordance to the refund schedule of the program, or is this in reference to a full refund?" This is a fair question since most of the refunds mentioned have not qualified if they are full refunds or not. And depending on when in time that refund is requested, there is usually a schedule. And if this refund is going beyond that schedule, if it would go to a full refund or to a higher level of refund than permitted in that schedule, they are probably right in asking whether that's the case or not. So, that's a probably welcomed question that the work group indeed should address.

And let me pause for one second to see if anybody has any questions on this or any comment.

Seeing none, let's go to 2.5.5.e.1. The excerpts from the report say that, "Are there any other changes that should be made to the Applicant Terms and Conditions that balances ICANN needs to minimize its liability as a nonprofit organization with an applicant's right to a fair, equitable, and transparent application?" So, this is mostly a call for new ideas. This is not something that agreeing or disagreeing was expected.

The first new idea comes from ALAC. They mention that "all applicable routes, procedures, costs, and timelines for any challenge/appeal mechanism and for each stage after delegation ought to be made clear in Applicant Terms and Conditions. This – since this refers to the challenge and appeal mechanism, it might probably be better addressed in 2.8.2, Accountability Mechanisms. So, absent any disagreeing to that, we will move this suggestion to 2.8.2.

The next idea comes from the Business Constituency. And they mention that, "in subsequent rounds applicants should transparently declare whether they intend to operate a registry or whether they anticipate selling some of their pending applications to others."

While this does indeed belong here in Terms and Conditions and this is something we should refer to the full work group as part of Terms and Conditions, I have a guess that this is also related to one of the discussions in the supplemental report about contention set resolution and private contention type resolution, which is probably what they are mentioning, "anticipating selling some of their pending applications to others." So, while keeping this comment here, we might also want to look into this comment when the supplemental report comes. Or perhaps it could be a suggestion for the Business Constituency to also state that point when commenting the supplemental report. We can do both, and actually either way this concern is addressed.

We also have a suggestion from the Registry Stakeholder Group that "the language that references eligibility and evaluation criteria should clarify when and why an application may be declined."

They also suggest to "specify the procedure and time frames for handling excess application fees discussed in foregoing comments." So, this is probably – not this entire comment, this phrase might be moved to the application fee discussion.

And they also propose a time frame for proposed changes, updates to the Applicant Guidebook. So, this also looks something that we might want to address at different a session.

So, we have possibly – we have three suggestions, and probably we'll have to deal with the three in a different way for each one.

I'm not seeing any hands.

We can now go to 2.5.5.e.2, which is in line 48. "Under what circumstances, including those arising relative to the sections above, should an applicant be entitled to a full refund?" And this is also not an agree or disagree question.

So, we had some ideas. The one is from International Trademark Association, that "the changes made to the Applicant Guidebook or program process such that it's no longer attractive for them to proceed with their application, this should be a decision for the applicant alone, not at ICANN's discretion." So, this also goes into ICANN concern of asking more clarity when a full refund should occur.

The next comment is from Brand Registry Group, and they suggested "a full refund with conditions could happen post-launch if post-launch it was determined the string was identified as a high risk for name collision or changes that are made to the Applicant Guidebook that are material to the applicant." And although they mentioned the question of whether it's material to the applicant, they don't mention whether the decision of whether it's material to the applicant or not is applicant's or ICANN's, of comparison to INTA where they clearly specify that this is applicant's decision whether it's material or not, not ICANN's.

Next, we have an idea from Valideus, that "substantial changes post-launch should entitle applicants to a full refund," which goes along with the other comments that were made, although it doesn't mention who will make the decision of whether they were substantial changes or not.

The Registry Stakeholder Group, they "support a full refund if an application is later disqualified due to name collision risk or ICANN makes material updates to the Guidebook." They also mention that – well, they only describe it in more detail what I

already mentioned, and those are both new ideas to refer to the full working group. And noted that there's another comment that is also mentioned the possibility of a high-risk name collision finding and which is possibly something to be considered also at the name collisions but should indeed be discussed here.

We also have a suggestion from NewStar. They "support full refund when ICANN makes substantial changes to the Applicant Guidebook that materially impacts an application." And they also agree with the Registry Stakeholder Group comment. So, this also goes to the idea of a full refund with some conditions, although (inaudible) more specific in whether those would be qualifications for a full refund or not.

We can now go to 2.5.5.e.3, when the initial report mentions that some of the Work Track noted that a limited challenge (inaudible) is a limited challenge process established. They believe the covenant not to sue there again should be removed. And others have noted the importance of the covenant not to sue based on ICANN's organization nonprofit status. And then a question is asked of whether the covenant not to sue should be removed or not.

So, although we've characterized some of those as agreements, we actually have both alternatives in the question. So, we should look into each of the alternatives was supported by that comment.

Jamie Baxter, dotgay LLC, and NewStar both supported removing the covenant not to sue, regardless of any additional appeals mechanism. So, even in the presence of additional appeals mechanisms they supported to ditch the covenant not to sue.

Business Constituency mentioned that they support a covenant not to sue if the appeals are in place. So, their support for removing is conditional to having those appeals.

And we have a suggestion from the IPC to retain the covenant not to sue. So, they are agreeing, but they are agreeing with the option of keeping the covenant not to sue. But they condition that to having those appeals process, and with those appeals process they believe the covenant not to sue wouldn't be too harmful for applicants.

But they also propose a new idea that the covenant not to sue would complement both the reservation to sue in cases of ICANN acting outside of its determination requirements, as mentioned in the other responses to Terms and Conditions. So, they're actually supporting a general covenant not to sue, but an allowance to sue or a reservation to sue in specific cases. So, they are going for a middle ground among all the other suggestions.

Then, the International Trademark Association mentioned that assuming the covenant not to sue remains, it should make clear that they do not cover cases of fraud, negligence, or willful misconduct, which cannot be excluded at law. So, they are mentioning that if it's kept it should be clarified for those cases, although I believe those cases are actually already coded in California law. So, they already be like this, and those clauses could be (inaudible) for remove the covenant not to sue, but they are making the position that it would be interesting to have that clearly articulated, because that happens to be true considering California law.

ALAC suggested that, "if the covenant not to sue was to be removed, a reasonable limitation of liability clause must be simultaneously put in place." So, they are mostly repeating what was said before, that if the covenant not to sue goes away it must be replaced by a limitation of liability.

But what the Registry Stakeholder Group also notes is that this question is very similar to a previous question. So, they refer to those comments instead of providing them again.

And let's see if anybody has any questions. Or while people think on questions, if anyone wants to suggest any other business we can do both in parallel, discussing other business and think on questions. So, any comments or any other business does anyone want to make?

Cheryl is typing. So, it doesn't seem that anyone wants to comment. Cheryl just mentioned that we had good progress and we are in track in this working group and this seems to be the overall sentiment.

So, let's end the call. Wish you all good holidays no matter what type of holidays do you believe in your country or belief system. See you all next year.

So, we can now stop the recording. Bye, all.

Michelle DeSmyter:

Thank you so much, Rubens. This meeting has been adjourned. Marsha, please stop the recordings at this time. Have a great remainder of your day, everyone.