

TRANSCRIPT

Framework of Interpretation Working Group Call 23 February 2012

Attendees

ccNSO:

Ugo Akiri, .ng
Becky Burr, NomCom (Vice Chair)
Chris Disspain, .au
Stephen Deerhake, .as
Desiree Miloshevic, .gi
Patricio Poblete, .cl
Kathryn Reynolds, .ca
Nigel Roberts, .gg
Bill Semich, .nu
Dotty Sparks de Blanc, .vi

GAC:

Frank March

Other Liaisons:

Cheryl Langdon-Orr, ALAC
Carlos Aguirre, GNSO

Staff Support and Special Advisors:

Jaap Akkerhuis, ICANN / ISO
Bart Boswinkel, ICANN
Kim Davies IANA
Kristina Nordström, ICANN
Bernard Turcotte, ICANN

Apologies

Keith Davidson, .nz (Chair)
Eberhard Lisse, .na
Martin Boyle, .uk

Becky Burr: Thanks, everybody, for joining. First item is the present and apologies. Kristina, can you let us know?

Kristina Nordstrom: Sure. On the call today from the ccNSO we have Ugo Akiri, Becky Burr, Chris Disspain, Stephen Deerhake, Desiree Miloshevic, Patricio Poblete, Kathryn Reynolds, Nigel Roberts, Bill Semich, and Dotty Sparks de Blanc. And from the GAC we have Frank March. From Liaisons we have Cheryl Langdon-Orr and Carlos Aguirre. From staff support and special advisors we have Jaap Akkerhuis, Kim Davies, Kristina Nordstrom and Bernie Turcotte. And apologies from Keith Davidson, Eberhard Lisse, Martin Boyle, and Bart Boswinkel.

Becky Burr: Thank you. The next order of business is confirmation of the meeting report for the 12 January meeting. That's the document that's up on the screen.

Bernie Turcotte: I guess the cut and paste was a little too quick for Keith. It's actually for the 9 of February meeting.

Becky Burr: Oh, I was going to say that seemed like a long time ago. Yes, then it is properly marked, just not on the agenda. So this is the meeting notes for the 9 February meeting. Does anybody have changes, comments, questions, concerns?

Kathryn Reynolds: Short and sweet as it was meant to be.

Becky Burr: Hearing no questions, shall we accept them? Do we have a motion? Or do we just do this by acclimation?

Bernie Turcotte: If no one opposes, we think of it as approved by everyone.

Becky Burr: Okay. There it is. Let's think of it as approved. Okay. And then on to the next topic is the discussion on the GAC response to the consent topic. Bernie, do you want to just describe -- we don't have the GAC -- oh, here it comes. So there's the draft GAC comments, do you just want to summarize this and --

Bernie Turcotte: It was really just to make sure if there were any additional comments from not the 9 February call, because we didn't chat about it, but from the previous call at the end of January where we did not have a large

attendance. So it was really to continue if there were any additional input. Probably what's useful to say at this point is that the exec is drafting a response for the GAC and we hope to have that ready prior to Costa Rica and we'll circulate it on the list since we don't have any more meetings. So I'm going to send it back over to you to moderate if there are any further additions or comments on the draft GAC response.

Becky Burr: Okay. Does anybody have any comments on this GAC response? I think a great deal of it is not particularly complicated or controversial. It does get into the issues of -- that we've been talking about, how one would reach the outcome of a response.

Bernie Turcotte: I think Bill has his hand up.

Becky Burr: Oh, I'm sorry. Bill?

Bill Semich: Bernie, could you just quickly summarize what our response is?

Bernie Turcotte: Well, I believe that what we're saying is essentially that we welcome the GAC support for the recommendations on consent. We understand they've made a whole bunch of great suggestions. We don't think we need to handle them directly in the consent paper. There's a lot of stuff that has been announced that is planned to be worked on in other reports. And we detail the reasons and where those things are. So essentially I think what we're saying is we take on all the points and they will all be addressed, but they don't necessarily require a change of the consent document as it is a summary.

Bill Semich: So just so I understand, because I don't see this document, maybe I should wait for it --

Bernie Turcotte: As I said, it's going to be finished up by the exec and sent to the email list before Costa Rica so it's not out yet.

Bill Semich: Just a concern of mine would be that we are somehow agreeing to this 60-day termination or whatever as opposed to recognizing the need for some kind of definition of what's different that's between lack of consent or response versus somebody just disappeared from the face of the earth.

Becky Burr: Right. I don't think we proposed to adopt a 60-day deadline or anything like that. Those issues are all going to come up in the -- we're going to have to draft them but we haven't gotten there yet. Frank, has his hand up. Frank?

Frank March: My apologies. I put myself on mute. I just want to confirm that your interpretation is correct. As I recall the discussion we had, there's some

debate as to whether the 60 days should be in here or not although it's something which in itself would require some sort of policy development process following this. But the 60 days definitely was not affirmed, rather it was simply taken as an indication that some sort of timeframe would be useful. Thanks.

Becky Burr: Thank you. Other comments? No other comments, okay. So the plan is that a draft response will be circulated with the intention of getting it out to the GAC before Costa Rica. I think our next meeting is in Costa Rica on Thursday, is that correct, Bernie?

Bernie Turcotte: That is correct. 13:00 local time on Thursday which is the 15th of March.

Becky Burr: Okay. I guess that we've been incredibly efficient and gotten through the entire agenda in 7 minutes. Is that right, or is there more? I'm sorry, I'm wrong. Public consultation. I had to scroll down on the screen. Okay, we have -- do you want to update the group on the final consent report and the public consultations on that?

Bernie Turcotte: Thank you, Ma'am, yes. The final report of pending and documenting consent for ccTLD delegation/re-delegation, basically for those that were on the DRT working group and the final report, what we've done is A), we have changed nothing. So it's a reformatting job and a presentation job for the final report. And basically we've taken various things and created an executive summary. I'm not going to go through it. There are no new recommendations. The original recommendations have not been changed. It's purely a packaging exercise. And if there are comments or questions, I'll be glad to take them.

Becky Burr: And when would we be posting this? When would we be proposing to post this, Bernie?

Bernie Turcotte: I'm hoping that if the group is agreeable today, we would really, really like to get this approved today, especially given there are no modifications from the original consent document that was approved by the group.

Becky Burr: So we probably should just look quickly at the executive summary because that's new content, although it is not new -- it doesn't even appear to be new words really.

Bernie Turcotte: The executive summary is a cut and paste from a variety of documents we've all seen. So there is very little that is new. Only the bottom part where we talk about the summary of the recommendations before including the detail of the recommendations further on in the report.

Becky Burr: Right. Comments on this report? Bill? Bill, you have your hand up, but I can't hear you.

Bill Semich: Yeah, on -- it's a minor issue but it has meaning, on -- where did it go? Section 1.2.2, at least -- it's probably different numbering, I'm sure it's because whenever I open anything in Word it creates a whole bunch of numbers. But anyway, in --

Becky Burr: I don't even have a 1.2.2.

Bill Semich: Yeah, that's what I mean, my system probably created its own numbering scheme. But under recommendation D, IANA undertakes --

Bernie Turcotte: Let me go find that, Bill, before you go further. So under D?

Bill Semich: Yes.

Bernie Turcotte: Okay, let's go try and find D, so that -- D, okay. 1.2.2?

Bill Semich: Yes. The word party should be plural possessive instead of singular possessive since both parties need to give their consent.

Becky Burr: That's right. Bernie, do you see what he's pointing out?

Bernie Turcotte: Sorry, I was on mute. That's only a grammatical correction, Bill, and you are great on that. I think we can make that change without any compromise or hoopla.

Bill Semich: Otherwise I'm good.

Becky Burr: Okay, excellent. Any objections to posting today and getting it out? I think we will take that as approval.

Nigel Roberts: Well done.

Becky Burr: Okay. Bernie, can you update us on the significantly interested parties consultation?

Bernie Turcotte: I did not check today. Let me have a look, I've got it as a bookmark. But as far as I know there has been only one submission. There is still only one submission from Anthony Vancouvering, and that's about it. Unfortunately, that submission will force us to go into the extended mode consultation as far as the new rules for public consultations at ICANN. But that's life, that's okay. I think Anthony's comments are interesting, but I don't think they are going to change anything relative to what we've

proposed. That's my report on where we are with the SIP public consultation.

Becky Burr: Okay. I see Cheryl's hand up. Can I just ask you, Bernie, first to just outline for us what the extended consultation schedule means.

Bernie Turcotte: It means that after the consultation is closed, we need to sort of -- if I understand it properly, because we haven't gone through this, and Bart's the expert and unfortunately he can't make this call, so the working group will post a reply to the notes that have been given on the consultation and then there is an [impartial] consultation for those that have --

Kathryn Reynolds: No, you're wrong.

Chris Disspain: No, Bernie, that's not right. We don't post anything. It's simply a case of having a comment period and then having a period called, what's called a reply period where people can reply specifically to comments made. In simple terms that's it.

Bernie Turcotte: Yeah, so we're going to have that extended period available.

Becky Burr: Okay, I'm going to -- Kristina, could you announce what the code for mute is? Somebody is having problems.

Kristina Nordstrom: Oh sure, it's *7 -- I'm sorry, *6 to mute, and *7 to un-mute.

Becky Burr: Okay, great. Cheryl?

Cheryl Langdon-Orr: Thank you. I just wanted to say that it's not closed off yet, but Bernie, the ALAC is not going to respond to this, and I thought that particularly with the issues that we've now got, it would be important for me to put on the record that there will be no response from the ALAC on this public consultation space. And in fact, if we were to say anything it would be nothing but well done, thank you very much. Which we don't intend to do because we didn't want to trigger the additional time. But now it's been triggered, so never mind.

Becky Burr: Okay. All righty. Thank you. The next item, agenda item is further discussion on the issues raised on the list especially regarding what the reference to misbehavior might mean and what might be meant by IANA stepping in. Just to sort of summarize what I think at least two positions are with respect to the misbehavior, is the question on the table really seems to be whether the duties of a registrar as the trustee in the non-legal sense of that word for the community is part of the range of considerations with respect to misbehavior. And then I don't think we've

actually had any discussion on the list regarding what stepping in means. So Nigel, you've been very quiet about this issue.

Chris Disspain: Do we have Nigel on the call?

Becky Burr: I thought he was on the call. I thought he was listed. Okay, I mean I think that this is a question that we will have to resolve and I think that there are -- there's some fairly firmly held opinions that the reference to substantial misbehavior is a reference to technical operation of the TLD only with respect to any kind of revocation issue. And that if it means anything else, it does not come up in the delegation, in the re-delegation context. Does anybody want to -- I am having a hard time figuring out how we can read the words, the duty to serve the community, out of the definitions of required or expected behavior. But that clearly is a term that can be used as a sort of -- it can be abused. And so we do have to talk about it and make sure we understand what we mean by that.

Nigel Roberts: Can I put my hand up? I've actually got the call forwarded and I'm actually at the website right now, so I'm not on the Adobe chat room. The interesting thing is, I know this is the ccNSO framework of interpretation working group and everybody in the call and in the group is very concerned with ccTLD matters. But the fact is that RFC1591 was written to apply to all then in existence TLDs including dot com. And I would be very interested to see how we interpret that in terms of the context of this duty to serve the community wording.

One of the things that I got shot down was I suggested -- well, I mean it's a fact, because I was there, that back in the day, in 1996, the duty to serve the community was the duty to operate the zone file with technical competence. Because back in the day, most TLDs either edited the zone file manually or they had some fairly simplistic but efficient automated means of doing that. So what I suggested was that we could take today's context and interpret that in today's life so technical competence means operating the registry competently as well as operating just the DNS competently. But somebody, and I forget who it was, shot me down on that.

So as you say, there's some strong opinions in that.

Becky Burr: Yes --

Chris Disspain: Becky? It's Chris, when you've got a moment, when it's my turn --

Becky Burr: Pardon me?

Chris Disspain: I'd like to speak when it's my turn, thank you.

Becky Burr: Okay. You may speak and then Patricio after you.

Chris Disspain: Okay. So a couple of things. Nigel's point about dot com, I think -- I agree with your interpretation, I agree that 1591 was intended at that time, blah, blah, blah. But I think that with respect to dot com and in fact with respect to all of the gTLDs existing at that time, if indeed there were any others, that 1591 has been succeeded by contractual arrangements between ICANN and the individual registries. And I don't think there's any way of getting around that in the same way that I would argue that if any ccTLDs have individual contracts with ICANN, that those contracts effectively should say the same as 1591 by mutual arrangement by the two parties.

So I'm not sure there's anything much to be gained by discussing the new, discussing this in the context of gTLDs.

In respect to what misbehavior means and what is the operating for the trust of local community, I think there's a lot more debate to be had on that issue. Whether that can happen on this call I have it on the list, but there's a way to go yet before we get clarity on it. I just want to say one thing which is I think -- it depends on how deep you want to go into this, but I think the use of the word misbehavior is, in a legal interpretation, is likely to be interpreted slightly more widely than specifically in respect to technically managing the zone file. It's an unusual word to use in the context of purely technical matters and fits much more comfortably linguistically in the context of the community. But that's just a passing comment. Thanks.

Becky Burr: Okay, Patricio?

Patricio Poblete: Yes, about what Nigel said, I tend to think that we cannot interpret this misbehavior as particularly limited to being competent in the technical operation of the registry. Even in the early days, before the RFC1591 was published, there were problems with ccTLD managers to how -- trying to take advantage of their position to favor their particular IFC if they were competing with others and if they were in the IFC for instance. And I think that's one reason why in RFC1591, number 3, it says the designated manager must be accessible to all groups in the domain that have domain names. And this means that the same rules are applied to all requests and a number of other things. And this nondiscrimination clause, if it were not followed by the manager, I think it would be interpreted as misbehavior.

Stephen Deerhake: I concur with Patricio's interpretation.

Nigel Roberts: It's Nigel. I think Patricio is exactly right. That is indeed imbedded in 5091.

Becky Burr: I hear a but coming?

Nigel Roberts: No, there's no but. I was actually going to refer to that. There are two things here. There's the requirement to operate with competence and there's the misbehavior clause for revocation. The two are separate. In 1996, the requirement to operate with technical competence necessarily only referred to operating the DNS with technical competence. Because there was nothing else. I suggested on about two or three calls ago that you would now purposely interpret the clause to include technical competence in operating a registry. And I recall there was a howl from a couple of people, and I can't remember who it was now. It wasn't Eberhard, it was somebody else.

Becky Burr: Okay, I just wanted to check to see if anybody had a hand up. So I'm a little confused about what you're saying, Nigel.

Nigel Roberts: Becky, I can't hear you now, there's an enormous crackling.

Chris Disspain: Steven, you need to go on mute.

Kristina Nordstrom: The Operator has muted you now, Steven, and *7 if you want to speak.

Becky Burr: Nigel, I'm not sure I followed you. Are you saying that there's some set of things that fall into misbehavior and then there's technical competence that's separate?

Nigel Roberts: Yes, there's two different duties here. There's a duty to be technically competent, which is -- and again, if you look at it even more carefully probably applies at the delegation phase, although it's hard to understand how you could only apply to delegation phase and not thereafter. There is then misbehavior. Now misbehavior implies something a little bit more than just being incompetent. Misbehavior implies some kind of intentional thing the way Patricio was describing it. And if you read 1591, John [Castell] clearly, because he had experience I'm sure, was dealing with the situation whereby you had a country where the internet was emerging. Let's say there were two or three ISPs, one of them became the ccTLD manager, and said, well, I'm giving free domain names to all my customers, but everybody else has to pay \$1,000. That's misbehavior. It's not substantial misbehavior, it's misbehavior. Substantial misbehavior might be misbehavior that's repeated when told not to do it anymore. I don't know. So that's where we're going with misbehavior and substantial misbehavior.

Becky Burr: Okay, so here's my question. I just start reading this and I come to the -- in Section 3 before the bullet points, it says, the designated manager, the major concern is that they be able to carry out the necessary responsibilities and have the ability to do it in an equitable, just, honest, and competent job, to do an equitable, just, honest and competent job. And then there are these points after it. So where do the equitable, just, honest parts come into that? Or do they in your analysis?

Nigel Roberts: Well I think that that specifically refers to the test you have to pass to get the delegation.

Chris Disspain: Nigel, can I just stop you for a second? If you have to pass that test to get delegation, doesn't it inexorably follow that you are expected to behave that way?

Nigel Roberts: I think I said something along those lines, about two minutes ago, Chris.

Chris Disspain: I agree, yes.

Nigel Roberts: But I think that falls into misbehavior. In other words, what they're saying is, you have to show that -- and let's be blunt here, it was you have to show you know how to configure a DNS zone file. That's what it meant. Once you've done that, you have to carry on doing that probably, but there's no explicit clause saying that. It's implicit I think, and it's implicit in the fact that, if you don't do that, it's not quite misbehavior, but it is in a way. Misbehavior to my mind means something intentional and has some kind of guilty mind to it, some kind of wrongdoing associated with it as in the scenario that Patricio mentioned.

So you can't just -- say for example, I'll give you this. In 1996, dot com went off the air because of an incompetent behavior. Now one incident of dot com going off the air shouldn't have been enough for the IANA to revoke the delegation of dot com and of course they didn't.

Becky Burr: Right.

Nigel Roberts: But if for example the name service for the entire TLD becomes non-authoritative every other week, that's misbehavior. Whether it's substantial or not is a matter for the individual fact.

Chris Disspain: The misbehavior is actually not fixing the issue. If you want to be very specific about this example, the misbehavior would be not fixing the issue.

Becky Burr: Okay, so this discussion is a little bit about what -- how you -- how you get from misbehavior to substantial misbehavior. But I still, Nigel, Section 2 says that the authorities have a duty to serve the community. And so --

Nigel Roberts: And when you read that work carefully, it talks about the community being global as well as local, yes.

Becky Burr: Correct. So what does that mean?

Nigel Roberts: A duty to serve the community. Well it's practical words, isn't it? It's hope and moral obligation and grand, fine words.

Chris Disspain: Brotherhood and apple pie.

Becky Burr: And nothing more?

Nigel Roberts: Well, I'm struggling a little.

Becky Burr: Okay, I'm just -- I just want to push this a little bit because we know it's not a popularity contest. Sorry, go ahead.

Nigel Roberts: No, you know and I know what we all as ccTLD managers do, we serve the community. But what exactly in the sense of I hate to use the word law, but in the sense of mutual obligations here. And again, I'm struggling a bit. It's like the old trust deed or in a will saying I leave you all my money on the basis that you use it to do good work in the community.

Becky Burr: Bill, do you have -- Bill Semich? I think you're on mute, Bill.

Kim Davies: Becky, it's Kim, and I'm just going to drop from the call and come straight back in.

Bill Semich: It's always been my belief that the duty is related to managing the top level domain and nothing more. It's not like you're going out giving blood every other day on the job or building schools or anything like that. I mean people can do that, as part of their charter as an entity, but I don't think that's what's being required here. What's being required here is to realize that what you're doing is managing a service for the community and not something purely for your in crowd of private people who want to go out and court domains.

Becky Burr: Okay, I agree -- I mean I definitely agree that it would be hard to read something else -- serving the community in the operation of the ccTLD, I think that makes sense to me.

Bill Semich: I also had my hand up in response to some of the things Nigel said if we can get back there.

Becky Burr: Okay. I don't think Nigel has come back on.

Bill Semich: And that relates to a little bit of apples and oranges. I think Nigel said that substantial misbehavior would be if dot com were dead every week. But I don't think that substantial misbehavior section applies to the DNS failing. In fact in number 4 where, further down in number 4 -- where is it? Yes, satisfactory job of operating the DNS service. That's a revocable action and it clearly states it. I'm not even sure that the misbehavior and the stepping in implies a revocation. Stepping in might be sending out IANA technical stock troops to help somebody or whatever. I don't know, I'm just saying -- so I don't think we have come to a point where we know what it is, what misbehavior is, nor what the stepping in is. But I definitely don't think it's incorrect or poor or incompetent operation of a DNS because that's covered in Section 5.

Becky Burr: So what would be misbehavior in your reading?

Bill Semich: I think it would be related to serving the community properly. But again, I'm not sure we're talking about a revocable act by IANA if they step in. I think we do have a little tough row here to hoe coming up with these interpretations which are agreeable to all of us. But the stepping in issue I think needs to be solved before we figure out what misbehavior is, is one thing for me.

Becky Burr: That's interesting. Patricio? Patricio, you have your hand up, and then Desiree. And Chris, are you --

Patricio Poblete: Yes, I was on mute.

Chris Disspain: I'm back in the queue, Becky.

Patricio Poblete: In the RFP, there is a number of -- there's a list of obligations for the manager. Like the domain has to be managed in a competent way, in a (inaudible) way, and so on. And one would have suspected that would have been a general remedy for the cases when the manager is not complying with any of these. But only in number 3, there is this sentence about the IANA stepping in when there is misbehavior. And that's one problem I have when trying to interpret this document. Actually it's number 4, the significantly interested parties section. That's a problem I have when I try to interpret this document. Why is it only in number 4 that there is this penalty or something that could apply when there is misbehavior? What happens if there is misbehavior with regards to some other of the obligations? There doesn't seem to be anything for that. And that's why I tend to interpret that this misbehavior sentence and the possibility of IANA stepping in should apply to all instances of noncompliance by the manager, not only to number 3.

Becky Burr: Thank you, Patricio. Desiree and then Chris. Desiree, I think you're on mute. *7. Chris, while Desiree is working on that, do you want to step in?

Chris Disspain: Sure. No court -- bottom line is, if this ever ended up in court, what we try to do is come up with a series of guidelines and interpretations of the standard operations. No court is going to interpret 5191 purely on a clause by clause basis. In other words, taking each clause in isolation. Neither is it going to look at a clause and apply specific -- sorry, I'll try it again. If it looks at a particular clause and applies specific examples to it, unless you can come up with a roadmap where the clause takes you, just to have a circular clause that says we don't know where this takes us, is meaningless. And the court wouldn't agree to that.

So as a simple example, if you had a ccTLD where the manager refused to delegate domain names, as I said, they're not technically incompetent because their DNS is running fine, the (inaudible) is running fine, but they refuse to delegate domain names. Or, a finer case, they refuse to delegate domain names to the government. Now, unless anyone is suggesting that that is not covered, it seems to me that one way to work through what these clauses might mean is to use specific examples where we might be generally comfortable we think illustrating that behavior and work backwards from there.

Becky Burr: Okay, Desiree, are you able to -- whatever is going on, Kristina, seems to be continuing to -- Desiree, are you there? Okay. I --

Kristina Nordstrom: Becky, Desiree is only in the Adobe room, she's not on the phone bridge.

Becky Burr: Okay, so she's going to type it in. Nigel, one of the issues that I struggle with when I see this, what I think Chris was just starting articulating, which is at least under statutory construction here, a court would attempt to ascribe meaning to all of the provisions of the document. And so if the duty to serve the community doesn't have a separate meaning, then it's superfluous.

Desiree has typed that misbehavior does not relate purely to the technical management of the DNS or the TLD, but there is a policy and commercial aspect to it that it operate and governance models taken down from the DNS.

Stephen Deerhake: Well that goes back to that whole business of, I'll sell you my -- sell my neighbors one for \$1, but for you it's \$100. That kind of misbehavior.

Becky Burr: Right. That seems to me also to be covered by the word equitable.

Stephen Deerhake: I think so, too, yes.

Nigel Roberts: I think we might find that word, Chris, to be quite important if this is ever litigated.

Becky Burr: Kim is typing something. I'm sorry, you think it would be quite important if it was litigated?

Nigel Roberts: I think the word equitable -- you and I have had this discussion before, Becky, about the nature of any binding obligations that might have been created. And I think that's where they might lie, in the principals of equity rather than principals of law.

Kim Davies: I can just say what I typed, if you'd like. Sorry. I don't -- I was just going to say, many ccTLDs today are already doing some kind of price discrimination depending on the type of registrar. I think the question is whether it's being developed through a public process or guided by public interest principals in developing the particular pricing structure. So I think it's not black and white to what are these issues, but the process by which you came up to what you've done.

Nigel Roberts: I think that's quite a dangerous road for an outsider, whether it's me or you, to go down to judge the local context.

Kim Davies: Possibly so.

Stephen Deerhake: Let me put this on the table as an example, because with AS, if it's an on island registration, it's free. If it's not on island, it's not free. Are we being discriminatory here in violation of the RC?

Chris Disspain: Stephen, it's a good question and it comes back to the use of the word -- I just want to, I'm sorry to do this, but I want to be very specific about it, because you used the word equitable, right?

Stephen Deerhake: Yes.

Chris Disspain: And I want to make absolutely sure that well, yes, there's a difference between using the word equitable in the context that it is currently being used and discussing whether it's a legal obligation in equity or in common law. Those two things are different. So I think it's important to make the point that equitable has a simple meaning, generally just with how we deal necessarily with the board, etc. But again, Stephen, what it seems to me we need to be able to do is to find an acceptable test against which we could put your thus described behavior and come to the conclusion that in fact you meet the test. And equally, we could put some examples that we all agree don't meet the test up against that test and have them fail.

Stephen Deerhake: Gotcha.

Becky Burr: Right, I do think that makes sense. Equitable to me means fair. It doesn't mean identical necessarily.

Stephen Deerhake: I would accept that, because from my standpoint, equitable is, if the domain is available and you're the first one to ask for it, whether you're on island or off island, you have first right to that. Whether it's on island for free or off island for a fee.

Nigel Roberts: Stephen, there's actually another way of looking at this in your particular case and I would suggest -- just bear with me for awhile, it sounds whacky to start with. I would suggest that you're actually charging everybody the same including on island and off island and that you're making a donation to the on island people in order so that they can get it effectively to them no cost.

Becky Burr: Well that -- I mean this is an issue about context, right?

Nigel Roberts: I mean you're doing good works for your local internet community by forgiving or waiving any change that you might otherwise have made.

Stephen Deerhake: Yes, but is that equitable under what we're talking about?

Nigel Roberts: It's not equal, but it may be equitable.

Becky Burr: So, Chris, I kind of like your notion of trying to sort of articulate some things that we think would pass the test and some things that wouldn't and then try to figure out what the difference is. Otherwise, we're in -- otherwise it is very, is potentially very subjective.

Nigel Roberts: I think it's quite interesting, and I'd like to see what Chris is suggesting. What I think he's suggesting is that we use inductive reasoning to get where we're going.

Chris Disspain: I think you may be right that that's what I'm suggesting, Nigel, although I wasn't clear that I was suggesting that until you just suggested it.

Nigel Roberts: I just knew you were going to say something like that.

Becky Burr: Okay.

Chris Disspain: Becky, I think we can do some work on this, on the list. If Bernie would -- if we were to start with sort of like a clean sheet of paper and drew up a whole series of ridiculous examples that are quite clearly in the test and

quite clearly out of the test and then start molding a test from there I would have thought. But it's going to be hard and we need to concentrate on it and it's not going to happen very quickly.

Nigel Roberts: There's also a danger that we're going to run across in doing this, and I'm not suggesting for any reason we should not do it, is that we may come up with something that we all agree is one side of the line, the other side of the line. And then we turn around and we find that the ccTLD, and I'm not going to pick any particular continent, but a ccTLD down somewhere is doing exactly that. And they're a member of our community and they're going to get upset.

Chris Disspain: Yes, but the purpose of this, Nigel, is not to hold the examples up, but to simply use them to, as you had said, for reasoning purposes.

Nigel Roberts: Yes, I'm quite happy with that.

Chris Disspain: And if we're going to be concerned that eventually one day a ccTLD might do one of the things that we think breaches it and therefore we can't have that rule, then we're wasting our time.

Nigel Roberts: No, I'm not suggesting --

Chris Disspain: I know you weren't.

Nigel Roberts: I'm not suggesting -- I'm suggesting that we grow to be prepared for the political forum.

Chris Disspain: Absolutely.

Becky Burr: Right, and I do think this requires some further consideration including putting some of those examples on the table. And I think clearly the -- it would be important in this debate to sort of understand where GAC's members are coming from as well so that we're, so that we understand the whole picture. I think that Bill has his hand up. Bill?

Bill Semich: Part of my concern here is that I'm not sure that this whole equitable share and so on treatment concept applies to what might be called price discrimination. A couple things. Obviously this was written at a time when there really was only one real registrar and that was always the registry whether it was NSI for dot com or NIC.FR for France or whatever. And so the concept of price competition, which also could be seen as price discrimination, really wasn't on the table as far as prices were concerned. And also, the names were all being registered for free anyway in I would say all cases during that time period.

So I'm going to suggest that we not try to get too confused on concepts of pricing which is a commercial model idea, and equitable treatment meaning rules are fair and apply to everyone equally just a simpler concept. Now the rules are fair and apply to everyone equally in fact could be easily interpreted to mean if a name is two characters you can charge more for it than if it's four. Because everyone who wants a two character name will have to pay more for it. That's fair and equal. So these are the kind of concepts I'd like to put forward for any draft report on this thing to consider.

Becky Burr: Okay, so I think the suggestion is here to take this issue to the list and to have people suggest examples of things that they view as clearly on one side or the other of the standard.

Chris Disspain: Well I think the examples will help us to draft a sort of standard, Becky, as opposed -- we start with you don't necessarily have to have the words of the standard report, but you have to at least have a coming together of minds.

Becky Burr: Exactly. What I meant to say was, sort of examples of things that are clearly okay and things that are totally not okay so that a standard can be articulated.

Chris Disspain: Exactly. Or inducted as Nigel suggested, by reasoning.

Becky Burr: Okay. All right. And then, Bernie, do -- are we prepared -- it seems to me it's difficult to have a view about what stepping in means unless we have at least some view of what the standard is, but maybe I'm wrong.

Nigel Roberts: Can I speak on this? I think stepping in is very simple. It means doing something. I thought I captured it in an email some weeks ago. I think the question you're asking is not what the stepping in means, but what are the tools that are available and what is not available?

Chris Disspain: What are the options.

Nigel Roberts: Yes. Stepping in basically means the IANA will do something.

Becky Burr: Okay, I can go with that. Any other comments on that?

Nigel Roberts: The comment that then follows is, would the something be anything short of outright revocation?

Chris Disspain: Well again, you can start to look at that by listing what IANA could do. So for example, what -- it can't fine you, it doesn't have the power to do so. It can't -- there's a whole list of things it can't do. The question is, what, and

it's open to interpretation, the question is what is it within its power to do? But that clearly then is your grab bag of options. And then the next question is, at what stage is it inequitable to take that piece from the grab bag and use that? So a really stern letter publicly posted on the website might for example be something that IANA could do. What would it -- when would that be reasonable and so on.

Nigel Roberts: And then of course we get to the very interesting question, and I like your analogy of the grab bag, what pieces of the grab bag are available du jour and what are available de facto? In other words, just because they can do something is it legal?

Chris Disspain: That's correct, and you can always -- but in our context, Nigel, in what we're trying to do, there's nothing to prevent us from deferring to a we think they can do this. If they do do it, it would be an act for the court to decide if they have the right to do so. We don't have the obligation nor do we for that matter have the skill.

Nigel Roberts: Agreed. The common thing is I think we're beginning to zero in on some very interesting territory.

Becky Burr: Yep. Okay, so that sounds like a plan. Bernie, are you okay with that plan?

Bernie Turcotte: It's a way forward, and therefore I love it.

Stephen Deerhake: Can you summarize it all?

Becky Burr: So we are going to start by offering examples of actions or behaviors or conducts that we think would be certainly permissible and other examples of behaviors, conduct that we think would be clearly problematic. And from those examples, attempt to identify and articulate the principal that's driving them. But it's kind of lining things up and seeing if we all agree on what side of the line things fall on and then figure out from that what --

Stephen Deerhake: Gotcha. That should make for a lively list for a week or so.

Becky Burr: Yes.

Chris Disspain: If you think that's going to be over in a week, Stephen --

Stephen Deerhake: Well, we'd like it to be just a week, but it will probably be longer.

Chris Disspain: I suspect you're right.

Nigel Roberts: Becky, before we leave this call, can I throw in one to get us started?

Chris Disspain: Nigel, just before you do, Becky, I'm going to have to go now because I have a meeting to go to, so I'll leave the call and thanks very much, everybody. See you all in Costa Rica.

Stephen Deerhake: Thanks, Chris. Safe travels.

Bernie Turcotte: People, don't start leaving. You have to approve the progress report before you leave. So after Nigel's thing, we actually have one little bit of business to do.

Nigel Roberts: Okay, well mine is quite simple. An example of what is acceptable behavior. Charging a fee for registration for annual maintenance of a domain name.

Becky Burr: Okay.

Nigel Roberts: It wasn't always obvious if you remember.

Bernie Turcotte: All right, everyone, I think Nigel has launched it and I'll be glad to be the record keeper and compile all of this. But let's do them on the list so that we have a nice, solid track of that.

Stephen Deerhake: Yeah, I'll put our policy out there.

Becky Burr: That's also helpful. Cheryl has -- Kim is charging \$1 million per domain per year and Cheryl's suggestion is that this is something that might be on the Costa Rica agenda and I do think this is such an important issue that we should consider really kind of wading into it in Costa Rica as well.

Bernie Turcotte: And Desiree has her hand up.

Becky Burr: I think Desiree has had her hand up. Okay. All right. The progress report is up and would be posted in advance of the Costa Rica meeting. Bernie, will you walk us through it please?

Bernie Turcotte: Thank you, Ma'am. Our usual disclaimer when this is the case. There is no policymaking, there is no new things. Repackaging our reality. So basically it's short and I will walk through the whole thing because it's short and sweet. We met 7 times by teleconference. We have meeting notes, we have transcripts of the teleconference, so we're telling people about that. We completed the public consultation on the topic of consent. We published its final report on the topic of consent which we have approved on this call, thank you very much, updated its terminology doctrine for the final report on the topic of consent, launched the public consultation on the

topic of significantly interested parties, and begun work on the topic of revocation or unconsented re-delegation.

Our current status on consent, the public consultation on the topic of consent closed. We have the details. The FOI received input, blah, blah, blah, so this is the stuff we talked about today. Significantly interested parties, the working group has completed its initial work on the topic of significantly interested parties and published its interim report on the topic for public consultation. That public consultation will close on 30 March.

Revocation or unconsented re-delegation. The working group has begun, has begun its work on this topic, yes Bill, I'll pick it up, its work on this topic in January of 2012. It is expected that this will be the most complex topic to be dealt with by the FOI working group. The FOI working group will concentrate on this topic at its meeting in Costa Rica.

Terminology. The results of the final report of consent were included in the draft terminology document.

Activities in Costa Rica. The chair and vice chair of the FOI working group will be presenting an update on the activities of the working group, the final report on consent, and the interim report on SIP to the GAC and the ccNSO. The FOI working group will be holding a meeting a meeting on Thursday, March 15, 2012, 13:00 to 16:00 local time. Participants are reminded that these meetings of the FOI working group are always open to the public as observers.

Conclusion of the report, the one grammatical thing noted to be fixed. Madam Chair, over to you.

Becky Burr: Okay. It looks like we've been very busy. Any comments on the report? I've got Cheryl, I don't know what Cheryl's signal means, and Bill, you have your hand up? Bill? Bill, are you there?

Bill Semich: Okay, I hit the wrong button. Butter fingers. I do have some concern under current status consent, paragraph 4, once they report. I'm not comfortable with the concept that we're actually going to wait for GAC to approve the report. It is our report of ccNSO and so on, but I know we want GAC's input and advice and recommendations. And I would be much more comfortable if we had language like that in there.

Bernie Turcotte: I think part of the problem is that's not the way it's described in the Charter. When we finish recommendations, we forward them to the ccNSO and the GAC for approval.

Bill Semich: I'd be surprised. I might have been asleep when we approved this charter, but throw it at me on the list and I'll comment.

Bernie Turcotte: Will do.

Bill Semich: Thanks.

Becky Burr: Other comments? Okay.

Stephen Deerhake: Does Bill's question then prevent us from approving this?

Becky Burr: I guess we would have to do -- we would have to approve subject to resolution of what the charter says. Bill, just in the event that --

Bernie Turcotte: Maybe we can get a pending approval that I discuss this with Bill on the list and we come to a resolution of the issue?

Becky Burr: Works for me.

Bill Semich: That works for me.

Becky Burr: Okay, other comments? Hearing none, we will -- it's approval pending the two of you working out this issue.

Bernie Turcotte: Thank you, Ma'am.

Becky Burr: Okay, any other business -- do we have any other business other than the fact that there will be a meeting in Costa Rica on Thursday, March 13th, 13:00 to 15:30. Bill, you've got -- I think you've re-raised your hand?

Bill Semich: Yes, can you hear me okay?

Bernie Turcotte: The date is wrong. It's the 15th by the way.

Becky Burr: Okay.

Bill Semich: I just wanted to take a chance to bring up a topic I raised on the list some time ago which was met by a thundering silence and that's the concept of an appeal to review panel or whatever the existing RFC1591 -- maybe it's a bad idea, but I think we should at least deal with it at some point.

Becky Burr: So -- I mean 1591 does very clearly contemplate the creation of some sort of a panel. The question I have is, would -- beyond that, from the proposal for how the panel would be constituted or operate would involve policy development presumably.

Nigel Roberts: Becky?

Becky Burr: Yes, Kim?

Nigel Roberts: You just understated what I was about to say. We do need to interpret that particular clause and I do think we need to note that RFC1591 clearly foresaw the establishment of an appellate or review function. It's equally obvious to note that that's never been exercised even in the most controversial of re-delegations. And to note that that is definitely something that we should recommend for policy development, something like that.

Becky Burr: Yes, that's where I come out. Bill, do you have a different perspective on that?

Bill Semich: I don't really have much of a defined perspective except the fact that it was provided there. There are good things about something like that, there are bad things, there's legal liability and so on. So I think it might require some investigation prior to a PC if it's even feasible in light of the current structure of things compared to the way they were back in 1996, '94, or '88, whatever. So I'm really just raising it as a discussion topic. Maybe it might be worth a breakout group or something. I'm not convinced that we need to recommend a PDP.

Kim Davies: I am.

Bill Semich: Sorry?

Kim Davies: I am so convinced. And I'll give you my reasoning for that. The reason I think that there needs to be policy development on that is that from my knowledge of the time, as you probably remember because you were around the same time, the IDNV was John himself. So John was both the person who cited and the person who reviewed it. And that ain't gonna fly.

Becky Burr: So I think that's probably almost anything that we do beyond acknowledging that it's contemplated in 1591 and hasn't been implemented is sort of next phase. I mean I think there is -- yes, there is a question about whether a PDP should be developed for this, but I think that all is a later stage of our work and not clearly within our mandate.

Bill Semich: Okay, I'll take a look at it again and give it some thought.

Becky Burr: Excellent. Kim, you have your hand raised, but I don't know if you have --

Kim Davies: Yes, I was just going to make the comment that when RFC1591 was written it was a staff level action to approve delegation and re-delegation

by the IANA staff. And what we have today is we have effectively a two stage review process. We have staff review and if it effectively gets past staff, and staff agree that the change should be implemented, it goes to a panel and that panel is the ICANN board. Now whether that's satisfactory or not, I'll leave it for everyone else to decide. But I think it is -- there is some concept of a secondary review and that is the review by the board.

Stephen Deerhake: Can I ask a question, Kim, in regards to the two-stage process?

Kim Davies: Sure.

Stephen Deerhake: Which is, has the board ever gone against staff recommendation on a re-delegation?

Kim Davies: Yes.

Stephen Deerhake: Really? Okay.

Kim Davies: Yes.

Nigel Roberts: The disadvantage to this, Kim, is that from my perspective, the two are one. There is no independent review.

Kim Davies: That's fine. Like I said, I mean obviously whether that is satisfactory is for you to decide, but I think it would be missing something to not identify that dimension that (inaudible) ten years ago the process was there was no appeal process to a board. And to be honest, the board has its own appeal processes as well that's baked into ICANN as a whole. So whether you could use ICANN's own appeal processes to appeal a re-delegation, I don't know, but built into the structure of ICANN, that's something new that wasn't in existence when 1591 was developed.

Becky Burr: Okay, my suggestion is that we do further contemplation about sort of where the scoping issues arise in the context of this discussion and then discuss it when we have more of that, when we've thought through that issue a little bit more clearly.

Okay. Is there any other business, Bernie? Bart?

Bernie Turcotte: I believe not, Ma'am. We're done and we've done well.

Becky Burr: See you all in Costa Rica.

Stephen Deerhake: Good night, guys.

Becky Burr: Bye-bye, everyone.

