

**GNSO
Operations Steering Committee (OSC) GNSO Council Operations Work Team
06 January 2010 at 17:00 UTC**

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Participants on the Call:

Ray Fasset - Registries
Wolf Ulrich Knoblen - ISPC
Ron Andruff - CBUC
Avri Doria – NCSG
Tony Holmes - ISP

Staff:

Ken Bour
Rob Hoggarth
Glen de Saint Gery
Gisella Gruber-White

Apologies:

None

Coordinator: Excuse me, at this time today's call is being recorded. If you have any objections you may disconnect. Thank you ma'am, you may proceed.

Gisella Gruber-White: Thank you, good morning, good afternoon good evening to everyone on today's Council Ops call. We have Tony Holmes, Ray Fasset, Wolf Ulrich Knoblen, Ron Andruff. From staff we have Glen De Saintgery, Ken Bauer, Rob Hoggarth and myself Gisella Gruber-White. We have apologies from Avri Doria and just remind everyone to state their names when speaking.

Thank you, over to you Ray.

Ray Fassett: Thank you very much. Okay, Ray Fassett here, our first meeting of the year, of the GCOP. So did not again send out a formal agenda for today's meeting but I think we're all pretty much up to speed on what we'll spend our time on today which again remains talking through this concept of council reps having to abstain.

And then what impact does that abstained vote have on the final outcome being right now it defaults to in effect a no vote and should there be options available to change that.

So with that said there's been some discussion, I sent out an email this morning, I was - I think Ken did a wonderful job going back internally, getting us legal advice as we asked.

I interpreted Dan's response from what Ken explained and I think Ron had some comments then I responded this morning.

Is there anybody else that has comments on this, or where we're at now? If not I can give a summary.

Man: Yes.

Man: Go ahead.

Ray Fassett: Give a summary? Okay, so basically if I understand it right, and Ken interject if you want, staff legal advice is that a conflict of interest which is the issue here can't exist with ICANN.

Why? Because - and different than board members, council reps do not have a fiduciary responsibility to ICANN, so therefore a conflict of interest can't exist upon a vote taking place at the council level.

Now I read Ron's point though and here I thought he made sense. Okay, well we can't just put our head in the sand, we are hearing that there can be issues of a conflict, and let's not get caught up in semantics, but there can be an issue of a conflict by a rep where the rep feels they have to abstain their vote.

That's reality. So it's - you know so while I can agree with Dan's position, and I think he's probably correct that there can't be a conflict at - with ICANN. The question remains what - one, where is the conflict and what is the conflict about?

And whose burden is it to resolve the conflict? Those to me are the key questions. And if we agree that there can be a remedy to avoid the conflict, can these remedies be put into the rules of procedure? And then....

Ron Andruff: Go ahead, finish. I'm sorry, I thought you were finished.

Ray Fassett: No, and then one last thing is assuming the whatever we may come up with in the rules of procedure are then followed, and the abstention still exists at the council level, should in those instances the denominator be changed?

Those are the basic questions as I understand them to be but now Ron, please go ahead.

Ron Andruff: No, I just wanted to say Ray I agree with the piece you sent through just prior to this call. I think that that is - that's the nub of it, I agree that a conflict cannot exist within ICANN and I'm glad - I was very grateful for your - you know your synopsis on that.

Because that is a bit of a confusing issue, obviously there will always - and from what we heard from Steve and others there, these conflicts arise quite regularly.

So I didn't see it as you saw it in the sense that it looked like we were just trying to be - to obfuscate the idea that you know conflicts exist, but clearly conflicts do exist.

But there isn't a conflict with ICANN per se, it's a conflict with the issue and I agree with that 100% so this is what we have to talk about.

Ray Fassett: Right. So one assumption I also gather from Ken and again he can correct me, so I'm bringing it out is it doesn't seem to me - I mean it seems pretty clear that per the bylaws if I'm not mistaken that each council rep is allowed one vote and only one vote.

So us looking at the concept of proxy is probably not the path of least resistance.

Ken Bauer: This is Ken. I would make a slight just comment there.

Ray Fassett: Yeah, please.

Ken Bauer: Because the - in that paragraph A it does say except as otherwise specified in these bylaws and as I tried to note in my...

Ray Fassett: Did we lose Ken?

Coordinator: We did lose his connection. He should be back with us momentarily.

Ray Fassett: Okay.

Wolf Ulrich: Hey Ray?

Ray Fassett: Yes Wolf.

Wolf Ulrich: One question, Wolf. Does he mean that the council advisor, you know is the legal council advice that there is no conflict of interest on ICANN level, does this mean it's there intention to say okay, then there is no need for any kind of abstention, or what does he mean?

Ray Fassett: Yeah, right, I don't mean to cut you off, but I'm kind of listening to what we've been discussing all along and I'm not quite comfortable to make that broad stroke.

I think from what I'm understanding there can be reasons for an abstention at the council level.

Ken Bauer: Sorry Ray, this is Ken Bauer, I don't know what happened, the phone just bam, and I was off.

Ray Fassett: Yeah, go ahead.

Ken Bauer: Yeah, I'm sorry. So that comment that I was making had to do with this clause that's in there that says except as otherwise provided in the bylaws, each member only gets to cast one vote.

In many sections of article ten where it says except as otherwise in the bylaws it also says or the GNSO council operating procedures.

And I think I remember Samantha Eisner telling me at one point that the - something that's in the GNSO council operating procedures can modify these sections that we're talking about here.

So there are two things I would say. Either a, the GNSO operating procedures can modify this paragraph, or it would be an easy thing to simply add to the bylaws a phrase that says except as otherwise specified in these bylaws or the GNSO operating procedures.

Because that's done in many other places in article ten, it's very common. So I would say that we should at this current time we shouldn't accept that the bylaws prohibit one person one vote.

Ray Fassett: No, I was thinking again that sort of off the cuff phrase path of least resistance, is it really realistic that we can change the bylaws?

Ken Bauer: I would say at the moment we shouldn't rule that out.

Ron Andruff: Well can someone clarify - this is Ron, can someone clarify for me one person one vote part proxy doesn't work. I would think that that one vote would be - proxy would mean I would give that one vote to someone else in my organization to make that vote, which I think we're referring to as also the alternate.

Can someone clarify the distinctions between alternate proxy and one vote?

Ken Bauer: I can try, this is Ken again. So let's assume for the moment that the bylaws - what it means when it says one person one vote is a councilor can only register a single vote for a particular issue at any time. That's what this paragraph eight says.

What Dan was saying is here's another option. You could bring somebody else who is not a councilor in from the stakeholder group and/or constituency and have them cast a vote.

Now you say well wait a minute, they're not a councilor. Right, and that's where we go back to these other bylaws language that I cited where it says that it is possible under certain circumstances, and we'd have to change the bylaws to add this to the set of circumstances.

But you could have somebody else come in as an alternate, you'd register that person with the secretariat, they would participate in the discussions, they would vote.

And then when that situation's over they would go away and the other councilor would come back and take his or her seat. Does that help?

Ron Andruff: That makes a lot of sense. So why wouldn't we want to do that? I mean in terms of changing bylaws this seems to make sense to be a logical bylaw change.

Ken Bauer: This is Ken again, I would make this point. To bring in an alternate I think to vote raises a lot of just technical logistical issues. You've got a set of councilors who know each other, they know their names and they've worked with each other and all that.

Here comes a brand new person in who maybe is not known to the council, you have introductions would have to be made, you have statements of interest and declarations of interest to be - make sure get put into place.

Secretariat has to be notified who this person is and dial instructions, there might be email lists this person becomes a part of. It just seems to me that bringing in a non-councilor to vote or to discuss and then vote on a matter vis-à-vis someone who cannot perform their duty is more difficult to do than a proxy vote.

Which would be you know I just say to this other councilor who is already on the council - and by the way he or she would probably be voting the same as the other people in that constituency or stakeholder group anyway.

So they carry on the discussion and then that person registers the vote of the person who couldn't be there. It just seems like - I think we should have both procedures in the rules.

And when we talk later about what I've constructed, I would make them hierarchical. I would say you know go down the list of remedies in the least difficult procedure until you remedy the problem.

And if you can't you go to the next step. And I put them both in the procedures. But I would think that it would be easier to execute the proxy than would this other alternate thing for reasons I've given, so I'll stop there.

Ray Fassett: Yeah, in practice implementing the proxy is easier than the alternate.

Ron Andruff: So this is Ron again, if I understand that correctly then when we talk about proxy we have - you know in the case of the BC we have two representatives on the council.

So let's assume one of them is conflicted and so - but again in principle these two representatives should be voting the will of the constituency.

So one may be conflicted because of some business relationship with that particular issue that's being discussed. So the one who is unconflicted in that case would be able to take the proxy vote of - not the conflicted individual per se, it's the proxy vote of the BC.

Does that make sense? So the BC itself is saying we're voting in this direction, so we expect you two to go there and make that vote. One of them puts his hand up and says but you know I am actually consulting this particular company that has up - okay, so now we have a conflict of interest.

Declare the COI and ask for you know file a document that says that the unconflicted councilor will vote the two votes on behalf of the BC.

Ken Bauer: This is Ken. That sounds right to me.

Ron Andruff: So that's a reasonable thing because it comes back to the one person, one vote story. So what we're saying here is that it's two votes, two reps and - but they're voting the will of the constituency.

So if we have documentation in place that could be filed, you know the standardized documentation that allows for that circumstance, then that conflicted individual doesn't register as an abstention.

They register as a conflict, a COI, and then that vote then will move by proxy and they will be approved by you know someone within our constituency, let's say the president or the chair because we're now reconstructing all those things.

That says this is approved by the constituency therefore we can go ahead.

Tony Holmes: This is Tony. I think that actually works quite well now because most of the charters for the constituency if you look at them they have text that binds their representatives now to follow in votes, the desire of their particular constituencies.

So if that is in place then I think Ron's suggestion works particularly well.

Avri Doria: Hi, this is Avri, can I add something?

Ray Fassett: Oh Avri's here.

Avri Doria: Yeah, sorry, I joined late.

Ray Fassett: Good. Please go ahead.

Avri Doria: I think even in the case of a constituency or stakeholder group that didn't have that binding. In other words, but that did it on a vote by vote basis, in other words a conflict has been announced and within the group.

And therefore the constituency/stakeholder group says so in this case is there a decision of the group on which way to vote? So even a group that didn't enforce party discipline but left people you know free to sort of vote as they thought was best for the constituency could still have a process that would make it work.

Ken Bauer: This is Ken, I want to support that comment and we discussed that I think too at one of our last conference calls. I think that's right, I agree with that too.

Ray Fassett: Well one thing I've learned in this conversation, this is Ray is that regardless of - well we've kind of narrowed it down to two primary options or tools that we're thinking about which is one a proxy and two an alternate - being able to cast an alternate.

And both of those options will require some modification to the bylaws, is that correct?

Ken Bauer: This is Ken, I would add one additional remedy that we keep skirting around but we - I think it could be - could work. Somebody comes forward and says I've got a problem, let's just - whether it's a conflict, whatever it is.

I can't function as a councilor on this matter and voting in this capacity. One of the things that could be done is the constituency and/or stakeholder group could direct the councilor how to vote.

And say okay, you have a problem somehow and so what we're going to do is tell you what to do and we'll do that in writing and all you've got to do is present that in writing and say this is what I'm being told to do.

My conflict has now been absolved. We know that there are certain circumstances with attorneys, with professional obligations where that wouldn't work.

But I think there might be others were it would and so that might be another one in the hierarchy of remedies and maybe we can talk about what I proposed, I also in that email, I laid out a whole scheme for how this might be organized.

And you know there might be a hierarchy of remedies.

Ray Fassett: I thought that would be first one, right?

Ken Bauer: That would be among the first, yes.

Ray Fassett: Yeah.

Ken Bauer: Yeah, and for some people that wouldn't work and then we would go to the next one, right? We can actually walk through that if you want me to summarize, it's in that last email that I sent to the list.

Ray Fassett: Yeah, go ahead, walk through it. Walk through the steps that you came up with.

Ken Bauer: Well am I changing the subject here? I am on the table that we wanted to settle first?

Ray Fassett: No, I don't think so.

Ken Bauer: Okay. If you guys have access to that summary email that I sent on the 27th in which we laid out what Dan had said and so forth and so on, several of you have responded to it.

At the bottom of that I started a set of paragraphs...

Ray Fassett: I'm sorry Ken, I'm looking at the - it was the 18th of December.

Ron Andruff: That's the last one I have too.

Ray Fassett: Yeah, sent to the Ray and GCOP members, it's called legal review date, abstention of proxy voting?

Ken Bauer: Yes.

Ray Fassett: Discussed at the conference with Dan Halloran.

Ken Bauer: I'm sorry, I stand corrected, it was the 18th.

Ray Fassett: Okay, just wanted to make sure we're on the same page.

Ken Bauer: Thank you very much. I just this morning installed Office 2010 and my email stuff looks a little different and it shows at the very top the wrong date.

Ray Fassett: You're at number three, A through E, I think that's where you're going right, in that email?

Ken Bauer: It starts - the paragraph starts another thought I had after considering this matter holistically.

Ray Fassett: Yeah, fine.

Ken Bauer: Yeah, then I have three items. All right, so what I was thinking about is if we looked at the procedures from a very high level, the first thing we might do is say look, and this was recommended by Dan and (Liz) back in the 2007 era, we should have something in there which talks about the duty of councilors.

And there are two specific paragraphs, we don't need to review the text now but there is text available that talk is about the need for active participation and being responsible and all that sort of thing, right?

So councilors are supposed to perform their duties and be available and understand what they're to do.

Now second item though says, look conditions could occur that prevent the fulfillment of a councilor's responsibilities and I've cited what I think are the two cases where this can occur.

First is an incidental or temporary absence and then I made a note that maybe extended absences should be handled via some other procedure which we haven't written yet.

But let's just for the time being we can ignore that. The second case is an abstention, and abstentions come in two flavors, one is volitional which I've sort of recharged it, but we used to call it voluntary but it's volitional.

And the second one is obligational. The first one is where we had a list of cases, you know I'm not up on the issue and I'm going to abstain because I haven't read all the material or I missed the last meeting - those would all be volitional abstentions.

And the second one would be obligational, meaning you know I've got one of those conflict of interest situations that we've talked about. Whether we call it that or something else, that's what we're referring to.

So again I'm just here I'm looking at the procedures, how we might attack them. First here's your duty, second we recognize you might not be able to fulfill your duties and three, here's a bunch of remedies in order that might apply to different of the conditions that have occurred.

So the first is electronic voting which I think we currently call absentee voting. That would remedy a certain class of situations in which a councilor can't perform.

The second would be a voting directive which I referred to a minute ago provided by the constituency or stakeholder group to the councilor. If that doesn't work the next one is...

Ron Andruff: Slow down, the - I'm sorry, so the voting directive - this is Ron, I just need to make sure I understand. The voting directive means that the stakeholder group or constituency says I want you, our representative to vote this way.

Is that correct?

Ken Bauer: Yes.

Ron Andruff: Okay, thank you.

Ken Bauer: And then the third one in the hierarchy or in the logic tree would be a vote proxy to either the house NCA or another of its councilors. And I made a notation of course, assuming that the organization can and will produce a consensus position that enables that remedy.

Which we think would be the case most of the time, but it might not always. And then the fourth one in the list would be this naming of a temporary replacement or alternate who is empowered to stand in for the councilor which is the one that Dan referred to that we would need a bylaws change for.

But he's willing to do it. Now that one does not require the organization to establish a consensus position, right? It probably just needs to inform the stand in what they should do or maybe it - they would say look, you're standing in and we don't really care what you do, you can vote however you want, it doesn't matter.

You are going to though - you're going to represent this constituency, we're not going to have an abstention, we're going to try to remedy that condition.

And then the last one is all the above fail and the councilor abstains and we decrement the denominator. So what I'm doing is trying to provide a kind of a set of lesser to more extensive remedies and we would always do them in that order.

Ron Andruff: So questions here, Ron, this is on the D, the constituency names a temporary replacement, the alternate. Why would the - why would we not try to bind that alternate to the constituency's consensus position?

Why would we say - I don't quite understand why you said that wouldn't necessarily need a consensus position, I just don't see where a constituency or stakeholder group would send someone to vote on something when someone else can't vote.

And say just you know however you feel on this thing. That just sounds kind of apathetical to what we're trying to achieve here.

Ken Bauer: This is Ken, all I was trying to say is it wouldn't be a requirement. You wouldn't necessarily write that in because it's not needed. If the constituency wants to remedy the abstention case, right, the person who's got the conflict and we can't do it by proxy voting for one reason or the other.

Well in fact if the constituency could develop a consensus position then it would use proxy because it proceeds - it's the lesser remedy in the list. And so what I'm assuming is they can't develop a consensus position, right?

But that doesn't mean they can't bring in an alternate and tell the alternate what to do. But you don't have to say - we don't have to say that in the procedures. All we have to say is the constituency wishes to bring in an

alternate to act in or stand in for the councilor who has the - who wants to abstain.

We presume - I would presume that the constituency or stakeholder group would instruct that alternate what to do, but we don't have to tell them that, right, it's not required.

Ray Fassett: Right. I mean from what we've heard our understand is that there are some instances where the constituency just isn't able to come up with a consensus position whether it's short notice, whether it's just that they give their reps autonomy.

In some cases to simply act as they think should be in the best interest of the constituency of their own volition, so I don't think we would want to hard code that in there.

Ken Bauer: This is Ken again, the premise on all of this, of all these remedies is that the constituency and/or stakeholder group would under most circumstances not want to ever have an abstention registered where their vote isn't counted.

And so we would give them a whole series of remedies that they could execute so that an abstention does not occur. But if all of that fails and an abstention does occur then we say you decrement the denominator.

Ron Andruff: I agree - this is Ron, I agree with the idea of a list of remedies, that makes sense, but I'm just concerned about what's in that list.

I'm uncomfortable with the fact - I just - I never feel comfortable when an individual in a bottom up consensus driven organization is choosing to make his or her own decision on something.

It just doesn't jibe with what we're trying to achieve as an organization.

Ray Fassett: I agree with that Ron, just so you know I'm in complete agreement with you. To me the question becomes you know what can we mandate from the ROP level to the house level.

I mean we have to recognize I think that the idea is each house is to have their - some autonomy and each - then therefore each stakeholder group or constituency is to have their own autonomy.

They're to take responsibility for their involvement with ICANN and I'm with you, I think that drives to where my reps are going to be accountable to the group, not what they believe.

But from where we sit in this position, I think our role can only go so far as to what we mandate upon the houses or the constituency groups.

Ron Andruff: So if I understand you correctly then what you're saying Ray is that the idea of taking D and trying to beef that up to say that that alternate would vote the consensus position, you're saying we need to keep that loose?

Ray Fassett: I think so because if they get the consensus position I agree with Ken that they'll just do C. But I think Avri has even explained in ALAC that in the ALAC it's just - to them it's - maybe you can explain it better, MCUC, yes.

Avri Doria: NCSG and MCUC, not ALAC but yeah, it's - I mean I totally agree with you that people aren't supposed to be voting their own but very often you will find a split community.

And so when Ray says they're accountable to their community, they most definitely are.

But sometimes, especially when you have a community that's split on an issue, basically then the representatives basically are you know use your view to represent one of the sides.

Because there isn't a consensus and especially within something like the non-commercials and the bigger., more diverse we get the less likely we'll be at a stakeholder or even an interest group/ constituency level to have a consensus on all positions or to force it.

And so that's why I think within a bottom up the notion of representatives and if your representative isn't representing you in the overall, then you get rid of that representative.

And it's not that there is 100% mandated vote at every turn being the only way to be bottom up. I mean I very strongly support you know legitimacy only through bottom up.

But I believe there can be a certain amount of trusting your representatives to represent the views and that's why you have a bunch of them, etcetera.

Ron Andruff: Sorry, I just want to respond to Avri. I think that you know it's one thing to say you just get rid of your rep, it's another thing to actually do it, because just the amount of disharmony and discord it can create within an organization just trying to remove somebody who's not fulfilling the expectations.

It's so problematic that most people would prefer to defer that and say you know let's just let him run out his time and he's gone and we'll get somebody new in.

But the bigger issue is - comes back to if a stakeholder group or a constituency cannot reach consensus, is that not the time when there should be an abstention?

Sorry, we just can't get consensus so therefore we abstain from this? So that would almost fall into an obligational abstention?

Avri Doria: Why do we need more than one representative from a stakeholder group then?

Ron Andruff: Well I always thought - my understanding is sharing workload and having a little bit more brain trust from the organization to chew over ideas within that GNSO council.

Ray Fassett: Well here's what I'm thinking, this is Ray. I mean the MCUC likes the way they go about things. This is - Avri has explained it and that's the way - that's what they want to do as a stakeholder group.

It's not our place to say no you can't do it that way. If we want to put in a - if we feel that there should be a mandate in the charters that the reps are to at all times be representing the consensus position, for example of their group, then that goes to a different work group.

This is something Chuck Gomes recommended, if we want to go down that path, that's Olga's group. We could ask Olga to look at that and see if there should be language required in all of the charters.

But that's not our position.

Ron Andruff: I would vote for that personally. Sorry to interrupt Ray, but I would support that idea of looking at that because I think it's important that you know the representatives again are not individuals who make their choice.

And I understand what was just said, that you know sometimes that's the tie breaker is that individual. But on the whole I think that the organization of ICANN and the GNSO has to be one where it's consensus, it's about the individuals who are at the GNSO bringing forward the feelings of the body, not of themselves.

Ray Fassett: Okay, well we can put that as an aside, let's double back and ask whether we have consensus among our group whether we should go to Olga's team and have them look at this as something operational that should be put into the charters.

Avri Doria: Avri, I'm certainly not against asking them to look into the issue. I'd be uncomfortable saying that we have a consensus saying that that should be the way it's done.

Ray Fassett: Yes, right, that's a very good point.

Ron Andruff: I agree with that Avri, this is Ron, I agree with that as well. No problem.

Ray Fassett: Right. Our consensus position would only be do you want to look at this?

Ken Bauer: Ray, this is Ken, can I make a comment?

Ray Fassett: Yeah, go ahead Ken.

Ken Bauer: Yeah, in some ways I think I'm a little bit responsible for this detour. It was not my intention in that parenthetical clause that says does not require that the organization establish a consensus position.

It was a note to you guys on the team. It was kind of a parenthetical note to us that this particular remedy wouldn't still require that, right because we're saying that the one before it does require it.

And if you can't produce that then we need another remedy for the situation which you can. I would suggest that we not put that language into any specific rule which doesn't mean that therefore that - at that point I think it would default to whatever the charters do in fact say.

And if the charters say we constrain our members, then that's what happens. If the charter doesn't say it because that's how they chose to do it, then it's silent.

Avri Doria: Avri, can I ask something on that one?

Ray Fassett: Yeah, but just before you do, I just want to be clear. So you're saying in C we're not silent but in D we are silent, right?

Ken Bauer: Yes, because I think that one of Dan's issues around proxy from the 2007 document, in fact now that you point that out I realized I used the same artifact in the document, right, I used brackets and stuff.

One I think does belong there because I think to use proxy he was insistent that there was a consensus position that could be used to make the proxy happen.

In the case of the over I don't think that was a requirement.

Ray Fassett: Understood. Avri, go ahead.

Avri Doria: Okay yeah, even having the opinion I do about you know not forcing party discipline on some notion of consensus, and I'm still not sure what notion of consensus we have, I am fine with having a set of rules that sort of say if there isn't consensus and the person is not there to vote, then there is an abstention, then you fall through.

I'd be fine with leaving out that proxy, you know proxy given to someone else to figure out what to do with notion.

The one that we're silent on, so...

Ray Fassett: Well is that C or D, I just want to make sure we're clear, we're talking about C?

Avri Doria: I think D, wasn't D the one that was optional?

Ken Bauer: D is the alternate one.

Avri Doria: Right, that the alternate that basically - and that's the actual proxy one.

Ken Bauer: No, C is the proxy one.

Avri Doria: C is some person - okay, I don't have it in front of me.

Ken Bauer: No, that's okay, proxy is when an existing rep has more than one vote and alternate...

Avri Doria: Right but that vote is constrained.

Ray Fassett: Consensus vote.

Avri Doria: It's consensus constrained. I'm fine with leaving out any option that is not consensus constrained. So even though I believe then in the general stake the representatives need not be constrained by consensus at all times, I do think that it's fine that in the absence or the conflict of interest that that vote be constrained by consensus.

Ken Bauer: Oh I see the distinction. That's a good distinction. Interesting.

Avri Doria: And when it's the stakeholder group saying we've got six votes damnit and we want to use all six of them because we've got consensus on this thing and it's important to us, then fine, they should be able to express their six votes.

But when it's well you know (Joe)'s missing, we don't have consensus so why don't we give you know (Jill) the vote to you know do what she thinks she need to do with it.

That one I don't think is necessary.

Ken Bauer: That's an interesting perspective, I didn't think of. But let me throw this one at you, okay? What's the - and this is for discussion, what's to stop a group constituency, stakeholder group, whatever from saying well we don't want to do A, B, C or D so we're just going to abstain.

And then therefore the denominator gets changed. Is there anything preventing that?

Ray Fassett: So what you're saying is they would use this tactic as leverage?

Ken Bauer: Right.

Ray Fassett: And you're asking the question is there anything preventing the constituency or the stakeholder group from using that leverage, is that the question?

Ken Bauer: Yeah, how are we going to hold them accountable to actually do A, B, C or D? Because here's what I'm thinking, here's what brought it to mind. If we say that in both C and D a consensus position is required, if we say - come right out and say that.

And then all the group has to say is well I'm sorry, we can't get to a consensus position, C and D are out by default. Therefore it's - we have to abstain.

Ray Fassett: Well that's a good argument and I could support that argument for the rationale that there isn't consensus in D which is the alternate.

And that's probably the logic for it, that's a pretty clear statement. That does protect the ability for someone to lower the denominator on an important vote.

Ken Bauer: Right.

Ray Fassett: Okay, so I'm kind of in favor of being silent, keeping the alternate option of D and being silent that it has to be a consensus position.

Ron Andruff: I support that. This is Ron.

Ray Fassett: My next question would be okay, but even with that said, okay, what are we - what are in the rules of procedure to hold the group accountable that they have in fact tried these A through D options?

Versus saying well we don't want to do any of these options so we're just going to default to E. Ken any thoughts on that one?

Ron Andruff: What's the benefit is what was going through my mind Ken? What's the benefit of defaulting?

Ken Bauer: I came up with one - am I on mute? No. I came up with one sort of scenario and I think I've applied it to one of the contracted party sides. Am I talking here?

Ray Fassett: Yes you are, we can hear you.

Ken Bauer: Okay, thanks. And you know a situation it could be - I think it's kind of unlikely. I'm trying to think of - under what circumstances would a stakeholder group prefer a reduction in the denominator to exercising its vote.

And so I understand Ray the question you're asking, which is okay fine, we have an abstention case of some kind, right, or a failure to perform and we're

looking at and we want to make sure that all these remedies are followed rather than just given lip service to.

So that in fact we don't default down to this last step and so I was - I can't really think of any good reasons, this is the gaming issue, right? I can't think of a circumstance...

Ray Fassett: Well how do you ensure that E is rare? That's it. I mean we all agree that it should be a rare instance. It could happen, but it should be rare. So how do we - what do we put in here to ensure that it is a rare instance rather than hoping it's a rare instance.

Ken Bauer: In the duty of councilor section we could also put duty of stakeholder groups and/or constituencies, right? We could put something in that says these organizations own the votes.

And they have a duty to exercise them and they do that through their delegated councilors who have duties to prepare themselves and to act in a way so we could take that approach in which case we make it clear to the constituencies and stakeholder groups that they have an obligation to exercise these votes and not abstain.

Now that's just - I don't know that they - I'm not sure how much further we can go. One thing we could possibly do, right, if we talk about it, we could remove the scapegoat at the end.

There is no decrement the denominator case. In other words we've given so many good remedies here under various circumstances, consensus, no consensus, you know electronic vote, there's a whole lot of things you can do.

Direct account, that one of them must work. And if you do abstain at the end, guess what? We don't change the denominator.

Ray Fassett: I kind of like that idea.

Ron Andruff: I like that idea too, that feels right.

Ray Fassett: Anybody else like that idea? Wolf, Avri?

Tony Holmes: It's Tony, I think it's a good idea as well.

Ray Fassett: Thanks Tony.

Avri Doria: I think we have to go back to those who came to us at the beginning saying there had to be the possibility of decrementing the denominator to make sure that they felt that at least one of those remedies made it possible for them to agree to that.

Personally I see no reason not to agree to it, but I think we'd have to go back to the people, I guess it was the IPC who said they absolutely had to have that.

Ray Fassett: Well no they didn't. They said that at first and then when we talked through it and explained our position that we thought the burden needed to resolve at the stakeholder group level, they saw that.

And they agreed with that too so we said well if there were options or remedies that existed at the stakeholder group level for you to relieve yourself of that conflict, would that be satisfactory to you?

And they basically I thought I heard them basically agreeing with that.

Ron Andruff: Well and the other part of it is you know I don't know if we invited them to come and give us some advice and we've taken that advice. I think the key

here is to not so much go back to a couple of individuals or to one constituency and say this is it.

But rather we should try to frame this and then take it to the OSC and have them review, because at the OSC level you'll have IPC constituency review.

Ray Fassett: Yeah.

Ron Andruff: But the bottom line is that taking away this decremented denominator is a very big step forward for us. And I think that's what the others - as Ken just rightly said with these four - there are four ways you can resolve this problem.

So we're not going to allow anyone to game the system by decreasing the denominator as has well been pointed out by many, the number of votes are too few.

So you know if we take away that leverage it forces people back to the table to figure it out. And now that we've kind of agreed in loose terms that we don't force a consensus position on the alternate, the alternate steps up and makes that vote, I would expect that what will happen more often is not that we'll have consensus and that the one rep will assume the vote of the other for the purpose - the proxy vote of the other representative to make the vote.

I would think that would be what we'll see most of the time as a result of these three, what will become four options.

Ray Fassett: I think that's well said. I like the four options myself. I think they could work in practice.

Avri Doria: Could I ask a question about the fourth option being the silent on consensus one? Does that one fit with what Dan had said was required? I'm being confused, because I thought that proxy was okay in the case of consensus

but that there was questions about whether it was okay in the case of there not being consensus.

Ray Fassett: I think as it pertains to proxy, Dan's position is that there has to be consensus within the constituency to even go there on a proxy, to even discuss it, that's a requirement.

But when we're talking about alternates, that's not his position. Now it is not necessary that there needs to be consensus within the stakeholder group.

Ken Bauer: This is Ken, I'll just - one small - I just want to be - I don't think I specifically asked Dan that question and it didn't come up in our discussion. He was - here's how this discussion actually took place.

Dan has some reluctance around using proxy voting. The word proxy conjures up legal things, I just don't - I don't really know all the background of it, but you can tell that back in 2007 there were some positions around you know can we do something else.

And in the end what was done was absentee voting and that took care of the problem at the time and then it died. We've resurfaced it and in my process of going through all of the things that they said in 2007, we've I think met most of the issues and we have met all of the issues that were identified.

And Dan in as much told us, Rob and I down on our conference call. He's still a little reluctant to use proxy voting and that's when he said to us, here's another option. We could do an alternate.

And I said well I don't think we can do an alternate because you have to be a councilor to vote. And he says well, not if we execute this bylaws provision which is already there.

And we would have to tweak it a little bit to make it fit this condition but he seemed perfectly willing to do that. Now since he didn't rule proxy out and I think it's a good solution, at least I'm hoping we can persuade him that it works.

And we've dealt with all the issues and I'm going to come back to that in a second, and he seems okay with this idea of an alternate, I thought they might work together very nicely in sort of a hierarchy, right?

So that's how I positioned it. But we don't have conclusive agreement with Dan on this yet but this is where we're moving it, I mean this is where we're sort of pushing it a little bit.

Ray Fassett: So we don't know if Dan's going to take the position that in order to invoke the alternate there needs to be a consensus position. We don't know the answer.

Ken Bauer: It would be - I don't think it's - since it's not - the condition in which that alternate already exists is a case where I get - I'm on the council and I go to the board, right?

And because I'm now on the board I can't vote. Somebody else can step in and vote for me but there's no constraint, there are no rules, there are no regulations that say when I step in or when somebody steps in for me, that they have to vote their - there's nothing, it's silent.

So I assume that he would not impose that restriction in the alternate case.

Ray Fassett: Okay, let's make that assumption for this. Go ahead Avri.

Avri Doria: Yeah, I'm still confused again and perhaps it's because I don't understand what we mean and the scope of alternate. Is the alternate only someone that

comes in to a meeting for five minutes at the vote and sort of says okay, I'm a local councilor as an alternate and I cast this vote?

Or is the alternate some sort of longer term notion that says on this particular issue I've removed myself and therefore the role of counselor five from you know stakeholder group three will be played by for the whole duration of the topic?

I don't understand what we mean by alternate or somewhere in between those two things?

Ray Fassett: Let me try on this one. I think that falls within the duty and burden of the rep and the stakeholder group. So it depends - it becomes when the rep makes it known if they're already in the midst of some degree of discussions on it, then the rep decides okay, I'd better let my constituency group know about this before the vote comes?

Well yeah, that's the way it goes. If the rep decides that okay I see this coming, I'm going to get out of this one early, then the alternate would step in and be in there for a longer period of time.

Avri Doria: And so would participate as a council member on that topic from that point until the topic's resolution.

Ray Fassett: I think so, that's my interpretation.

Ken Bauer: This is Ken, that's my interpretation also.

Ray Fassett: And then where we'd have to be careful about because it's a good question is what we don't find is the person that is claiming the conflict is still you know getting into the conversation which we could probably envision that happening.

So we've got the alternate in there so somehow there would have to be a procedure that if it's Joe Smith, look Joe, you can't talk about this issue.

Avri Doria: Yeah, I think there's a lot of little devils wandering around this whole issue. Thanks.

Ken Bauer: This is Ken again, incidentally I just wanted to say a couple of the things that were on Dan's mind when he expressed his reluctance to use proxy voting.

Things like this, back - and apparently this was done way, way back in the DNSO or some period of time because he's been around a long time, where one person would come to the council with six votes.

Right, I'm here and I'm now going to vote six - because I've been proxied all these votes. He wanted to make sure we didn't do things like that and that we tied down the procedures.

That proxies when they were done they were incidental, they were not lasting, in other words you can't - I can't say well you know I'm going to proxy all my votes for the month of September to so and so.

So we would tie the procedures down in a way that they would be - it would be incident specific, you know this would be like a motion before the council or something that would have a beginning and an end.

It wouldn't be lasting. We might impose this rule which actually I credit Rob Hoggarth for coming up with which is to say when you proxy, you may only proxy one vote to one councilor at a time.

So let's say - and this I think works out arithmetically, no councilor can execute more than two votes then, mine and the one that I was proxied.

So if you had three abstentions that needed to have proxies in a stakeholder group like - since you have seven people there you could actually get that done, right?

And if you get to a situation where there's so many people who have to have their votes proxied, you don't have quorum and we have rules about how quorum would be managed and proxies do not count toward quorum.

So I think we can mitigate against all of the concerns that legal had back in the 2007 time frame by just really tying the procedures down like I've been discussing.

Ray Fassett: I think those are excellent points. Those are very good points. And here's another scenario I've been thinking about too is why we need D, is if we use the BC as an example, no the IPC, let's use either one.

Let's say both their reps have a conflict, okay? So there's no ability to proxy one to the other. There they have to go to D. So we have to have that D in there, the ability to name an alternate.

All right, so if we're basically in agreement that these are the four steps that we would take out E and see what happens later on it.

There's a huge drafting job here from what the things Ken just discussed about nailing down sort of the finer points as he just mentioned.

Drawing out the four points maybe a little bit more clearly or with more detail, there's quite a bit of work here to get it into a position of getting in front of the OSC.

Ken Bauer: This is your dutiful policy staff speaking, this is Ken. I would be happy to continue in this sort of drafting capacity.

Ray Fassett: You took the bait, thank you.

Ken Bauer: I took the bait, absolutely. It's a fascinating subject, I'm actually really enjoying working on it with you guys.

And all I really try to do in this email was to bulletize it so we could grab on to the ideas.

Ray Fassett: And you did it very well.

Ken Bauer: Yeah, and so my first question to you is do you like the general approach of the duty, the things that might prevent the duty, and then the remedies?

Ray Fassett: Yes, I do. Anybody else? I think Ron dropped off, Avri, you okay with the approach?

Avri Doria: Yeah.

Ken Bauer: Okay, what I would do - that was important to me because I didn't want to go and write a whole set of procedures using that construct if you guys weren't too keen on it, right?

The other way to do it is to say here's a problem and here's the three remedies. Here's another problem and here's the three remedies. Here's another problem, here are four remedies. And the remedies are the same in many cases, right?

So what I was trying to do is say look, here's what you're supposed to do, here's what happens - here's the things that might prevent you from doing it and here are a bunch of remedies in hierarchical order that you go through one by one.

And so if we're okay with that, I like it. I will start to write these procedures using that model. Now if we don't like it after it's all written, we'll write it a different way but at least we think at this point that that's a pretty decent way to go about it.

Ray Fassett: I do. Anybody object? Okay.

Ken Bauer: Good then I'll start work on that and that will actually be very helpful. Because I think if Dan actually could see the real procedures that might be in the GNSO council rules, then he'll be able to really think about them more critically.

And then we'll know exactly what bylaws changes we'll need.

Ray Fassett: Exactly, I think that is being fair to Dan by taking this next step. One other question I wanted to ask you Ken and others is I know there was some back and forth or it seemed like there might have been some back and forth on it, you've been using the term conflict of interest.

Ken Bauer: Thank you, that was going to be my next question.

Ray Fassett: I'm wondering if we can change it to personal conflict of interest. I want to add a personal conflict of interest.

Avri Doria: Why is that different than conflict of interest?

Ray Fassett: To distinguish that this conflict of interest is not with ICANN. So we acknowledged there cannot be a conflict of interest with ICANN by a council rep, we acknowledge that. That doesn't mean that there can't be a personal conflict of interest.

Ken Bauer: This is Ken, essentially you're asking a nomenclature question, right?

Ray Fassett: Yeah, basically.

Ken Bauer: What can we call it so that it doesn't - in Dan's mind the term conflict of interest I guess in legal terms refers to a specific kind of fiduciary problem which we don't have here.

And so you know we're just looking for a different - I called it a professional dilemma but that didn't sit too well. Maybe we can come up with some other term.

Personal conflict of interest would be another way to do it I guess.

Avri Doria: Except that that might include conflict of interest, if conflict of interest meant fiduciary conflict. Then personal fiduciary conflict could be equally as confusing.

Ray Fassett: How about just personal conflict?

Avri Doria: Personally conflicted?

Ray Fassett: Personally conflicted, yeah, something. We'll work on it. But yeah, that's what I wanted to address was the - I don't want to find us getting on a path of semantics.

Ken Bauer: What I did in this little bullet session to sort of avoid it is said look, there are reasons to abstain which are volitionally and obligationally created. So in a sense an obligational abstention is another way to look at a personal conflict without using that term.

Ray Fassett: Well here's one of the things I'm just kind of thinking now so I'll just say it out loud. I just don't want - we don't need - nobody needs - we don't need the lawyers that are in the IPC coming back and disagreeing with Dan that yes, it is a conflict of interest.

You know, now we've got lawyers and it happens every day, lawyers disagree with each other on terms. So you know why aren't you calling this a conflict of interest?

Well because it can't be a conflict of interest. Well yes it can. No it can't, yes it can, no it can't, you know? So I'm trying to find a middle ground where we keep conflict of interest, the term, but now describe it, give it a description.

It's a personal conflict of interest. Maybe we have to put in a definition, what does conflict of interest mean? Conflict of interest does not mean a conflict with ICANN.

Avri Doria: Right, so one could say I have a non-fiduciary conflict of interest?

Ray Fassett: I can - I'm not a lawyer but I can hear Kristina saying but it is fiduciary because I have a fiduciary obligation to my employer.

Rob Hoggarth: Ray, this is Rob if I can just interject, I know I've been silent most of the call. I think that the fundamental issue here is that if an abstention is going to be triggered it needs to be for a significant and substantial reason.

And that's where we sort of found ourselves in that big C conflict of interest discussion. As long as we can come up with some nomenclature that does reflect that it's not just because I'm feeling bad today or for some other minor reasons then I think we'll be okay.

Ray Fassett: All right. I have to think about that one. I thought that we were sort of landing on well we don't want to get in the middle of whatever the rep feels their conflict is.

If they feel they have a conflict, then you know we're just going to take them at their word, they think they have a conflict, who are we to say they aren't?

Ken Bauer: This is Ken and I think - let me try this one more time. I don't - I think we can avoid dealing with the term conflict of interest. I think it will work out and here's the reason why.

We don't decrement the denominator as a result of our most recent decision as a team, right? So when I take the denominator out, now basically I come forward and say I have a - I am going to abstain on this matter.

And somebody says well why are you going to abstain? Well you know I might say something like I have an obligation to abstain.

Ray Fassett: Kristina says I have a conflict of interest. I don't know why...

Ken Bauer: I might say I have a conflict of interest but we're not going to write it down that way, we're going to write it down as a obligational abstention.

Ray Fassett: Well here's my point, here's why I'm not articulating it well. We have not addressed the issue then that the person has a conflict of interest. They'll come back to us and say well that's great, but you've not addressed the issue that the reason I have to abstain is because I have a conflict of interest.

Ken Bauer: Is the reason important or is the fact that I need to abstain? I think what I heard Kristina saying is I have a professional reason that I must abstain, whether it's called a conflict of interest I don't think was really the essence other point.

What she then followed up by saying and Steve agreed was and when I have a professional obligation to abstain you can't do - you can't treat it as a no vote. If you do that you're in essence putting me in a position with my own ethics and my own professional obligations that makes me essentially a liar, right, or whatever.

And so what we're - the answer to that is we're giving your organization multiple remedies to execute which can be done and now you can abstain, meaning recuse yourself, but we won't actually register an abstention because we have a remedy for it instead.

Ray Fassett: Yeah, and I'll tell you I hear all that and I'm not against the spinning and the terms and all that. I'm just saying that in effect we're siding and we should just then come out and say it, that there - as far as the rules of procedures are concerned, there cannot be a conflict of interest.

I mean if we're avoiding the term all the way around, then we should just come out so everybody's clear.

Avri Doria: I don't understand what you mean, this is Avri, I'm confused again.

Ray Fassett: Well we're saying that a scenario to abstain are all these different reasons and here are the remedies, here are the remedies to absolve the abstaining. But somebody says but you have - and none of these by the way remedies allow the denominator to be changed.

So someone says well you have not offered the ability for a conflict of interest to exist, that should then therefore change the denominator.

Ken Bauer: True, but what we're saying in essence is we believe - this is Ken - we are saying that we recognize that there is always a remedy available, always.

If you have a consensus in your constituency you proxy vote. If you don't have a consensus, you name an alternate. There is always a remedy available and therefore there should never be a case where you have to abstain on the vote.

What you do is you recuse yourself from the discussion and the vote, but somebody steps in, either a proxy person steps in or an alternate steps in and that can always be done, always.

Avri Doria: I like that obligational recusal.

Ray Fassett: Yeah, I like it too, by the way just so I'm clear, I'm just trying to foresee here, is there - let me try the question a little differently. Should we just come out and say that there - to us there is no scenario where there can be a conflict of interest?

Avri Doria: But I thought we were handling conflict of interest, not that we couldn't have any. What we might have in the conflict of interest, but we have these four remedies for avoiding your conflict of interest.

Ray Fassett: No, we're doing everything in our power to avoid using that term.

Ken Bauer: This is Ken, let me take a shot at it if I might. We're calling conflict - I think Dan's position is the term conflict of interest has a narrow legal definition.

And by not using the term what we are assenting to his narrow interpretation that says conflicts of interest at ICANN means a specific thing legally. And it means that the people who are claiming it have a fiduciary responsibility to ICANN which they do not.

Therefore they can't use that term. That term is reserved, it's a key word, it has a specific legal meaning and the case doesn't exist. Though ICANN board of directors has it, but the councilors do not.

So we need to find...

Ray Fassett: All I'm saying is document that.

Ken Bauer: Well I did say what he said in the...

Ray Fasset: No, I mean let's document as part of this, us document that.

Ken Bauer: I made a notation in my notes that we would put something into the procedures that says we don't use that term for these reasons.

Ray Fasset: Very good, that's all, I think that would be a good idea if we did that.

Ken Bauer: So instead what we say is there is an abstention that's due to obligations that people have that aren't conflicts of interest. But they nonetheless require remedies.

Ray Fasset: Okay.

Ken Bauer: As a conflict of interest would.

Ray Fasset: I like that.

Ken Bauer: Does that help?

Ray Fasset: Yes, that helps, I like that idea. Avri, you okay with that?

Avri Doria: No.

Ray Fasset: No, how come?

Avri Doria: Still confused, because - and I should hesitate to try and speak for anyone else, but if I were a lawyer and I felt I had a conflict of interest due to my situation, then yes, that's not an ICANN conflict of interest but that still is a corporation X conflict of interest.

Ray Fasset: Yeah, so here's what....

Avri Doria: That's what's confusing me. So I don't see how ICANN can declare that the only conflict of interest that is a conflict of interest is an ICANN conflict of interest.

Ray Fassett: Yeah. Well here's my thinking on this. So we are doing everything in our power to not use the term conflict of interest. We're skirting around it, right? And there's a reason why we're doing that because ICANN's legal is taking a position on this term. Fine.

We understand, okay, let's put in writing in black and white what this term is felt to mean by ICANN legal advice. Let the IPC lawyers read what this says.

And if they defer it now let's bring that forth at discussion. If the IPC folks or others want to challenge that, that's healthy. That's good.

But unless we put it in there they won't know to do so, that's why I'm thinking it's a good idea. Put it in black and white, what is ICANN's position on this?

We as a group, we accept the position by - as far as floating it out there, let others read it. If they have a different opinion let's bring forth that discussion.

If they want to challenge it then let's do that. But if we just stay silent on it and just try to use different terms, we're not - we're avoiding the discussion.

Ken Bauer: Ray I think that was beautifully said and to Avri, I don't think we're saying that there isn't - if an attorney who is a councilor says I have a conflict of interest we're not saying that that's false.

We're saying yes of course, if you say you do then of course you do. What we're saying is that legal would prefer that we not use the big COI terminology because it has a specific legal meaning that ICANN doesn't want its councilors to be attached to for reasons that it knows.

And we can argue, as Ray said we can argue with them about whether that should be or shouldn't be true, but for the moment if we accept it, all we really are saying then is when you step forward and say I have a conflict of interest, we're just going to write it down as an obligational abstention, that's all.

It doesn't change what happens and it doesn't change the remedies, it's just how we - what we label it.

Ray Fassett: Exactly.

Avri Doria: Okay. As I say, as a person who's not a lawyer and only a philosopher I'll remain confused and let see what the lawyers have to say.

Ray Fassett: There you go. I think putting it in black and white can only be healthy, so that's all I'm asking for. Let's go ahead and use the other terms and - etcetera, but let's also just be sure to state what we - what we're saying conflict of interest to mean in the world of ICANN so people can also understand it like we're understanding it.

Ken Bauer: Yeah, this is Ken, I got that and I will put that into this next draft.

Ray Fassett: Perfect. Thank you. As long as there's no objections. Okay, well we're about 11 minutes over the hour, I don't have any - well there is one other bit of housekeeping and I don't know who all's - I don't think Ron's on the call but it doesn't matter, I'm going to get it out there for the recording purposes.

We've been running now for quite a while with really absent vice chair, it was originally Jove Kiernan, but he hasn't participated in any of these meetings now for quite some time.

I think it's time we address this. I was going to suggest someone if they were willing to take on the vice chair role and I would like that to be Avri if she would be interested.

Now we don't have to make a decision today but I just want to get it out there, maybe Avri you can think about it if you would like to take on that position.

Avri Doria: Okay, yeah, I will.

Ray Fassett: Okay, so we'll make that a topic at our next meeting when we have more attendance as well.

Avri Doria: Yeah, I'd be interested in hearing what other people thought of my doing that before I...

Ray Fassett: I'll float something on the list as well, okay? Other than that I don't have anything else to add and if you guys are willing we can adjourn and end the call and the recording.

Avri Doria: I'll talk to you later. Thanks, bye bye.

Ken Bauer: Thanks everybody.

END