
ICANN Transcription

New gTLD Subsequent Procedures Working Group

Monday, 13 January 2020 at 1500 UTC

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MICHELLE DESMYTER: Welcome, everyone. Good morning, good afternoon, and good evening. Welcome to the new gTLD Subsequent Procedures PDP Working Group call on the 13th of January, 2020. In the interest of time, there will be no roll call as we have quite a few participants online. Attendance will be taken via the Zoom room. If you happen to be only dialed in on the phone bridge, would you please let yourself be known now?

And as a friendly reminder to everyone, if you would please state your name before speaking for transcription purposes, and to please keep your phones and microphones on mute when not speaking, to avoid background noise. With this, I'll turn the meeting back over to Jeff Neuman. Please begin, Jeff.

JEFFREY NEUMAN: Thank you very much, Michelle. Welcome, everyone. It's a brand-new week and we'll spend this first meeting this week talking about

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string contention. But before we do, let me just ask to see if there are any updates for statements of interest. Okay. Susan has an update. Susan is now a member of the IRP/IOT. Okay, so [inaudible] last year, but the first meeting is this week. Thank you, Susan. Anybody else with any updates? Okay. Then today, we'll spend the bulk of the time – or all of it, actually – talking about string contention mechanisms of last resort. Although, I'm not sure why it's "time permitting," since it's our sole item. Is there anything anyone else wants to add for any other business? Okay. Let me scroll down here. Nope. Okay. Let's go and jump straight into it as this is getting pulled up.

We started last week, at the very end of the discussion on Thursday, going over the list of goals. But we haven't really discussed the goals themselves in terms of whether these should still be goals of string contention mechanisms. Or not, in the case of the first two goals, if you scroll down, because those were the two goals that were in the 2012 round.

And then, once we do discuss the goals that we think should be ones that we work towards, we need to think about prioritization because some of the goals could directly oppose each other or could certainly conflict with each other in certain ways.

The first thing you'll notice is that we've taken – I think it was Susan that suggested this on the call last time – the implementation guideline F, at least the first two goals, and put them into the list below. Now, they're included with all of the others. That's why they have an asterisk by them, because they were the ones that were used in the last round. But that doesn't mean that we need to have them apply in the next round. We should be discussing these goals

in connection with all of the others and not really treat them as different, at least for the purposes of this discussion.

So just looking at those goals, from the 2012 round one of our goals was to resolve contention sets within a pre-established timeframe. And the second one was that if there was no mutual agreement, a claim to support community by one party would be a reason to award priority to that application. I think that the first sentence of number two is not really up for discussion as part of this topic. That, I think, is still agreed upon, at least when we talked about communities and we've talked about that issue.

It's really the second sentence of number two that's a part of this discussion, which is that if there's no claim for community and no mutual agreement, a process will be put in place to enable an efficient resolution of contention. That's the second one.

A third one – and I know this was debated and we'll need to talk some more about this – was that there was a mention of reducing the risk of bidding wars in which the winner ultimately overpays for the TLD. This is a tentative one because there have been comments – not just on the last call but previously – that they don't agree with the concept that bidders are overpaying for their TLDs since they're paying whatever they value it at and that maybe reducing the risk of bidding wars is not a bad thing. So that's certainly one we'll need to discuss.

The next one was also one that we had a comment on towards the end of the last call, which was to reduce collusion, profiteering, and/or speculation, especially as it relates to financial transactions external to the program. Collusion is often a legal term of [art] but I

don't think that that was the way it was meant for this sentence. So if we do think that reducing collusion is a potential goal, we will have to define what we mean by collusion and why it's not a good thing.

Goal five is increasing transparency. Goal six is to resolve contention more quickly, which is interesting because we already have a goal that says that, if there's no mutual agreement, we will enable efficient resolution of contention. That's number two. Two and six sort of relate to each other.

Then number seven is to increase predictability. Eight is to encourage new entrants into the field. And then, there was a comment. Not in the last call, but there has been a comment made, both in public comments that were received and, I think, in the supplemental initial report, that having a goal of encouraging new entrants also could lead one to want to implement multipliers for certain types of applicants such as those eligible for applicant support.

Number nine is to increase efficiencies in application evaluation by way of understanding the contention set. That came up as a result of discussing auctions at the beginning of a process to determine which application you would review first. So that's where that goal came from.

And number ten, which was a new one added from the last call, is to increase creativity in the resolution of contention sets. That could, obviously, be at odds with some of the other goals up there.

Let me just go to the chat. Kristine has asked for the link and the link is there. Paul says, "What does collusion mean?" I think, Paul,

I mentioned that that's one that, if we keep it as a goal, would need to be defined, as that was discussed or questioned on the last call. Alan, please.

ALAN GREENBERG:

Thank you very much. Clearly, as you say, we have goals that are at conflict with each other. But I think more important than that is that we have not just the goals but how we're thinking about this that is in conflict with each other. I made a statement a long time ago that within ICANN if someone does something according to the rules and you don't like it, it's "gaming." If you like it, you call it "innovation."

I think we're very much in the same situation, here, that we want to resolve things quickly, we want to use creativity, and we don't want to intervene. On the other hand, we don't always like the results. In the other world, we would call it "gaming" and not "innovation," even though technically there's nothing different between the two other than whether we like something or not.

I think we really need to get down to the basics of what we're trying to achieve here and then pick which side we want to be on. Because I don't think we can straddle the fence and not end up with a situation where in some cases we're delighted with the outcomes and in other cases, we think the wrong thing happened. I don't know how to do that, but I think we have some fundamental decisions to make, not just in the wording but in what we're trying to achieve and which of these goals are the ones that are really important to us. Thank you.

JEFFREY NEUMAN: Yeah. Thanks, Alan. Certainly, we do need to make those decisions. I'm looking for input from those that have some ideas because I think you're right that a lot of it depends on how you view the situation. One person's creativity is another person's gaming, as you said. But we need to make some choices and I'm hoping to stimulate some discussion.

Paul asks again about the collusion and Elaine is now asking, "Are TLDs public assets? If not, what are they? How do you justify your answer to that question? We've created a multi-stakeholder model that defines ICANN as a steward of this resource. If we don't treat TLDs as public assets we [devalue] ICANN's legitimacy." Paul, I don't know if you have access to a microphone and want to or can speak if you want to just go a little bit more into your comment? Yeah. Thanks, Paul.

PAUL MCGRADY: Thanks. Setting aside the question of "public asset" because in California not-for-profits aren't the government. I think that the public asset argument had a little more strength to it when ICANN had a government contract, but the orthodoxy was to walk away from that contract. I didn't agree with it at the time and I think it has caused problems. I think this is a problem it's causing, right now. But there it is.

Elaine's point is important, which is that we really need to think through what these are, where they come from, and where ICANN gets the legitimacy to sell these. Is it an exclusive right to sell these

or is it just one market player in a market that has not matured yet? Those are all really interesting, important questions that we should talk about.

But we should also talk about that even if we decide to collectively deem these some sort of quasi-public asset, does it then necessarily follow that the only way out of contention sets are to enrich ICANN? Or is there room for creative problem solving like there is in nearly every other industry?

I hope that's helpful. I'm not trying to be confrontational. When we use words like "collusion," that's a big, scary word. And especially in this political environment, it means something to a lot of people. I just think we need to be careful what words we use and to see if there is space, here, for creative problem solving or if the only default really is, "Let's just give the money to ICANN." Thanks.

JEFFREY NEUMAN:

Thanks, Paul. The other thing I want to draw attention to is ... And I only put the first statement in there from the ICANN Board. There was another one as well. Specifically, the board is concerned. If you scroll down a little bit in that statement, the board is concerned about abuse and these concerns mostly center on issues of auctions of last resort and on private auctions.

And then, I think there is a statement. Although, I was trying to look for it quickly as we were speaking. It's specifically about the perception of applicants enriching themselves financially merely by losing. I'm paraphrasing because I can't remember the exact words. Maybe as I'm saying it, someone from ICANN can find that exact

statement. But we do need to address at least the perception from ...

There are a number of elements of the community that feel that if ICANN were to allow private auctions going forward there would be some applicants that will just be in there to enrich themselves. I pointed out that on the last call, there was one public company that had to report earnings and they reported over 50 million pounds of money that was received from private auctions, and that there may be others that want to follow in their suit.

Is that a concern? Should that be a concern? If so, then how do we deal with it? If it's not a concern, then I guess we have our answer. Kristine, please.

KRISTINE DORRAIN:

Hi. Thanks, Jeff. I thought I would interact with you rather than just typing in the chat all of the time. Yeah. I think that in this case, when we talk about that someone might profit or speculate on a TLD, remember that in order to go through their private resolutions you had to have more than one willing party. If anybody thought someone else was in it just for some sort of profit and that really irked you, you could say, "I want to do the ICANN option. It's public, I can get some of the proceeds, and there's no winner other than ICANN." That's a different issue. Paul's brought that up and I think we have to talk about that.

But if you want to go through a private resolution and the two parties are good faith and coming up with a solution that works for them, I struggle to understand why the rest of the community cares.

Because it doesn't affect you. That's my biggest problem. As long as you leave that off-ramp of that if some party feels like they're being taken advantage of or that someone else is getting a windfall at their expense then you have the right to say, "You know what? I changed my mind. I want to do an ICANN auction."

And I liked the idea of including a list, almost like a buffet list, where we were able to say, "You know, if you want to do a private resolution, here are some suggestions you might think about, including maybe even the sealed-bid-type auction, in which you can say, 'I want to do it privately but we're going to cap on it because we don't want it to get out of hand.'"

I think there are options and I don't think limiting options is the right answer here. I think expanding options is the right answer. Thanks.

JEFFREY NEUMAN:

Okay. Thanks, Kristine. Thanks for coming into the queue because I think that's better than me reading them. Thanks for entering the queue. If other people want to take Kristine's lead and jump in the queue, that would be great. In the meantime, I will read them.

Karen Lentz has put into the chat the other board response that I was looking for, so thanks, Karen. This is from the ICANN Board. "On gaming or abuse of private auction, the board believes that an application should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications. This not only increases the workload on processing but puts undue financial pressure on other applicants who have business plans and financing based on

their intention to execute the plan described in the application. In particular, we are concerned about how gaming for the purpose of financing other applications, or with no intent to operate the gTLD as stated in the application, can be reconciled with ICANN's commitment of core values."

Anne Aikman-Scalese states that "to the degree that public comment did not support elimination of private negotiations to resolve string contention, we aren't really in the realm of public assets in our policy work. We must, however, try to eliminate gaming without taking away private negotiations. Submitting sealed bids at the time of application seems appropriate. But if there's a community party application or an intent to object is filed then the bid should be able to be revised because the value of the TLD is different in terms of the cost the applicant is facing."

Elaine states that "if private resolution results in money changing hands then instead of funding some community agreed-upon ICANN function like root server governance or regional Internet registries, it does affect everyone. We have an opportunity to bolster ICANN's effectiveness and legitimacy."

It would be great if someone could join the queue. Kristine states that ... Sorry, I lost my place. "No one had to apply to start with the funds or not in ICANN entitlement."

Phil Buckingham states that "the collusion definition in this context is two parties or more coming together privately to join forces prior to outbidding other applicants to win a contention set. What's wrong with that?"

Donna states, “Elaine, I don’t agree. The program should not be a means for ICANN to profit from the program either. We have agreed that the program is intended to be cost-recovery.”

There are lots of different opinions, here. Let me Go back to Anne’s comment for a second. Anne does talk about the public comment not supporting elimination of private negotiations. Actually, Anne is correct that there was certainly a good deal of support to allow things like joint ventures; some sort of way of merging bids from applicants that could have a significant benefit on the application itself by having different applicants joining forces, if that’s able to be done. And changes to be made to applications, which becomes a little bit more difficult if you do an auction at the beginning. But I want to stay away from the mechanisms at this point because I want us to agree on [the goal].

Okay? Any others, please enter the queue if you have some thoughts on this because we do need to get to resolution on this. If it means going through each goal by goal to see, “Yes, I think this should still stay in,” or, “No,” we can do that. But I’d love to hear some other people get in the queue if they want. Okay. Paul, please.

PAUL MCGRADY:

Thanks, Jeff. I was just going to type this into the chat but I think you’re right. Sometimes you reading the chat is not as effective and you’re not able to convey tone from the person who typed it in. I just wanted to say that I think you and Alan are right. We need to get back to the theory here, first, before we start constructing mechanisms. It seems like there’s a pretty big divide on this one.

Maybe there are two or three different divides. It's hard to even see if it's just two points of view or three or four points of view. Three or four points of view is not unusual in ICANN-land. Jeff, I don't know how we do that. I don't know how we step back. Maybe step a level up from these goals and have a real discussion about what the theory is behind contention set resolution. Are there ways to prevent contention sets in the first place? Maybe we're asking the wrong question. I don't know. But I do think that we need to take a step back. Thanks.

JEFFREY NEUMAN:

Yeah. Thanks, Paul. This whole conversation came out very early on in our discussions when we presented a number of different possible models for resolving contention sets. The only one that survived, I will say, really, that had some semblance of support, was an auction-type model. So doing things like a random selection of who would get it or who would be first to evaluate it did not seem to have much support in the comments that we got.

Similarly, a beauty contest or a request for proposal process did not seem to have an adequate level of support, or at least enough to change the way that we were to do things. Ultimately, we ended up with the notion of auctions being the preferred mechanism for resolving contention sets. That's how we ended up here. Let me go to Anne and then Susan.

ANNE AIKMAN-SCALESE: Yeah. Thanks, Jeff. Can you hear me?

JEFFREY NEUMAN: Yep.

ANNE AIKMAN-SCALESE: Okay. I wanted to ask a question first and then make a comment regarding the auction proceeds. When Kim had linked the board's view with respect to this topic, I wanted to get a clarification as to whether that was a board view that came in in our public comment period or it was a board view ... And I know she linked it but I didn't have time to get to it. Was that a more recent comment or did it come in during our public comment? I'm trying to understand the impact of it on where we are on this.

JEFFREY NEUMAN: Thanks, Anne. I'll answer. Karen can correct me. It did come in response to our ... I want to say it was the supplemental initial report, I believe. Yeah. Or the regular initial report. Thanks, Karen. That's their official [one].

ANNE AIKMAN-SCALESE: Okay. And do we view that comment as something that is really restraining the notion that there would be any private auctions or private negotiation for resolution of contention sets based on what the board is saying? Are they saying, "Hey, we're not buying this"? I don't know that I understand how restrictive their comment is.

JEFFREY NEUMAN: Yeah. Thanks. The board submitted this as feedback, not as any kind of resolution of what they would do at the end of the day. I don't

think we should read it as “this is restricting what we can propose or put into our policy.” I think it legitimately is their concerns as board members but not as an official board position.

So we asked all the groups, and ICANN staff as well, to comment. But it is the board’s opinion and it is something that we should understand when we do present our solution, that this may be something ... That we may not be addressing the board’s concerns or that we are, either way.

There has been some discussion just on the chat about the auction proceeds and the results of that group. Anne, you have your hand still up. Is that ...?

ANNE AIKMAN-SCALESE: No, it was just the comment that the proceeds from auctions, should those continue as a mechanism of last resort, are not intended to benefit ICANN. Folks need to read the proposed final report of the CCWG auction proceeds. Public comment is due on that in mid-February. I’ve used the term “good causes.” Controlling those funds is a bit of an issue. I urge anyone who’s concerned that those funds would be used solely for ICANN to comment on the proposed final report. I’m saying that in a representative capacity as the representative for the Commercial Stakeholders Group. Thank you.

JEFFREY NEUMAN: Thanks, Anne. Yeah. If you have some comments to make, please comment on it there and not in this group because this is not a group to discuss where those proceeds get to. But that said, if the

outcomes of that group do shape your view on future auctions then, obviously, that will play here. Susan, please.

SUSAN PAYNE: Thanks, Jeff. I'm not sure if I put my hand up at the right time, really. You were talking about us trying to agree on which of these goals we supported and which we didn't but then the conversation seems to have gone in a slightly different way. I don't know if you want to spend some time reviewing the chat first or seeing where this discussion goes first? Maybe I'll put my hand down and put it back up later.

JEFFREY NEUMAN: Why don't we go to Alan and then we'll come back to you, Susan?

ALAN GREENBERG: Thank you. I really don't think the auction proceeds report and what is currently being planned for the current auction proceeds is relevant to this discussion. The overall concept of, "Is ICANN capable of using a pile of money for good ends?" is relevant in that if we think the answer is "no" then we don't want to put another pile of money in ICANN's hands. But the specific way this particular process has gone I don't think is particularly relevant.

We have explicitly said in the auction proceeds group that if there is more money it may or may not go into this pile and we could go and put it in a completely different thing. We could buy knitting tools for people in the disadvantaged world and buy wool and knitting needles with whatever hundred million dollars we get from the next

round. That's irrelevant to this discussion. I really think we need to come back to the basic principles.

The word "collusion," I guess, is the best example. "Collusion" says you're doing things either illegally or for nefarious, negative reasons. There's very little difference from collusion and people negotiating other than to what extent it's public and to what extent the ends are legal and justifiable. I think we need to decide.

First of all, get rid of the negative words which imply something. Really, we'd need to look at what we're trying to achieve. Personally, I agree. I don't think we want people going into this new gTLD process because they believe they're going to make a pile of money on the settlement. We want people going into it because they believe they actually can run a TLD and do it properly and for the benefit of us all. I really think we need to look at what we're trying to achieve.

That doesn't mean there won't be conflicts. But without that, I don't think we know how to go forward. Thank you.

JEFFREY NEUMAN:

Okay. Thanks, Alan. I see that Steve's got his hand up. And then, we'll talk about the specific goals and see if we can prioritize them or discuss them and see if they are still ones that we strongly believe in. Steve, please.

[STEVE CHAN:]

Thanks, Jeff. I'm not sure if Susan wanted to go. The point I was going to make was, I think, related pretty well to what we're talking

about now. I just wanted to point out that in that board comment to the supplemental report, they parsed out private auctions. They didn't necessarily call out all private resolutions. They called out private auctions specifically as something that they had, maybe, some concern about.

This working group had also parsed out private auctions versus other forms of private resolution such as joint ventures and, potentially, string changes. I'm wondering if that element of calling out private auctions specifically is being lost in these goals, here? And then, private resolutions as a whole are being lumped together where some might be acceptable to the working group whereas others might not be. I just thought I might call that out as a nuance that might have gotten lost. Thanks.

JEFFREY NEUMAN:

Thanks, Steve. I think that's a really good point. I think that when we talk about these goals, "private resolution," you're right, may mean a host of different things and not just private auctions.

Let's go to the goals themselves. I'll put Susan in the queue first. Susan, do you want to make your comment now?

SUSAN PAYNE:

Okay. Yeah. Thanks, Jeff. First off, I do support the comments that Alan was making about the use of some of the language, here. And I think that many of these goals are giving the impression that in any kind of resolution of a contention set that involves some form of payment – and that could be the ICANN auction or the private one there's a sort of implication in all of this that that's wrong,

unacceptable, and nefarious in a lot of the terminology. Do you think it would be really helpful for us to lose that kind of implication?

The goal in particular that I was just going to start on was because it was number one on the version I was looking at. It's now number three. It's the reducing of the bidding wars in which there's ultimately overpayment. I'm just not convinced that that is a scenario. I mean, there may well have been overpayment where people with hindsight look back and think, "Why on Earth did so-and-so pay that many millions for that TLD?" That happened in the ICANN auction of last resorts. We assume it happened in the private ones but we don't actually know what people paid in the private scenarios. There's not really a distinction being made between the two different types of settlement in that scenario.

But the value of a TLD is arguably what someone is willing to pay for it. And what they're willing to pay for it depends on all sorts of factors; not just how much money they think they're going to make out of it but also what that TLD is worth to them and what its value is, which may be quite intangible. And in some cases, it's a desire not to have someone else have it. I think we're losing that.

For example, if we're talking about a .brand – for example but it doesn't have to be – the value of that TLD is not how many domains you think you're going to sell. It is very much what you think the risk is if someone else has it. I'm worried that we're losing that and we're making assumptions that bidding a particular price is not a true value and that people are overbidding.

JEFFREY NEUMAN: Thank you, Susan. Let's start there. There have been a lot of comments on that third goal in the past couple of weeks about whether this should be a goal. Right now, I'm hearing a lot more people saying it should not be a goal because the bidding wars ... It's all subjective. As Susan said, the value someone pays for a TLD is the value to them.

Let me ask the opposite question. Is there anyone that thinks that this should stay in as a goal, that overpaying for TLDs has been a problem or that we've had bidding wars? Is there anyone that wants to speak up on behalf of keeping this as a goal? Christopher, please.

CHRISTOPHER WILKINSON: Thank you. In the light of the silence, I just thought I'd take the floor to say that something along these lines should be kept. I'm alarmed and depressed by Susan's description of the problems that could arise because this is not what the domain name system is supposed to be about.

The TLD is a service to registrars and registrants. The rent from a good name should accrue to the registrant. I don't see the moral, economic, or political interest in allowing profiteering or high prices in the upstream environment. I see that you've got that, and I think you should try and stop it. I would maintain this language but I appreciate that the language could be refined to specify conditions and objectives. But I don't agree with Susan's analysis resulting in a policy for ICANN. Not at all. Thank you.

JEFFREY NEUMAN: Okay. Thanks, Christopher. Donna, please.

DONNA AUSTIN: Thanks, Jeff. Donna Austin from NeuStar. Can you hear me okay?

JEFFREY NEUMAN: Yes.

DONNA AUSTIN: Okay, thanks. I just wanted to note that within goal three there's a section that says that the winner ultimately overpays for the TLD. I just wanted to note that that's one of my concerns with the Vickrey model if it is a sealed bid at the time that the application is submitted because that could potentially happen because the applicant doesn't have enough information to make a value judgment on how much they should bid for at the time that they submit the application.

And in that case, the winner ... I don't know whether we've agreed this or not but I think the assumption is that if that goes ahead then the winner will ultimately be ICANN. That means a lot more money going into ICANN's coffers, regardless of whether that goes to a good cause or not. I just wanted to pull that piece out. That's one of my concerns about the Vickrey model – if it is a sealed bid at the time that the application is submitted then I believe the winner would ultimately overpay for the TLD, whether or not it's the second-highest bid that gets up or not. I think that that's still largely a concern for me. Thanks, Jeff.

JEFFREY NEUMAN: Okay. We have a couple of plus-ones to Donna's point. Elaine states, "I'd be okay with removing the first part about overpaying if we keep 'encourage applicant to bid their true value for a TLD.'" What does everyone think of that? I think that is in line, Donna, with your comment. In your point, you said that if they were to do the Vickrey at the beginning, they might overbid because they don't have all of the information and then they're not bidding the true value.

It seems like if we just change the goal into "encourage applicants to bid their true value for a TLD," maybe that is more in line. How does everyone feel about changing that to "encourage applicant to bid their true value for a TLD"? Christopher, I don't know. Is that an old hand or a new one? All right. I'm going to assume it's an old hand. Let me go to Donna and then Alan.

DONNA AUSTIN: Thanks, Jeff. I'm concerned. How do you decide what the true value is and who enforces that? The true value is only known to the applicant themselves. It's a little bit like they're saying one man's meat is another man's poison. I'm really concerned that it would be a subjective measure. Determined by who? And what would be the consequence if somebody pays what somebody else thinks is in excess of what the TLD is worth? So I have concerns with that language, as well. Thanks.

JEFFREY NEUMAN: Yeah. Thanks. I think, Donna, that this language is for us as a group so that when we're evaluating solutions we use that as a factor. It's

not for anyone to do ICANN enforcement on. It's factors that we're considering when we select our recommended model going forward for resolutions. I don't know if that helps with the language or it still has the same concerns but I just wanted to make that clear. Alan.

ALAN GREENBERG:

I guess I also have concerns with that kind of language. When we first started talking with new gTLDs and the price was set at \$185,000, I made the analogy of, "Look what people pay for a Super Bowl ad in the US." They pay enormous amounts of money compared to the cost of a new gTLD, which is a pittance compared to that, because they believe that getting their brand name to the right group of people has a huge value.

So especially if you look at .brand TLDs from companies that are potentially large, you can't arbitrarily set the value unless you know what the competition is and unless you know the environment. Essentially, you may be willing to pay any amount of money in relation to the rest of your business costs to make sure that no one else gets that.

But clearly, you don't want to volunteer to do that unless you know there's competition and unless you have some idea of what the other people are going to be doing with the TLD and whether it's a competitive issue or not. We could use the words but I'm not sure they are useful in getting to our endpoint. Thank you.

JEFFREY NEUMAN:

Thanks, Alan. Let me just read ... Sorry. I'm going back, here. Elaine states that "language keeps the spirit of not upgrading in an

auction to get a bigger payout as the loser.” Ken Stubbs agrees with the comments Donna made. Phil states, “Donna, maybe a solution to sealed bids allow a second or third ...” All right, I want to try to get away from the exact solution, here. I want us to focus on the principles before we get to the solution. Phil, we can introduce that back in when we talk about specific solutions.

Anne states, “For anyone considering the use of auction proceeds ...” Okay, this is about auction proceeds, where they go, and the principles. And then, Kristine supports Alan’s comment.

What I'm going to do is, because it does not seem like there’s huge support for keeping the language exactly the way it is, I'm going to ask that that be bracketed for now. And then, maybe put italics next to it Elaine’s language of encouraging applicants to ... Yeah. Just as italics and also bracketed, again.

Let me go back to the first two. I want to discuss and see if those are still relevant, we still value them, and where they stand. I think “resolving contention sets between them within a pre-established timeframe.” This is a private resolution. Do we still want to leave? Regardless of whether we accept private auctions or not, do we still want to have a pre-established timeframe for applicants to resolve their contention set by joint ventures or, in certain cases, changing the string? That was limited cases. Let’s not talk about the specifics of that. But in general, do we still believe that there should be some time period for parties to work things out themselves? Does anyone disagree with that? Susan, please. Not that you disagree. Susan, go ahead.

SUSAN PAYNE:

No, I'm not disagreeing at all. I absolutely agree with that. I think that, as someone has already alluded to on the call – it may have been you, Jeff, I can't recall – a number of the comments that were put in in the public comments supported parties finding alternative solutions, not necessarily all financial. I absolutely think that that should be a firm goal, to try to encourage or at least give the opportunity for the parties to seek to find a path forward between themselves before resorting to “who can throw the most money at this?”

Yes. I suppose the only thing I would comment on is the pre-established timeframe. I'm not quite sure there was a pre-established timeframe per se in the last round. I know that's what the implementation guidance said. I'm not quite sure. I mean, some contention sets took a great deal longer time to resolve than others. I don't think there was a specific time set aside for parties to resolve. It was more if they could reach resolution before it went to auction. Maybe we think a pre-established timeframe is worth having but I'm just not sure, as things stood, that we really had that last time around.

JEFFREY NEUMAN:

Yeah. Thanks, Susan. Maybe Karen could correct me if I'm wrong. I think that once every application in a contention set passed all of the hurdles, at some point ICANN said, “Okay, we're going to start the auctions in a period of X number of days if there is no resolution.” I think parties could request extensions as often as they wanted and that's why it seemed to be like there was no pre-established timeframe. But I think there was one. It just could be

extended by any party at any time. I don't know if we want to revisit that. Paul, please.

PAUL MCGRADY:

Hi. I agree that there's an opportunity here for resolving contention sets and they don't necessarily have to resolve around money. I've put three ideas off the top of my head into chat. One, you've already mentioned: modifying the strings in some way that still accomplishes what the two applicants had in mind. Agreeing to run it as a JV, which would mean changing applicants. That's the new idea that wasn't in the Applicant Guidebook. It's not new to me. Or build use restrictions.

For example, public interest commitments that could respond to brand concerns. The classic example from the last round was .coach. All kinds of uses and meanings for the word "coach," from sports teams to affordable seats on an airline that had nothing to do with purses. In that situation, maybe the .brand applicant filed ... I don't know. I didn't represent them but maybe they filed defensively.

But if they could get a public interest commitment from the applicant of .coach that says, "We'll keep an eye on this namespace and it won't become a place where people can buy and sell purses, wallets, belts, and other things that you care about." That might have been sufficient and that might have resolved the contention set. Not everything needs to be a binary, "money has to flow," and we don't always have to argue about who's going to get the money. There are all kinds of creative ways to solve these things that don't involve money at all. Thanks.

JEFFREY NEUMAN: Yeah. Thanks, Paul. In a bunch of those, there are options that we talked about. It seemed like we got a good deal of support within the public comment. I think what we're saying is that unless there's anyone that completely opposes this – but I haven't heard that yet – that resolving contention sets within a pre-established timeframe is still a goal. Karen did confirm that they were given once all of the applications in a contention set were finished going through the evaluations, objections, and all that stuff, then they were given a time for their auction but they could extend it.

I don't know if we want to drill down into that more and make some more procedures around that. But it does sound like we still agree with the notion of resolving contention sets within a pre-established timeframe, at least, with some form of private resolution. That doesn't necessarily mean we have to allow all of it but at least some of it.

The second one I want to talk about is because this was later interpreted to mean auctions. Again, skipping the first sentence in there, which I think we can ignore for this section; “If there's no claim of community and no mutual agreement, a process will be put in place to enable efficient resolution of contention.” That was defined in the 2012 round, subsequent to this policy as being an ICANN auction.

Do we still believe that if there's no community priority, no mutual agreement of a solution that we talked about in number one, then the ultimate last mechanism for a resolution would still be an ICANN auction?

Not to dictate the answer but almost all of the comments that we got in did support that notion of ultimately being an auction. Although, I will state that there were comments put in about non-profits and others that maybe should not necessarily be subject to auction. But for the most part, the auction of last resort was, indeed, the mechanism that most groups supported.

I'm actually going to make a proposal to change that second one. If there's no [out claim] and no mutual agreement, an auction process will be put in place to enable resolution of contention. That is, essentially, what the comments support. Yeah. Let's put that in brackets. Thank you.

All right. The third one, it again does not seem like we have agreement on. We've already discussed that one.

Let's go to the fourth one. The fourth one said, "Reduce collusion profiteering and/or speculation as it relates to financial transactions external to the program. While this is not an explicit goal for the mechanisms of last resort it has been discussed as a motivation for altering the auction mechanism."

One of the reasons we're talking about a Vickrey auction or another form of sealed-bid auction was because we thought it may be in line with this goal. But we've certainly heard comments that collusion is a vague, undefined term, here. Let me throw it out to the group to see whether we need this or whether there are ways to revise it in order to make sense.

While people are thinking about that, I'll go back to the chat. Phil states, "The biggest problem is that applicants, once they've found

out that they were in a contention set, then needed to raise additional huge sums of money to bid and win the auction. They need to have a factor in this huge cost in their original financial model. This was not a requirement in the RI financial model.”

Donna states to Paul’s point, and perhaps what Kristine mentioned earlier in the call, “If other options were available to resolve contention sets, that may reduce the possibility of profiteering from the program, which I believe is the primary concern.”

Greg states, “Bid-rigging would be a more well-defined term if it fits rather than collusion.” Martin states, “I feel an applicant should already factor in contingency in the event that they could be in a contention set.”

Greg offers a suggestion - thank you, Greg – to substitute bid-rigging instead of collusion. Does that say what people thought collusion meant? We have silence. Let me ask, do people support this goal? It seemed like in the comments that we got there was support for this kind of thing. Anyone? All right. Christopher, please.

CHRISTOPHER WILKINSON: Hi. Thank you, Jeff. I think we need to keep the word “collusion.” ICANN is, for practical purposes, the competition regulator for this industry and “collusion,” has, as has already been pointed out, a quite specific reason and meaning. Having observed this process for a decade or two, I think there has been collusion. As I referred to in the chat, I would just say “exclude collusion” and “reduce profiteering,” if you like, because that’s more difficult to measure and it’s probably not illegal. Eliminating collusion among

interested parties is an important role for ICANN and it should extend, definitely, to this area. Thank you.

JEFFREY NEUMAN: Okay. Thanks, Christopher. Susan, please.

SUSAN PAYNE: Yeah. Thanks. I think the issue a lot of us have is the term “collusion,” and, recognizing that Christopher feels that collusion did occur, I'm not aware of collusion having occurred. That doesn't mean it didn't. But that's an improper practice, isn't it? That's my understanding of the definition of collusion. There is some kind of improper side-dealing between parties in a nefarious way rather than like a private settlement.

Could we just say something like “eliminate the risk” or “reduce the risk,” or something? We appear to be suggesting that we know there was actual collusion and I'm just not convinced that we do.

JEFFREY NEUMAN: Thanks, Susan. I think that's a really helpful suggestion. Can we put in there, at least in brackets, “reduce the risk of”? And it's the risk of all of those things, not just the risk of collusion. The risk of profiteering and the risk of speculation. That “risk of” applies to all of that. We'll have to rewrite that sentence to make sure that that's clear.

I do want to point us back to Elaine's comment because we should not be losing sight of the board's comment, which is that

“applications should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications.” I don't know how we prevent that but that is something we should put in, at a very minimum, bracketed text because the board has suggested that language. Maybe we put that as number 11. We might move it up in the ranks but we're just listing. This is not a priority list at this point, it's just a list of goals.

If we add “the risk of” to number four, does ... And I would also ask that we take out the parenthetical. That was just as an explanation of why it's put in there. But I think we should just ... Yeah. Okay. I've got Alan and then Christopher. Alan.

ALAN GREENBERG:

Thank you. On the term “collusion,” I think we have to go to the definition and say, “Is there something there that follows the term of ‘collusion’?” I mean, I could read it to you. I'll post it in the chat. It talks about a secret agreement, deceitful, an attempt to limit competition, or defraud others of their legal rights.

I don't think it follows those words. I think we need to be careful in using the term. I will post a definition and we can look at it from that point of view. I don't think I want to read it. Thank you.

JEFFREY NEUMAN:

Okay. Thanks, Alan. That will be helpful. Alan, I think your line's still open. Nope? Okay. Let me go back to the chat before we get to the next goal.

Kristine states, "Any reference to exclude or reduce collusion will be a problem because private resolutions are private. This is going to open up a whole mess of issues with people speculating about if there was."

Greg states, "Collusion covers a variety of potential practices and is not particularly specific. Bid-rigging is a specific form of collusion."

Donna states, "I think 'reduce the risk of profiteering' should be a separate goal from collusion and/or speculation."

Susan states, "But do we agree that collusion means illegal, improper practices and not private settlement? If we don't agree then we need a different term instead of collusion." Kristine says, "Yes."

Alan has ... Okay, this is back to the definition. And then Anne states, "Borrowing from the trademark phrase, is there a way for a party to challenge a bona fide intent to use a gTLD?"

Okay. Going back to the goal, we have "reduce the risk of collusion, profiteering, and/or speculation." There was the comment Kristine made which is important, which is that any 3rd party ... Because it's private, there's no way of knowing. I guess, Kristine, I would say that it would have to be a claim by someone in the contention set that there were others trying to collude, profit, and/or speculate. I don't think it could come from outside because of the privacy.

But again, these are not for ICANN to measure but for us to come up with a proposal as to what should and shouldn't be allowed. These are factors for us, not factors for measurement by other 3rd

parties. So when we choose an ultimate solution, it's what we will look towards to see, "Does this advance all of these goals?" Donna.

DONNA AUSTIN:

Thanks, Jeff. Is the concern with collusion the perception that in order to profit from the program applicants need to push up the price in a private auction, which means that they can then profit from it? If that's why we're concerned about collusion, that's why I'm suggesting that we have a singular goal or aim that is to reduce the profiteering from the program. Because that profiteering could take on a number of different forms.

There could be collusion among applicants to push the price up, which is the concern, I think. Speculation is a little bit different because you're spreading your bids in the hope that a number will end up in a contention set and you'll push the bid up but hopefully you hope to lose.

I think collusion and speculation are two mechanisms by which you could profit from the program. That's why I think maybe we've just got the wrong word, that this is about profiteering. Collusion and speculation are how you could potentially profit from the program.

JEFFREY NEUMAN:

Thanks, Donna. One of the things that was brought to the attention of board members, and which we have no way to independently verify whether true or not, was that there were certain portfolio applicants that had discussions amongst each other to say, "Okay, well, both of us are involved in these ten auctions. These are the ones I really want," these are the ones they really want, agree

amongst each other on how they'll bid on each of the auctions to make sure that one gets certain TLDs and another gets other TLDs.

Again, I don't know of any way to verify that because all discussions were private. But that could be one of the types of collusion that people were trying to prevent against. Ken, please.

KEN STUBBS:

Thank you, Jeff. I hope you can hear me. I'm very concerned about using the word "collusion" here. Principally, because I think from a practical standpoint you have to prove intent from the beginning. And just because two separate registry applicants applied for the same strings doesn't necessarily imply that they can't arrange or proceed down the road to negotiate some sort of a solution that resolves their issue. I don't think that the outside public really has the right to step in in a situation like that. I don't really think they have standing but I'm not a lawyer.

I think from a practical standpoint, we're making it sound incredibly shady and that the only reason we're putting this in there is the presumption that people are just going to get into this process to game it rather than for the purpose of establishing their domains. All I'm saying is that I don't think it taints the process by implying collusion here.

The same with the idea of profiteering. Define profiteering to me. I mean, from a practical standpoint, I know that Jeff was in the room, I was in the room, and there were promises made by ICANN, at the time that we were in the room and we discussed auction proceeds, that the funds were to be used to benefit the community and that

there was going to be a process that gave the community the opportunity to determine how the funds would be most effectively used.

That process got short-cuttred. It almost became an arbitrary item at the end. ICANN spent too much money getting out from under the US Government. They overpaid on attorney fees, etc., etc. All of a sudden, somebody decided, "Well, we ought to use some of this money to renew the reserve funds." There was never any intent at the beginning. Or maybe there was. Was there a collusion that eventually they'd be able to get control? I'm trying to make this sound more positive than negative. Maybe I'm missing something here. If so, please help me out.

JEFFREY NEUMAN:

Okay. Thanks, Ken. Does anyone else have any thoughts on those? I do want to go back to the chat for a second. Anne states, "I'm not sure horse-trading is actually a form of collusion. If not, not if private resolution is permitted. However, we should develop a policy to deter applications for the purposes of resale and/or profiting from that resale. In other words, that is bad faith."

Paul states, "I still have no idea what collusion means in this context." Paul, I think that's a right comment. I think it means something different to every person. That's why we have collusion there, highlighted, because I'm not sure we understand. We certainly have number 11 in there. That may address the concerns.

All right. Let's go to number five because I think this one is fairly easy to understand. That's increasing transparency. While this one

sounds like, “how could you not be in favor of increasing transparency?” the reality is that if we allow private resolution of contention sets that actually decreases transparency, at least up until the point where a solution is put into place.

Is this really one of our goals? Should this continue to be one of our goals? If so, what do we mean? What needs to be more transparent? Thoughts on that? Ken’s hand’s up but I think that’s still leftover. Anyone have any thoughts? What needs to be more transparent? Do we say that if there is some private auction the fees need to be disclosed? I don't know. I'm just trying to throw stuff out there. I'm not saying it should. I'm just trying to throw stuff out there. Christopher.

CHRISTOPHER WILKINSON: Hi. I'm sorry to keep coming back on some of these points. But in a previous conversation about this issue, my recollection is that the primary objective of transparency in this context was, indeed, to ensure that the participants in a contention set would transparently be identified and that ICANN would monitor and ultimately control the auctioning process, and that in that context we wished to make it as uninteresting as possible for private auctions. You seem to have lost sight of that. The transparency clause is there in order to stop private auctions.

JEFFREY NEUMAN: Yeah. Thanks. That’s one meaning of transparency that we have discussed in the past. I do want to note Avri’s comment, which I think is important: “it’s not the board that uses the terms ‘collusion’

or ‘profiteering.’ Those were our terms. The board used what we have down as number 11.” Let’s see. Okay. Paul, please. Thank you.

PAUL MCGRADY:

Thanks. I just wanted to point out that the three examples of non-economic problem-solving that I put in – changes to the TLD applied for, changes to the applicant to run things as a joint-venture, or public interest commitments in order to encourage somebody to withdraw a defensively-filed .brand application – are all very transparent and they’re all very public. I do think some of the ideas that we’re kicking around here do in fact increase transparency. Thanks.

JEFFREY NEUMAN:

Thanks, Paul. What you’re saying is that the transparency is around the ultimate solution that’s chosen as opposed to the transparency of how they get to that solution, which I think is important to distinguish. Because when we talk about different models of auction, we need to be clear as to what we mean by “increase transparency.” We don’t need to see everyone’s bid, for example. Or maybe we do. But certainly, the outcome needs to be transparent, and I think that’s what you’re saying. Alan, and then I’ll read some chat comments.

ALAN GREENBERG:

Thank you. I was going to ask the question, are we talking about transparency in negotiations of transparency and outcome? They’re two very different things. I think it’s probably useful, as we go

forward, to look at examples of things that we would consider legitimate and appropriate or not legitimate. If there are two applicants to a TLD and I approach the other applicant and say, "I offer you 50% of net revenue from net profit from operating the TLD if you stand down," is that a reasonable negotiation? Essentially, it's saying it's a joint operation with one being a silent partner. It sounds like a reasonable business transaction.

What if I say that I offer you two million dollars to disappear? That also sounds like a legitimate thing. Is it legitimate or not? I think, going forward, maybe examples of things that we consider offensive or reasonable may help us get somewhere closer to a generic outcome where we can describe what it is we're allowing and not allowing. Thank you.

JEFFREY NEUMAN:

Yeah. Thanks, Alan. We started going down that path initially but then changed course for this because we want to take everything and see if we can map it to the goals. We will get into talking about specific situations, certainly, on the next call. But we want to then have something to turn back to and say, "Okay, well, if we allow this or don't allow this, is it because it matches one of our goals or doesn't?" I think we'll just keep that in mind for the next conversation.

Donna asks, "Is it actually possible for the program to impose such transparency requirements?" Donna, I think it's possible if we are talking about outcomes. It certainly becomes much more difficult if we're talking about transparency of anything other than the outcomes. I do believe number five was "we increase the

transparency of outcomes.” I think that’s what it means or is supposed to mean.

Number six is to resolve contention more quickly. With number six, the only thing I can think of is to resolve contention sets more quickly. Actually, you know what? Without talking about specific mechanisms, does this seem like it’s still a goal for us? Is it one of our goals to resolve contention sets more quickly than they were done in 2012? Do people believe this should be a goal, that this should be one of those objectives that we work towards? Donna.

DONNA AUSTIN:

Thanks, Jeff. If the program has a requirement that – I know we’ve discussed this but I can’t remember the outcome – we can’t kick off a next round, so to speak, until that program is complete, then not resolving contention sets could get in the way of that. Maybe we need to be mindful of what that requirement is. If we can carve out contention sets so that it doesn’t impact any future round taking place, that may be okay. But if contention sets need to be resolved before we can kick off another round, then it seems to me that we need to have something in place to address that.

JEFFREY NEUMAN:

Thanks, Donna. That’s a great point. We should put in a note, there, that does indicate the potential dependency on timing of future rounds. And to the extent that it has that impact, then this may become more important than if that’s not an issue or a dependency for the next round.

Let me read some comments. Jamie states, “Resolving contention more quickly will require all prior elements of the application process to move more quickly.” That’s very true.

Gigi states that “if we have predictability and transparency resolution of contention sets, arguably it would be quicker.”

Phil states that “it has to be a very clear timetable in place so that ICANN commits, too.” One of the things we could state is that if this were a goal that the period in which parties to a contention set can agree to privately resolve this situation, we could say that it can only be extended once, twice, or whatever the rule is, instead of allowing this infinite extension of time periods just because one applicant requests that extension. I don't know. I can't remember if it was that all applicants had to agree or that it was that just one applicant needed to make the motion to extend. I should research that. Susan, please.

SUSAN PAYNE:

Yeah. Thanks. I'm referring back to what I was saying earlier. People were correcting me when I said I wasn't sure if there was a pre-established timeframe. People were correcting me and pointing out that there was. And to the extent that there wasn't, it was because one was waiting for all applications to be evaluated, or for particular objection processes, or requests for reconsideration, or whatever, to go through.

That would seem to suggest that in situations where there wasn't some other problem, the contention sets did move relatively expeditiously to conclusion. Perhaps this is a non-issue. I think it

potentially is because it's not about the resolution solution per se. But actually, delays were due to other issues altogether that we're not addressing here and can't fix here.

To my mind, if we want to have a goal about speed then I think it should say something like "resolve contention expeditiously." But not "more quickly" because that's suggesting we think it was too slow last time around. As I say, I think that, from comments other people were making on this call, we actually don't think that that's the case.

JEFFREY NEUMAN:

Yeah. So the one place it could be an issue or a problem is, as Donna brought up, if it becomes a dependency to the start of the next round that you have to be done with a certain percentage of cases or delegations, if it's by delegations, or by contract signed, or whatever. It could be an issue, there.

Let me ask the question in a different way. A lot of times, it wasn't the contention resolution that was too slow. It was that every little thing would stop the contention set from moving forward. Any request for reconsideration, the second request, third request, or fourth request. It was like an infinite number of requests for reconsiderations would stall the contention set for years. That may be why people think it was too slow.

That's not an issue with the contention set resolution, per se. It's more an issue of the use of the appeals and reconsideration, which I think we have sort of addressed. Well, maybe not the reconsideration, so much, but certainly appeals and trying to limit

the number of them in making sure that they don't take forever. If we "fix" that, I don't think the actual resolution of contention sets took too long. I think it was everything leading up to it.

Okay. Let me go through. I know the time. "Increase predictability." That's one of our goals for everything so I'm not sure that we have much comment on that.

"Encourage new entrants into the field." This is an interesting one because we did get support in general for a new gTLD program for encouraging new entrants. But this is pretty specific because it would be a goal for the contention resolution mechanism to encourage new entrants, which would then give rise to or prevent certain types of mechanisms from coming into play. Any thoughts on that?

Kathy is stating "it's very important." All right. Christopher, and then we'll stop after this one. Christopher, please.

CHRISTOPHER WILKINSON: Hi. I think it is important to maintain the reference to new entrants. As I think I've said before explicitly in the PDP, a main weakness here is that the incumbents have a disproportionate influence over the terms and conditions of new entrants, which is ultimately wrong, especially since the present structure of the DNS is excessively concentrated.

Now, how we do this, there are various ways. But if I put my Work Track 5 hat on, I would just say that you will recall that I have argued that the geographical names must be incorporated in the jurisdiction of the name concerned. I would go a step further that, in the event

of a contention over a geographical name, the applicant support eligibility should come in and we should give priority to the applicant support candidate for geographical names, provided that the geographical name will be incorporated in the jurisdiction concerned.

There are several other ways of encouraging new entrants but it's absolutely essential for our international public image to do everything possible to exclude the risk that we would be characterized as incumbents determining the terms and conditions for new entrants. Thank you.

JEFFREY NEUMAN:

Thanks, Christopher. We will start here on the next call. But I do want to state that even if we took out "encourage new entrants into the field" from this section, it's still one of our overall goals of the program. "Encourage new entrants to the field" is very specific into choosing which contention set resolution mechanism is selected. That's the question of whether that needs to be considered in selecting a means to resolve contention sets or whether it's just an overall goal of the entire program. That's what the discussion is around, now.

I do want to point out that whether something is "policy" or "implementation," our working group is very unique in that we are supposed to look at policy and procedures, which includes implementation. Not that we are going to define everything that needs to be defined in implementation, but to the extent that we have some thoughts on it or guidance. And that's how we would word implementation in a lot of ways; it's that it's guidance as

opposed to “you have to do this” or “you shall do this.” We do have the jurisdiction to cover both and that makes us a little bit unique as a working group.

Okay. I think this is a very helpful discussion. I think we’ll start at number eight again and go through number 11 but then get into specifics of how or whether each of the different mechanisms to resolve contention fit within those goals. And through that, we’ll have to prioritize the goals to see what’s more important. Because as we said at the beginning, some of the mechanisms may enhance some goals but detract from others. And so, we’re going to have to decide what’s more important to us.

Okay. The next call is on Thursday. I’ll just wait for someone to post the exact time. Thanks, Steve. January 16th at 03:00. Hopefully, we’ll come back with some more information on the work plan, as well, and a flowchart of auction mechanisms so that when we discuss the specific mechanisms we can follow along from that chart. Thanks, everyone. I appreciate everyone being on. I’ll talk to everyone on Thursday.

MICHELLE DESMYTER: Thanks so much, Jeff. thank you, everyone. The meeting has been adjourned. Have a great remainder of your day.

[END OF TRANSCRIPTION]