

# TRANSCRIPT

## Framework of Interpretation Working Group Call *6 September 2012*

### Attendees:

#### **ccNSO:**

Ugo Akiri, .ng  
Martin Boyle, .uk  
Becky Burr, NomCom (Vice Chair)  
Keith Davidson, .nz (Chair)  
Chris Disspain, .au  
Stephen Deerhake, .as  
Dejan Djukic, .rs  
Paulos Nyirenda, .mw  
Patricio Poblete, .cl  
Nigel Roberts, .gg  
Bill Semich, .nu  
Dotty Sparks de Blanc, .vi

#### **Other Liaisons:**

Cheryl Langdon Orr, ALAC

#### **Staff Support and Special Advisors:**

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

#### Apologies:

Bart Boswinkel, ICANN  
Eberhard Lisse, .na

Keith Davidson: Well, I think it's four minutes past the hour starting time, so I think we should make a start. We do have a number of people already on the call. So, firstly, can we have a list of those present and apologies, please?

Kristina Nordstrom: Sure. Okay, from the ccNSO I have Ugo Akiri, Martin Boyle, Becky Burr, Keith Davidson, Chris Disspain, Stephen Deelhake, Dejan Djukic, Paulos Nyirenda, Patricio Poblete, Nigel Roberts, Bill Semich, Dotty Sparks de Blanc. And from Liaisons we have Cheryl Langdon-Orr. From Staff Support and Special Advisors we have Jaap Akkerhuis, Bart Boswinkel, Kim Davies, Kristina Nordstrom and Bernie Turcotte. And we have apologies from Eberhard Lisse. Did somebody else join while I was doing the roll call?

Becky Burr: It was Becky rejoining.

Kristina Nordstrom: Okay.

Keith Davidson: Okay. And I ask if everyone, when they're not speaking, can they please mute their phones, star 6 to mute and star 7 to unmute, I think that's right. But please do, because there are quite a number on the call and if we can interference to a minimum, that would be appreciated.

Okay, no further apologies. Everyone present was recorded. Can we move on to the confirmation of the meeting for the 23rd of August? I think it was a fairly small meeting by memory and I don't think there was anything arising other than to continue our work on revocation. And I think everything is on the agenda for this call. Does anyone have any issues with the meeting notes from the 23rd of August? If not, can we move on to item 4 on the agenda, and revocation as a topic? And, Bernie, what's our best way of handling this? Is it better to look at Becky, Nigel, Eberhard's agreed text on misbehavior first, or is it better to look at the document? I'll leave that to you, anyway. Bernie?

Bernard Turcotte: I really think we're better off with the proposed text from yesterday. It will be a minute for me to haul it and get it in front of everyone on the screen.

Keith Davidson: Okay. And just if anyone on the call doesn't know what I'm talking about, I circulated the text to the working group within the last 24 hours, and it is under an e-mail with a subject line of Substantial Misbehavior. So, if you're not familiar, while we're waiting you might find that e-mail and have a quick read-through. And while we're waiting for Bernie, I'll just say that I'll record my thanks to Becky, Nigel and Eberhard for their ongoing efforts to find a way through.

For many of you on this call who haven't been participating in recent weeks, this has been quite a significant stumbling block for us. I thought we had perhaps reached an impasse on our last call, but we have made good progress in the past week, and I think some give-and-take from all has led us to what appears to be quite a good compromise from those that have had strongly held opinions on this topic. And so hopefully we have something that the rest of the working group will consider reasonably appropriate. So, let's test that, and over to you, Bernie.

Bernard Turcotte: I couldn't get myself off mute. Okay. Does everyone have the document notes, then, on the Adobe Connect?

Keith Davidson: Yeah, it's showing up, Bernie.

Bernard Turcotte: Okay. So, maybe the best thing, given Becky is here, to have her take us through this text, given she's the one who hammered it out with Nigel, and Nigel can join given here's here, but Eberhard is not, I believe.

Keith Davidson: Okay, Becky?

Becky Burr: Okay. Basically, just to be clear, I think that although we referred to it as a compromise, in many ways I think it is more of an exercise in sort of getting our thinking and our expression of what we are thinking aligned rather than sort of changing or compromising views. And I think what we have here is really a refinement of sort of a more precise way of thinking about it.

So, obviously the substantial misbehavior, you have to look at it in two parts. First, what is misbehavior? And so we interpreted that in the context of RFC 1591, to refer to conduct involving the failure of a designated manager to carry out or the manner in which the designated manager carries out the necessary responsibilities of that role. And the necessary responsibilities we have previously identified from the text in 1591.

And so --

Unidentified Participant: Sorry, may I ask something about this paragraph?

Becky Burr: Sure.

Unidentified Participant: I think it's -- I don't have an issue with the sentence beginning, "The working group (inaudible)" until the comma, I think that's perfect, because it would be the conduct involving the failure of a designated manager to carry out, okay? But what comes after the comma, I think it could not be interpreted as misbehavior because it just a manner in which the designated manager carries out the necessary responsibilities. That manner in which the manager carries out those responsibilities could be perfectly okay, so why would that be misbehavior? So, I think there is need for an objective, like in a (inaudible) manner or whatever manner, but as it stands it is really neutral, so it couldn't be misbehavior.

Becky Burr: So, I think we are missing a comma in here, but the point is, there are necessary responsibilities and then the text also says that those necessary responsibilities have to be carried out in a manner that is fair, equitable and honest. And so if you are carrying out the necessary responsibilities but being unfair or dishonest about it, the manner does become relevant.

So, I think if we said the failure of the designated manager to carry out the necessary responsibilities, or the failure of the designated manner to carry out the necessary responsibilities in the manner required by 1591, which is to say fair, equitable, honest and -- I can't remember what the third word was. Does that make sense/

Unidentified Participant: I think it would be better, because it somehow implied that the manner is not what is expected. But as I say, just as it is now, I don't think that part of the sentence could be interpreted as misbehavior. I think what you just said sounds better. It would need to be written the way you just said it.

Becky Burr: Okay. So, I agree and we'll make that change. By way of sort of general guidance and interpretation, this is sort of a standard that is roughly like misconduct in public office as opposed to the sort of more informal kind of misbehavior that you might talk about with respect to a child. We're trying to

really align it with sort of making sure that we're talking about conduct related to carrying out the responsibilities as the designated manager.

So, under that standard, a TLD manager who willfully neglects to carry out the duties of a TLD manager or in carrying out those duties willfully engages in misconduct to such a degree as to amount to an abuse of the trust placed in him by virtue of its designation without reasonable excuse or justification has misbehaved. So, that's the way in which we have interpreted misbehavior.

Now, misbehavior in this context, it is substantial misbehavior, so we can't stop there. We have to sort of look at what makes the conduct that we're talking about here, what would push it from sort of one time into a substantial category, and that would be behavior as we have defined it that is either egregious or persistent. And therefore we have sort of come up with this definition of substantial misbehavior as appearing to include the knowing repeated material failure to perform the necessary responsibilities of a designated manager in a manner that is equitable, just and/or honest. So, that's the digging back into the specific words of 1591, or performing the necessary responsibilities of designated manager in a manner that imposes serious harm or has substantial adverse effects on the local or global Internet community.

And then we go on to say, as we have said above, in this context, serious harm and substantial adverse effects should be evaluated in the context of the IANA contractor's continued focus on DNS security and stability as described above in 5.2.1.3. The point of this last sentence was to bring us full circle and make sure that we are reminding the reader that we have already interpreted the conduct here to hinge on the IANA manager, contract manager's responsibilities related to preserving stability and security of the DNS, as opposed to some more abstract or unrelated to those responsibilities, concept of harm or adverse effect.

Keith Davidson: Okay, a couple of hands up for questions. So, firstly, Martin, then Nigel. So, Martin. And welcome back, Martin. It's been a while since we've had you on a call.

Martin Boyle: Hi, Keith. Thanks. Hello? Am I coming over? Can you hear me?

Keith Davidson: Yeah, we can hear you, Martin.

Martin Boyle: Okay. Yeah, this might actually be something that's in my extended absence you've gone over ad nauseum, but I haven't actually had a chance to read through all of the transcripts yet. But I notice under the first (a) that you make a specific and very clear reference to willful -- willfully neglects and willfully engages, and I wondered why you were excluding from that the incompetence that led to a breakdown in the service that was being provided?

Becky Burr: Excellent question, and the answer to that is very intentional. Because the next section goes on to talk about persistent problems in the operations of the TLD. And so we think that there is a separate competence/incompetence standard that doesn't turn on willfulness or intent. But somebody with the best of intentions could be completely incompetent. That would be handled by the section addressing persistent problems in the operation of the TLD, which is the next section in 1591. So, you're absolutely correct, you (inaudible) --

Martin Boyle: Could you --

Becky Burr: So, 1591, Section 5, after we talk about -- I believe it's Section 5, is that right, Bernie -- says, in the event of persistent problems in the operation of the TLD, the IANA function contractor might need to make changes. I'm sorry, I had the 291 in front of me.

Bernard Turcotte: I'll pull it up for you in a second, Becky.

Keith Davidson: I've got it here. In cases where there are persistent problems with the proper operation of a domain, the delegation may be revoked and possibly delegated to another designated manager. I think the precursor to this is 3.5 of RSC 1591, and the precursor to that is opening line of 3.5, which states, "The designated manager must do a satisfactory job of operating the DNS for the domain." So, does that answer your question, Martin?

Martin Boyle: I have had a bit of a problem trying to identify where this text is going into the existing draft, so I would like to at some stage look and find out what our wording is in the draft before agreeing to that. But nevertheless, I actually do have a sort of residual concern in my mind that you can be just incompetent in the way that you are doing some of your duties as a ccTLD manager without actually doing it willfully because you are competent. And so I think there is a sort of a double track here, and I just want to make sure that we have got in place that which covers it. Thanks.

Becky Burr: Yeah, Martin, that was exactly what was bothering me. So, you should -- we'll get it to you in the context so that you can see it, but I was stuck on exactly the point that you are, that there has to be some way of dealing with plain old incompetence, even good humored and unintentional incompetence. And I think that we have accomplished that.

Keith Davidson: Okay, so Nigel?

Nigel Roberts: Thanks. I hope I'm already off mute. I'm going to try to resist the temptation, because Becky and I have gone around this for a few days now and I think we're both pretty happy with what we have achieved. And so most of what I've got are minor niggles. First of all, [I'll come back on] Martin and I'll underline what Becky has just said.

It's not reflected in the document, but there is a lot of authority and background information in looking at the definition of malfeasance and misfeasance as far as government and public officials is concerned, and clearly substantial misbehavior is a similar sort of thing. It's when somebody does the bad thing by virtue of it is obvious that he shouldn't be doing. Mere incompetence is dealt with in Section 5 on the objective standard as whether or not there are problems with the domain.

The comment I put my hand up originally for is simply to remind ourselves, really, that we shouldn't be saying something is something. We should be saying appears to be, because actually we're an interpretation group, we're not the source of total authority. Somebody, let's say a tribunal in the future, might take a different view. We are coming up with conclusions, so we would want to be fairly definite about what we think. So, I think I've put something on the chat about just a minor suggested change there. It would be nice, by the way, if the text reappeared. It has vanished off my screen, because I was going to make a comment on it. Are we able to do that, get that note back up that was on a minute ago?

Keith Davidson: Hopefully, Bernie was driving that, so, Bernie, could we have the note back on screen?

Bernard Turcotte: Yes.

Keith Davidson: And while we're waiting for that to appear and just as an administrative aside, I note that Bill Semich is on the call and maybe wasn't included in the original list of participants. And also Eberhard has joined the call despite an apology to say that he wasn't going to.

Nigel Roberts: That's a different text. There we go. Something else is happening.

Bernard Turcotte: I'm working on it.

Nigel Roberts: Okay. The second point I'm going to make is actually by virtue of a clarification, pointing at something. And I think we've quite considered to think we've already addressed it, but to highlight it so everybody else on the call has got the opportunity to see what I've just seen.

Now, I'm looking at points (a), (b) and (c), and in (a) we have got two things which a parliamentary draftsman would probably put as (a)(i) and (a)(ii), or something like that. So, under (a), Neglecting to carry out the duties that TLD manager should carry out, or when carrying out those duties engages in a misconduct. And that's qualified by (b), to such a degree is to imagine abuse of trust.

If you simply string all those words together, you would think the qualifier (b) only applies to -- in carrying out those duties engaged in misconduct. But actually I think, and I ask Becky to see whether she agrees with me on this, I think that the qualifier (b) applies to both parts of (a). If everybody else agrees, I think we can leave it all exactly as-is, but I just wanted to point that out, that in our own interpretations we must be careful that we don't create scope for ambiguous interpretations by whoever reads it. Becky, do you agree with that?

Becky Burr: I agree with that. I think as (a), (b) and (c) [goes], it's everything.,

Nigel Roberts: But it's (a)(i) qualified by (b) and (a)(ii) qualified by (b), not just (a)(ii) qualified by (b) or (a) --

Becky Burr: Yes.

Keith Davidson: I think it's actually, there is a .a and a .b both currently residing in .a that need to be separated out, because essentially what you're saying, Nigel, is that, firstly --

Nigel Roberts: We could do it that way, too, yes. But what I want to see is what's in (a) inside brackets, qualified by (b) and (c).

Keith Davidson: Yeah, okay.

Nigel Roberts: So, I'd do that with (a)(i) and (a)(ii), but, Bernie, it's your choice.

Becky Burr: No, I agree with you.

Keith Davidson: Okay, not hearing any disagreement, okay, any further questions? Martin has his hand raised again. Nigel hasn't unraised his hand. So, Martin, the floor is yours.

Martin Boyle: Thanks, Keith.

Keith Davidson: Actually, Martin, we're getting quite a large amount of feedback, and I note that your features on your computer are on. Are you on the phone as well as your -- the Adobe Connect?

Martin Boyle: No, I'm using a headset.

Keith Davidson: The headset from your computer?

Martin Boyle: From my computer, yeah. What I might do is when I finish making my point is to dial in separately from my computer, and then I'll switch the other microphone off.

Keith Davidson: Okay.

Martin Boyle: The two bits that I'm sort of homing in on is -- are the (c) and the second (a). On the (c), without reasonable excuse or justification, we've got somebody who is willfully neglecting, willfully engaging in misconduct, in what way is it going to be reasonably excused or justification for a willful act?

And my second point is under the second (a), and there it says the knowing repeated (inaudible) or failure to perform the necessary responsibility of a designated manager. This then overlaps with my concern about the incompetence, the unknowing, and the refusal to be told. So, I am just sort of raising a question for sort of an explanation of what the word "knowing," or why have we put the word "knowing" in that particular slot?

Keith Davidson: Becky?

Becky Burr: So, I think that in order to address your concern, Martin, we're going to have to get the text of the persistent problems, because this section in terms of substantial, the way we analytically parsed this was to say substantial misbehavior is -- that there are requirements that you do a job that is just honest, equitable and competent. And so substantial misbehavior, to the extent we're talking about the manner of carrying out the responsibilities, addresses the just, honest and equitable prong of 1591, and that persistent problems in the operation addresses competence requirements. There is an intent or repeated requirement in with respect to just and honest and equitable, but in the analysis of the competence requirement, there is no intent knowing component. You can be just plain old clueless and incompetent, and if there are persistent problems, IANA has the right to revoke.

So, I hear you. I understand what your concern is, but until we get the language up there, I think you're not going to -- you really need to be able to see that, that the way in which we sort of separate this out into two chunks. And incompetent doesn't arise in the substantial -- that's not what substantial misbehavior is about; that's what persistent problems is about.

Keith Davidson: And can I just say, too, Martin, that we won't be resolving or finalizing any of this text on this call alone. As is our practice, it will go through at least two reading. Because this is the real, sort of nitty-gritty of our work, these particular aspects of revocation and so on, it may take longer than that. So, don't feel that you're agreeing to, or that you're being pushed into agreeing to anything tonight and reading it in context with the most -- the standard document is quite critical as well. I see Nigel has his hand raised.

Nigel Roberts: Yeah, just to add something. I agree entirely, 100%, as we've been working towards this for a week or two. That's not surprising with Becky. But on Martin's point, he asked about why there is item (c) in the -- both (a), (b) and (c) are the element of misfeasance in public office that were taken from the seminal case, so I can't give you the authority right now. It's in an e-mail I sent to Becky about a week ago and I don't have that immediately to hand.

So, although, as I say, it's not reflected for brevity in what by itself is a page worth -- of trying to analyze a single two-word phrase, there is even more behind this. And I will gladly dig out the English lower authority, which we've used as a model and which I suspect will [persuade the] authority in the US as well.

Keith Davidson: Martin?

Nigel Roberts: Becky might even have it handy, if she's got my e-mails handy.

Keith Davidson: Martin has his hand re-raised. Martin?

Martin Boyle: Thanks, Keith. And is this better?

Keith Davidson: Way better.

Martin Boyle: Okay. That's fine. I think my sort of difficulty, and I hear what you say, Nigel, and obviously in the case of willful neglect and going through the process of substantial misbehavior, that there does need to be some option for appealing against it. It's just that the term of actually having a reasonable excuse to willfully neglect or willfully engage in misconduct is something that does give me a little bit of cause for concern that we should be putting this into a document that is going to be in the public domain. So, that really was my concern on that word.

Nigel Roberts: I'll dig that out for you, Martin, but I think you should perhaps, when I provide you with the authority, address your comments to the learned judge is probably long dead. I think it's a 19th Century case, but I'll dig it out for you and I'll send you the copy that I base my submission to Becky on. And we've modified it slightly. Instead of saying government official, we say TLD manager, but it's pretty analogous.

Keith Davidson: And was that your hand up again, Martin?

Martin Boyle: No, sorry, I clicked erroneously.

Keith Davidson: And anything further to add, Becky?

Becky Burr: Didn't we get all the way through that? Anybody else have questions?

Keith Davidson: Okay. Well, hopefully that gives everyone the context of the discussions that resulted in the wordings and what the intent of the wording is. So, anything more on misbehavior or substantial misbehavior at this stage? Is everyone reasonably relaxed to the extent that they can be, and can we proceed to incorporate the -- what will be a slightly amended text with some of the suggestions that have come through tonight into the main document? Cheryl indicating a tick for yes, and I'll assume that no response from others means that it's okay. So, Bernie, shall we return, then, to the revocation document and other issues?

Bernard Turcotte: Well, we could, but, really, there are some bits of text which have to be amended after this one which haven't been, so I think this was the core piece. We can go back to 3.2. Becky had some other text which I haven't yet incorporated because I was waiting for this one. But I am uncertain on the value of going over that text again without just doing a major rewrite to incorporate this stuff.

Becky Burr: I agree, Bernie. I think that there were some changes that I put in to reflect, based on the transcript a couple of sessions ago that we ought to circulate and get out in front of the group before we --

Keith Davidson: Okay. So, if I'm hearing you both right, Bernie and Becky, you're suggesting that we really don't try and do anything more in terms of revocation until we -- until you've had another bash at the whole text. Is that what I'm hearing, Bernie?

Bernard Turcotte: Yes, that's what I'm proposing. We will have -- I think Becky and I can for sure -- to have a document out within the week, which will give everyone a week to go over it before the next meeting. And then we'll be working from the text, the full document with all the minor bits and pieces in the right places, and I think that's the best idea at this point.

Keith Davidson: Okay. Yes, I guess my only concern with that is that we're only here for two more calls between now and ICANN Toronto, and I'd like to keep our momentum up on this. But I guess you're right, there is probably not much point in bashing up on other bits of text at this stage.

So, with that, unless anyone has any additional comments or inputs on the whole revocation topic, can we move further down the agenda? And I'm not hearing anything, so we have two outstanding items on our agenda that have been carried over several times over recent weeks. Both mentioned in item 5, so the response to the GAC on consent and the response to GAC on SIP. And I have been holding back on those, waiting for some reengagement from a broader group of people on the working group, and I think I need to probably have a chat to Martin specifically about some aspects of one of these items in the next few days. So, can we keep those as carryover items and resolve them on our next call? And, Becky, I see you have your hand raised. Becky?

Becky Burr: I was just going to ask a question about the GAC, or ask for some input about the GAC comment on significantly interested parties, but I can do that offline, too.

Keith Davidson: Okay. So, if that's all right, we'll leave those items to come up on our next call agenda. And that will take us to any other business. We have our meeting scheduled for 20 September at 2100 UTC, and then we have a further meeting the 4th of October 500 UTC. I guess in the interim as well, I think Bart -- oh, no, Bart's not on the call, but we'll probably have to start working on our progress report to report our progress to the ccNSO and other groups so that we can have those read at the next couple of meetings, too.

And then just as a matter of administration, too, we are meeting -- we are scheduled to meet on Thursday afternoon on 18 October in Toronto. That, of course, will conflict with the public forum session of ICANN. And we're starting to examine whether that Thursday afternoon will continue to be the most appropriate time for this working group to meet at ICANN. If it's going to go head-to-head with the public forum every time, it may not be particularly useful.

So, just -- we probably need to spend a few minutes in Toronto thinking about the timing of our meetings as well. So, with that, unless there is any other business

that anyone has, I think we should call a very early -- oh, I see Martin has his hand raised. Martin?

Martin Boyle: Yes, thanks, Keith. When you were talking about item 5 and you saying you wanted to have a discussion with me, was that to do with the change to the attachment that you sent to the GAC and that you agreed subsequently with Bill Semich?

Keith Davidson: Yes, yes.

Martin Boyle: Okay. So, I will wait for your call and exchange with you on that. The other comment that I had actually raised for any other business, which again I think is probably partly associated with the consent held over and the SIP held over. But I think it is also relevant to the revocation discussion. The GAC has flagged to us now that they do consider the GAC principles for ccTLDs as being a policy document. That actually does have implications for our discussion on the revocation paper as well, and so perhaps for next time we need to start thinking about how we should be taking that into account.

Keith Davidson: Yeah, yeah, I've got a couple of points on that that I'd like to just talk through with you as well. So, I'll follow up with an e-mail and see if we can find a time to have a fine conversation in the next -- or early next week your time, I think, middle of --

Martin Boyle: Yeah, that would be fine, Keith.

Keith Davidson: Okay. So, if there is nothing else, I think we'll have finished our call exceptionally early today. So, if nobody has anything else, there is quite a bit of follow-up for Bernie and Becky and myself, and with that we'll call an end to the meeting. Thank you very much for your participation and we'll talk to you all again in two weeks' time.