

ICANN

**Moderator: Brenda Brewer
March 30, 2015
11:00 am CT**

Becky Burr: Okay, here in DC so far we have Becky Burr, Stephanie Duchesneau, Paul Rosenzweig, Jonathan Zuck and Steve Crocker. We have lots of other people in the room, thank you all for participating and consistent with our current practice we're going to take attendance by presence in the Adobe room. Unless there is somebody in - on the call who is not in the Adobe room, in which case would you please let us know now?

Okay, I'm going to take that as a everybody is in the Adobe room. Alice, is there some way of - I didn't realize that I was handicapping Adobe by sending legal sized documents. Is there some way of making - like getting rid of the discussion notes or...

Man: You can slide back and forth.

Becky Burr: Oh, so I can just move it around? Okay, great. And if it's moveable for everybody to control that would be great.

Man: Well sometimes it is and sometimes it isn't.

Man: Somebody has to enable that.

Becky Burr: Yes.

Man: Whoever is in charge.

Becky Burr: That would be Alice. Alice is always in charge.

Man: (Unintelligible).

Becky Burr: Okay, you're showing your age.

Man: Thank you.

Woman: You're welcome.

Becky Burr: Okay, so why don't we just go ahead and get started? What I hope to do first is go through the mission statements, commitments, core values and reconciliation that we talk through in Istanbul. I have attempted to implement the input that we had in Istanbul. I have also attempted to input the suggestions regarding formatting to make this easier to see and to make it clear - very clear what we are proposing to change from the current bylaws into the new language.

So starting with the document that is up here the, mission statement, on the left you have the current bylaws language. You have the - in the middle the proposed language. Anything that appears in the same color darkish grey text

corresponds directly to the language in the current bylaws and the language that is added appears in section - in red.

And then on the left hand - on the far right-hand side, sorry, we have notes, comments, questions. These are largely notes and comments, but I'd like to use this opportunity to also think about questions that we may want to ask in the public consultation. So consider this an opportunity for that.

As you'll see we've essentially taken the mission statement from the current bylaws whole and then added in under the coordinating policy, in this role with respect to domain - let me step back. The roles are divided between names, numbers, protocol and parameters. And then coordination of the evolution of the DNS root name server system. The three in the current bylaws is policy development - coordination of policy development.

To provide more specificity - I've inserted the language that you've seen before that suggests that with respect to names ICANN's mission is coordinate the development and implementation of consensus policies as defined in specification 1 that insures stable and secure operation and that involves issues for which uniform or coordinated resolutions reasonably necessary to facilitate the openness, interoperability, resiliency, security and or stability of the DNS.

Malcolm raised a question with respect to a number of different things, but you'll see that I have put placeholders for IPE and AS numbers for protocol port and parameter numbers and for the DNS server folks on the theory that they may have language that they specifically want to insert in here and I didn't want to make it up.

So I wanted to flag that.

As we discussed in Istanbul we wanted to have all rights that are not delegated are retained or sort of all authority. So there's a provision in here that says ICANN's mission does not include the regulation of services that use the internet's unique identifiers or the content that they carry or provide. Nor shall ICANN undertake any other mission not specifically authorized by these bylaws. That language is new from Istanbul and thank you to, I think, Paul and (Edward) who drafted that.

Man: Malcolm.

Becky Burr: Malcolm.

Man: I want Malcolm to get the blame.

Becky Burr: Okay, we're blaming Malcolm. Then, finally, just going to the right-hand column, the notes, comments and questions. I have identified in the right-hand side the aspects of the affirmation of commitments that are covered by this mission. And also I have put the relevant language of specification one in full in this document.

The reason that I did this - and the first thing that we should notice is that the additional language is intended to clarify, but not to alter or diminish or expand ICANN's current mission and so that's sort of the premise and then specification 1 I've included here as a side bar. Obviously specification 1 we need to think about how that becomes durable in some way, but I wanted to put it here because there were concerns and questions about well what about who is, what about, you know, cyber squatting?

What about those kinds of things and I wanted to demonstrate that the language of specification 1 specifically encompasses and encompasses, you know, some things with that limitation including allocation of registered names, warehousing speculation, reservation of names and maintenance and access to accurate and up to date information, who is data.

So with that I'd like to open this up to discussion about whether - two things, one, whether the substance is right. And, two, whether the presentation might - my current contemplation is that we would have a cover page that sets out in one page all of the relevant and most important provisions of the attached documents and then attach those documents to it.

So these are more by way of the kind of guts in this specific language that we're proposing, but obviously for purposes of the consolation we'd want to have something somewhat easier and more accessible. So the first person - even though Malcolm doesn't have his hand up - since Paul wants to blame him. I know Malcolm you've had some specific questions and comments on this document. So I wonder if you'd like to start with those?

Malcolm Hutty: Yes, thank you Becky. There were really two areas. Firstly, what you've done is you've left the original language intact as much as possible. And I understand why you have done that, but when reviewing it I was very aware that it is going to be used in a different way in the future. In the past it hasn't really be language that has intended to be the basis of review.

So you wouldn't be going, you know, in the past you weren't able to go to an IRP and say this thing was outside this mission and therefore should be set aside and it is our intention that it should be used in that way in the future. And so then reading this in that light these three sort of mission statements - I was looking at it see does it work for that purpose? And what you've got here

is you've got a - you seem to have some duplication in the statements here.
Not in what you've done, but in the original.

So you've got coordinates the allocation and the assignments of three sets of unique identifiers, which are the main names and then you've also go coordinates the operation of the evolution of the (unintelligible) main service system. And then you've got coordinates positive developments reasonably appropriately related to these technical functions in this role we're expected (unintelligible) and so forth.

So I was wondering, you know, what are the things that would fall under one, coordinate the allocation and assignment of domain names, that doesn't fall under the policy description in three? Is there anything that falls into that? The picket fence that you've written circumscribes three, but it doesn't circumscribe one.

So if one authorizes things in addition to three then that's not constrained by the picket fence. This seems to be an area of, you know, potential confusion and I'm wondering if it calls for the section as a whole to need to be rewritten. So to clarify it and to make it less about setting up things repetitively and instead saying the IP addresses, the protocols and the DNS stuff all in one place. You know?

Becky Burr: Okay, so...

Malcolm Hutto: That was my first question. That was my first point - I had a separate point on the substance of what you had written, but maybe I should bring that up later? Maybe you'll - maybe we can discuss that first point and come back to that? How do you want to handle that?

Becky Burr: Let's discuss the first point and come back to it. I'm interested in comments from the group. I do see number 1 as being administrative as opposed to policy development and I do think that there are administrative functions that ICANN proposes, but I'm willing to hear all sides on this. Paul?

Paul Rosenzweig: Yes, I think that's what I took from the language Malcolm. It's almost like the discussion in the CWG about whether or not the IANA function should be separated structurally from ICANN. If we did, you know, and I have no idea whether they're going to do that, but if they did then item 1 would sort of go away. It wouldn't be an ICANN mission anymore. It would be the IANA mission. And ICANN would only have three left. At least that's how I read it. I don't feel overly strong about it and am certainly willing to consider changes in the language.

Becky Burr: James?

James Gannon: Yes, my reading of this would be that basically the first one is setting (unintelligible) coordination of the administration. The second one is coordination of the operation and the third one is coordination of the policy development. So it may seem like there are repetition in this, but it is setting out three distinct separate items.

Becky Burr: Thank you. Others? Steve?

Steve Crocker: Yes, so just on the point that we're discussing, I don't have any trouble distinguishing among those three things. The third sets the policies, the first and the second are - I would have used the word operational as opposed to administrative, but we're basically talking about the same thing. I would not distinguish one and two as - in quite the same way as was just suggested. The

first one is the operational business of allocating names, numbers and protocol and port assignments.

The second is a very - is a much more specific and is focused on the operation of the route name server system. Route name server system refers not to the allocation of top-level domains or policies or anything really that has to do with the publication - making those names available. So that's talking about the route servers (unintelligible) and mechanisms and operations around those. So at least, to my eye, there's no conflict among any of these. I have other points that I'd raise at some point.

Becky Burr: Okay. Other comments on this one particular issue with respect to duplication or confusion? Just one note on - you correctly now Malcolm that I deliberately and slavishly tried to maintain the language wherever possible. Just out of - not that I did not think that I could make it much better in more eloquent, but just because for practical purposes of getting through this since we know every word is going to be scrutinized.

Steve Crocker: Wasn't all of this your fault once upon a time?

Becky Burr: No, this was not my fault once upon a time. I mean this was the 2003 (URC) stuff and I actually suggest this rightly different language, but - so it's (Joe)'s fault. Thank God something is (Joe)'s fault. Okay, I've got Malcolm. You've got our hand up.

Malcolm Hutty: Yes, those interventions help clarify what this is intended to mean. I'm not sure whether that's the only way it can be read and bearing in mind it's going to be - need to be read by somebody sitting in a review mode. You know, I think we should consider whether it would be - whether clarification would end up being helpful. I - to be honest it sounds to me like there is a broad

agreement and consensus there isn't any disagreement as to what we actually want to achieve by this.

Becky Burr: Right.

Malcolm Hutty: But I mean really the question though I'm putting to myself is if somebody were to challenge something on the basis of this text as being lying outside this text. Could this text be used in a - very easily to determine whether or not that challenge should be upheld? And that then comes to well what would be - having that review or looking to what does one cover and does it cover things that go out beyond three? Is three a subset of the one relating to DNS or is it a separate thing? Is that - so I'm not sure whether it's as clear as it could be for that purpose even though I think we agreed what we want it to do.

Becky Burr: Okay, so since no good deed goes unpunished. Could I task you with taking a stab at clarification using the smallest number of words and change as possible so we could circulate that to the group?

Malcolm Hutty: I can certainly make an effort on that. What I will attempt to do is to do it - keeping the words the same and changing the paragraphing. The light things that are collected together.

Becky Burr: Okay, I think that what we want to do - the critical issue is to make it as clear as possible with respect to what is being changed and equally importantly what is not being changed. So we'll look for something from you on that. Steve, you've got a hand up?

Steve Crocker: I do. So we're focused very much on these words, but let me suggest standing back a little bit. The top-level question that we're looking at, as I understand

it, is what happens if challenges come up later where somebody says this doesn't belong in scope or conversely if something does belong in scope.

So to use a (Steve DelBianco)'s major contribution to all of this, what are the stress tests here? And one way that I can think of to do this is to pose specific cases and ask what is our sense of what we - how we would have liked this to be handled or how we'd like it to be handled in the future if something came up and how does that comport with the languages here?

So in that sense let me raise a couple of specifics that come quickly to mind. As we're all familiar the applicant guidebook for GTLDs has quite a lot of texture to it, including criteria for refusing to allocate a name, geographic, moral order, community (unintelligible) and so forth.

To what extent would somebody say, oh, you're regulating content and use the words that are emerging here as the basis for saying that those agreed upon rules fall outside and that ICANN should not be in the position of administering the community consensus on those points. That's one.

Becky Burr: Okay.

Steve Crocker: Another is from an entirely different direction.

Becky Burr: Okay, I'm sorry.

Man: Lunch?

Becky Burr: Lunch, everybody should go get lunch. Hold on guys. We're going to go get lunch.

Man: I'll bring you one.

Becky Burr: That's okay.

Man: (Unintelligible) enable me?

Becky Burr: Oh, yes I can.

Steve Crocker: Okay, so an entirely different thing is that - the rights protection. I don't know how familiar people are with the time zone database, but it's an interesting little story.

For many many many years there was a very important database of the time zones around the world. So that you could look up for a given geographic area what time zone it was in. It's a lot more complicated than it seems to be in that you have little localities that have their own affinity and also they switch back and forth to daylight savings time and other things.

So - and this information is relatively important for shipping and other things so that getting it right is important. There was a guy at the National Institute of Health who did this in his spare time for many many years. And then he retired and all hell broke loose and it was a question of what was going to continue this important database.

So the - there was some blurry details along the way involving astrology, if you can believe this, but at the end of the day the IETF asked ICANN if ICANN would, as part of its IANA function, maintain this database. And ICANN said, yes and we do. And this is continuity and this is stability and so where does this fit with respect to - does this fit under protocol and parameters

of space? Now arguably it fits under the protocol parameters, but I don't believe that at the end of the day it fits under the current contract.

So this is a function that ICANN has taken on that is outside of the purview of the Department of Commerce and there is only good news here in the sense that it all happened and it's all smoothing everything out, but I'm asking as a, you know, one of these theoretical stress tests could somebody come along and say ICANN has gone outside of its remit by taking this on? So that's another example. Are we having fun?

Becky Burr: Yes, yes. These are very useful.

Steve Crocker: Okay. I'm looking at the red in the middle column and under three there are four parts - A, B, C, D and D is in this role with respect to DNS route services ICANN's mission is to and then text to be inserted. I had not realized when I first saw that that is related to the fact that there is a separate piece over on the left that says coordinates operation evaluation of the route system.

Becky Burr: That's in the current bylaws.

Steve Crocker: Yes, I understand now, but from a broader perspective all of that is a piece of making the names available and it struck me as a bit odd to have that separate from the broad aspect. It's a - it's very important obviously, but it is in my mind logically a part of making the names available as opposed to - so in terms of parallelism, names, numbers, protocol parameters and DNS route system server systems - stuff that sits underneath names in my view. Further, well, and there's lots to say about the route server system and the way in which it's likely to evolve or possible to evolve in the future. Anyway, I wanted to just flag that.

Becky Burr: Okay.

Steve Crocker: I've got two more at some point if you wish. I'm happy to...

Becky Burr: Why don't we take those on - I just want to get back to your very first one. The GO names and that corresponds with (Jonathan)'s comment aside from intellectual property.

The reason that I put specification 1 up here is so that we can point to these things and say, for example, that this specifically includes this coordinating function, reservation of registered names that may not be registered for the avoidance of confusion, intellectual property, technical management of the DNS or the internet reservations of names from registration, etcetera.

So there is a specific thing that says that reservation of names is not content. Now I understand why you - Steve just raised his eyebrows at me and I think we have a way to address that in the core values and fundamental (unintelligible) issues, but then also it talks about who is and the intellectual property stuff. So we are kind of living with this weird tension (unintelligible) way. We're living in this weird tension right now and we can like try to take it apart and fix it or we can...

Steve Crocker: What's the weird tension?

Becky Burr: Well, the - I mean - we have all of these things - the specification one says registration - disputes about domain names not the content of those names. So I mean we have this sort of registration, not content dichotomy that we navigate now and have not navigated for 17 years. And I'm not unwilling to take it on. I just weary whether this is the, you know, this is the place to take it

on or whether what we should be focusing on is sort of leaving as much in place as we can. Paul?

Paul Rosenzweig: I'd be really happy to do a rewrite of ICANN's mission statement to reflect what we think the operational reality is. But if we want to have a proposal for the board by June 30 and for the NTIA by September 30 it's not happening. That would be a major undertaking within the community that would just require extensive consultation. So if we were all to say right now with the consent of the entire government out there we'll put it off a year then I'd vote to start down that road, but I sort of endorse here your least change principle very strongly.

Becky Burr: Okay, so one suggestion is to note as part of this that there may be further rationalization that needs to be done and that as part of a review we may want to have a bylaws review - or that may be something that sounds like Steve DelBianco's name written on it - or (Jordan)'s written on it, but others?

Paul Rosenzweig: Or work stream 2 written on it.

Becky Burr: Yes, work stream 2, okay. Others with thoughts or comments on this? Now since - Steve's back. In terms of the time zones database the other - these other things - there's a really really interesting question the IETF asked ICANN to perform a function. It does not have the effect of regulating others. It's a tool that everybody else needs. So it seems to me like it ought to be fair game.

Obviously ICANN (unintelligible) under its current mission statement. So I wonder if we, you know, really have a problem with that or I mean I guess maybe a workstream 2 issue is there a distinction in terms of the durability and enduring quality of ICANN's mission that differs when it is sort of

operating in a regulatory mode as opposed to operating in kind of an operational mode. James, I see your hand.

James Gannon: And Steve will probably be able to answer this. Is the time zone database specified in (NORSB)? Is that where the IETF comes into it or how did it come about that it went into ICANN via the IETF? Can it be framed as something which is an extension of a protocol parameter that this is the definition of the protocol parameter?

Steve Crocker: Well, I think the question to that is yes, but and I'm not at all uncomfortable with the sequence of events that led here and in my view it's 100% compatible with the basic notion what the IANA function is, which is to maintain an orderly set of data and probably shouldn't make it available and so forth. So from my point of view I don't have any problem at all. What I'm - the reason I'm raising it is whether or not somebody else would say that does not fit under any of these very narrowly specified three groupings and therefore I shouldn't be doing it.

James Gannon: The question then becomes then is this something that needs to be added to the mission statement or is it considered by the community to be something that comes under the management of protocol parameters?

Steve Crocker: Well, there's many ways to come at it. From my perspective the generic notion of what the IANA function is provides plenty of scope to take this on and nothing more needs to be said. I would not want to get into a position where somebody says, oh no, I know what the IANA function is and you're not - you've done more than you should and therefore you shouldn't be doing it.

Jonathan Zuck: Maybe I can just ask you a question. If you think that - is there an example of where that would be a legitimate opposition? Because this was fairly small in terms of the financial impact and others to the organization. Is there something that could be asked of ICANN because of a - some kind of a financial breakdown in IETF or something where here you now take on this responsibility too and then, in fact, it could be argued falls within the sort of family of obligation surrounding IANA, but could have - could actually have a significant cost associated with it where you wouldn't want the argument to be made.

Steve Crocker: That's a reasonable question. I don't have any examples that come quickly to mind.

Jonathan Zuck: I don't either. I'm just trying to think of the - because it seems unlikely that somebody would have opposed the time zone database.

Steve Crocker: There's another fringe area - my understanding, and I'm not certain that I'm an absolute authority on this, that the language tables associated with top-level domains outside of the current ICANN IANA contract, but are logically intimately related to the whole operation.

Becky Burr: They may fall outside of the contract, but you can't have IEMs without them can you?

Steve Crocker: Correct.

Becky Burr: I don't know...

Steve Crocker: There's been another (unintelligible) that I've observed through the process of quite a few people who are very active in the current process with relatively

little experience about the actual operation and so they start from the position that they - the contract is the gold standard and we want to try to port that somehow. I have strong words to say about the contract being gold standards of anything.

Becky Burr: Okay, dually noted. So I think these are all kind of relevant, but works stream 2 questions. In some ways the stress test can be used as kind of, you know, federalist papers background, you know, that may be able to inform, you know, going down the road not having the same kind of weight and precedence of the bylaws themselves, but informative in any kind of interpretive perspective. Make sense to people?

Man: Mm-hm.

Becky Burr: Okay, other things - discussion on the list that we need to - I'm...

Steve Crocker: I want to use the little time that I have (unintelligible) points...

Becky Burr: Okay.

Steve Crocker: The last thing on the right, maintenance of an access and update, you know the reservation of names I guess is what I would - is the next to last point. There is quite an active discussion within the IETF about allocation of top-level names for other purposes. Like onion routing and so forth. The thing I'd not like to see is an evolution of documents that kind of presupposes that ICANN has unilateral control in this area and really torque off our friends at the IETF.

Becky Burr: Okay.

Steve Crocker: I don't want to trigger a (unintelligible) battle.

Becky Neither do I.

Steve Crocker: We operate cooperatively and they set really the architectural rules.

Becky Burr: Okay, so and that is going to be - there is a - there's language in the fundamental commitments and core values that says you differ to expert organizations wherever relevant that may help to address that concern. It may not - I don't know, but continue through and see if that does.

Steve Crocker: All right. And my last point that caught my eye on this stage is up at the AOC - for the who is. So, in brief, the language that's in the affirmation commandments regarding who is was broken from the beginning inappropriate and archaic and needs to be dealt with. So I wouldn't want to see us perpetuate it. I'm happy to expand all of this in objective low-key detail, but...

Becky Burr: Okay, that would be helpful. And in particular it would be helpful to look at the language that's in specification 1 - maintenance of that and access to accurate and up to date information because that would be actual language that would be ported in going forward as opposed to the actual language in the AOC.

Okay, Alice, could we go to the next document, which is the reconciliation document?

Malcolm Hutty: Becky, before you do. You were going to come back to me on the other issue I raised concerning the content of the language that you proposed.

Becky Burr: Go right ahead Malcolm.

Malcolm Hutter: Thank you. This was a question about when you were tying in in that picket fence. The sort of the conjunctions you were using to tie that in and the standard that you were applying was - that involves issues for which the uniform coordinated resolution isn't reasonably necessarily - blah, blah, blah. Now that involves issues sets a certain standard and it's quite a low standard. It says that something is within the scope if it in any way relates to those things. And I was wondering if that was the appropriate standard.

Well, I was actually challenging the idea that that was the appropriate standard. Here we were - I mean, again I was thinking in terms of this - if this is to be used in an IRP on a claim something is outside the scope does that language provide a useful basis for clearly seeing whether or not something is indeed within or without.

And the point that I raised on the mailing was I gave an example of a (unintelligible) policy that would clearly be outside the scope and to see whether or not the language would support a clear resolution on that.

So the example I came up with was suppose that ICANN wants to insure that grocers didn't sell bread, only bakers did. And therefore would deny access to domain names to grocers that sell bread and then a complaint about that policy on the ground suggests (unintelligible) complaint of the scope is the grocer would be saying ICANN is attempting to regulate whether I sell bread or not and using its control over domain policy to do so and this is outside scope. So can we see if it's outside scope?

And using the standard that you proposed of involves (unintelligible) for which (unintelligible) coordinated resolution is possible. The argument would

be that ICANN is - whether or not ICANN has a policy on who is permitted to register domain names does involve issues for which uniform coordination is reasonably necessary to facilitate openness. The issues such as insuring the maximum availability to domain names and so forth are the issues related to facilitating openness? And because you haven't got - it's not required to achieve openness then ICANN could say that the content of the policy is its own prerogative and can be questioned.

It involves an issue that relates to that and even though we're doing it in completely opposite ways that's not open to review. You know, so I think what we mean to say in this is that the policy must be reasonably necessary to facilitate openness and (unintelligible) resilience security and stability. And if that's the case it's not really involving issues that are related to that. It's the policy must be reasonably necessary to do that.

Becky Burr: Well I think - I'm just going to pick up (unintelligible) paper.

Malcolm Hutter: I think I said this more clearly in my message on the mailing list than I have just now in orally.

Becky Burr: Okay, so the language is that involve issues for which - uniform or coordinated resolution is reasonably necessary to facilitate the following things. So it's a question of what the policy covers. I don't know why, you know, some kinds of policies with respect to who gets to name what would be reasonably necessary and others like only bakers can get, you know, things that said bread wouldn't be reasonably necessary, but I could be talked out of that perspective. Anybody else have views on this?

Jonathan Zuck: Some of that could have an indirect (unintelligible) things though.

Becky Burr: Correct.

Jonathan Zuck: Even if it's not ICANN's regulation. So it's a commitment that's made that ICANN is in the role of enforcing through its compliance function, but they didn't set the policy to begin with. Just a policy that people had to fill - that doesn't fill their (unintelligible) specs and can't just because they came in solvent, changed them later or something like that. I mean I don't know when the...

Becky Burr: The - yes, the - Yes, I agree with that. Malcolm, why don't you provide us language that we can throw in as an alternative and have a discussion about this issue.

Malcolm Hutter: Yes, I've done so at the bottom of the mail that I sent to the mailing list.

Becky Burr: Okay.

Malcolm Hutter: I think - I'm suggesting in so far as opposed to that involves issues.

Becky Burr: Okay.

Malcolm Hutter: Yes it's the - that involves issues for which? You know? The rest of it is fine, but it's the "that involves issue for which." I'm suggesting changing that to in so far as.

Becky Burr: Okay. Okay, great.

Malcolm Hutter: Coordination is reasonably necessary. You know?

Becky Burr: Okay.

Malcolm Hutty: And you go the full text in the message that I sent at 12:02 today.

Becky Burr: Okay, I will do that. All right, the next page addresses what we are no longer calling balancing. I went back and did a little research about how constitutional courts kind of look at these things and they sometimes call it balancing, but they also call it reconciling and it sort of relates to, you know, interpreting the obligations in any particular situation so that they are not in conflict with each other.

And so this is my attempt to put that together. We also heard a suggestion that we keep some of the, sort of, more flexible language about you know, you can't imagine every sort of circumstance that would come up as you're reconciling this and then we also discussed the need to figure out sort of how these various tests would sort of work in interplay and so on the one hand you might be reconciling one of the, you know, fundamental commitments with other fundamental commitments or you might be reconciling fundamental commitments and core values or you might be reconciling different core values.

And I've attempted, you know, in a really simplistic way to say essentially that if it's a core value that you're reconciling with another core value then it has to meet this high bar test of being justified by an important and articulated public interest goal within ICANN's mission and consistent with a balanced application of the commitments and core values. Likely to promote that interest, narrowly tailored and no broader than reasonably necessary and that in to the extent that it's - that we're talking about - that it's, you know, we're reconciling it with core values that the lower test of much further and be substantially related to substantial and compelling interest reason in the public interest and I've added in either case the decision maker engaged in this

reconciliation must document his application of the relevant reconciliation standard in writing.

Now I know people have not had very much time to look at this. Hopefully our discussions last week are relatively fresh in people's minds. I've also provided some proposed narrative in the right-hand column that is an attempt to kind of explicate what we're after here.

And, again, this does reflect a sense of the room that the two-tiered approach, you know, something is being subject to a very high bar and some things being subject to a more sort of rule of reason rationale basis kind of test. I am working on - and I think it will be useful in the consultation. A chart that just compares how different courts around the world articulate these balancing tests.

So, for example, you know, I know how the US courts do a - Canadian courts use a slightly different language. You know, so in collecting language about this from around the world and one thing I would ask is for people on this working group who are sort of - have access to different models of how this works to sort of bring those to my attention. The notion is that, I think, that this is a fairly - although the words might differ from country to country I think they're - the practice - this kind of reconciliation practice is fairly common and so I'd like to provide the evidence for that and give people ways to talk about the different tests a bit more concretely and maybe we'll have a better discussion based on that.

I see Malcolm's hand, but I'm not sure whether it's your new hand or your old hand. Oh, Gone. Comments? Questions about this reconciliation paper? Avri in particular, do you like the word reconciliation better?

Avri Doria: I'm fine with the word reconciliation.

Becky Burr: All right. Okay, leaving - any other comments on this section? It probably requires some reading.

Jonathan Zuck: I tried raising my hand - I don't know if I succeeded or not. I refreshed the whole screen, but the - I guess it's going to bring back to the surface this notion of public interest though and - but that's the core test for the reconciliation, public interest is a pretty hotly debated topic inside of the ICANN community.

Becky Burr: Well a substantial public and compelling reason in the public interest is defined as an important specific and articulated public interest goal that is within ICANN's mission statement and consistent with a balanced application.

Again, I had intended to do this here and I didn't, but I will note once again Avri's very helpful intervention that sort of talks about a public interest being discovered sort of through the bottom up multi-stakeholder process and so somewhere we have to think about whether and how that test goes in, but to me that is the best - that's the very best articulation of how we deal with public interest and we can talk about that sort of generally, but then say that it is just something that is discovered through the bottom up process. But, you're right, I did not manage to get that in here over the weekend.

Okay, no other comments on this one? I'm going to - what I'm going to do is hope and sort of assign all of you guys the task of, you know, reading these things carefully and getting back on the list so that we can start to put this in shape for the consultation and also as part of that to remember to kind of raise

questions that should be part of the consultation with regard to specific language.

Okay, yes and I'm sure you've read to it Avri since I sent it about an hour ago. Okay, Alice, could we have the next document, which is the fundamental commitments - it's - there are two more that you've got. One is core values, the one I'm looking for is the other one.

Jonathan Zuck: Fundamental rights.

Becky Burr: Fundamental rights. Okay, again, I've used the formatting of taking the language that's in the current bylaws and essentially doing a redline against that - the language in the proposed changes. Now remember that we are talking about bylaw provisions, which talk about 11 core values and here we are diving the world into kind of fundamental rights or commitments and then core values. Again, you know, the point is that the mission statement talks about what ICANN does - the fundamental commitments and core values talk about how ICANN does - how ICANN accomplishes its mission.

On the left-hand side I have left the numbering in the bylaws intact because it doesn't come necessarily in order, but the, you know, the fundamental commitments - I think fundamental commitments rather than just the right word is preserving and enhancing the operational stability, reliability, security and global interoperability of the internet. And I think it should be operability of the global internet if I'm not mistake. Respecting the creativity, innovation and flow of information made possible by the internet and limiting - by limiting ICANN's activities to those matters within its mission requiring for significantly benefiting from global coordination.

So that language is not - changed other than to add and requiring - so that has to be both. I think it's probably implicit in the language there. Employing open and transparent policy development mechanisms. I have modified this based on our discussion to talk about open transparent and bottom-up multi-stakeholder policy development processes as opposed to mechanisms because there's some question about what that meant. That promote well-informed decision making based on expert advice and insure that those entities most affected can assist in the policy development process. So that one is changed by focusing on the bottom up multi-stakeholder issue.

Number 8 in the core values is making decisions by applying documented policies neutrally and objectively with integrity and fairness. Now I want to note that there are two places, both core values number 8 and in section 3 of the bylaws which calls for non-discriminatory treatment and so I have tried to raise the non-discriminatory treatment requirement - brought it into the fundamental commitments aspect of this and based on (Lee)'s suggestion that the term disparate seemed peculiar and that what we were talking about was discriminatory.

Modified the language in that way and then finally remaining accountable to the community through mechanisms to find the bylaws that enhance ICANN's effectiveness. So in the notes - the first one - had the fundamental - the language about operate for the benefit of the internet community as a whole carrying out its activities and conformity with relevant principles of international and applicable law, etcetera. That is all language from the articles of incorporation that several people have pointed out and have suggested bringing in here. So this is very much as a suggestion for bringing this articles language in. The others are slight modifications. James, I see your hand.

James Gannon: This is possibly me just nit picking, but on number 3 with the revised ones.

Becky Burr: Mm-hm?

James Gannon: Sorry, would it be more assist in the policy development process? It seems like a very passive word tome. Would it be possible to possibly look at changing that to participate in the policy development process?

Becky Burr: Sure, I have no problem with that. Other thoughts?

James Gannon: It, just to me, makes it sound like it's somebody else doing the policy development and the multi-stakeholder group is just assisting in it rather than being the actual participants in TPD itself.

Becky Burr: Okay, again, that sounds like a reasonable change to me. Again, I was trying to stay with the language itself, but that seems like a pretty straightforward and self-explanatory document. Steve?

Steve Crocker: This is going to sound a little weird, but the word global that you've added is a restrictive word that limits it the earth interplanetary network (unintelligible) emerging. Again, are we going to get into a business where somebody says, no, NASA can't have that - we can't allocate that to NASA because they're not operating on earth.

Becky Burr: Okay, where did I add global?

Steve Crocker: Oh...

Becky Burr: Oh, global. Okay, that's an interesting - that's...

Steve Crocker: I mean once we start looking for stress tests.

Becky Burr: I don't have a problem with taking global out. There was a lot of consensus for putting global in wherever we could put it, but, you know, when we get our network to Mars.

Steve Crocker: Or maybe universal, intergalactic.

Becky Burr: Interstellar. Other thoughts on that?

Steve Crocker: We have yet to run into any other group that claims authority for some other parts of the interstellar space. So we're okay for a while.

Jonathan Zuck: I have a change I'd love to see but I can't call it relevant to the process we're in necessarily. But I feel like we have decisions based on expert advice when people participate but I'd love to throw something in there like rigorous analysis or something in addition to expert advice. That's a number three as well.

Steve Crocker: Could just write passes the (unintelligible) test.

Jonathan Zuck: Yes, I mean you know I would love to have it say objective data or something like that ideally. Getting more and more into that now that analysis might be.

Becky Burr: That doesn't strike me as hard to explain. Others? Okay, rigorous advice sounds good however you spell it.

Jonathan Zuck: Oh, oh, not rigorous advice, rigorous analysis and expert advice.

Man: Expert advice and rigorous analysis.

Jonathan Zuck: Yes.

Becky Burr: Okay other thoughts on that document? Okay everybody's asleep or angry that we didn't serve them virtual lunch. Okay.

Jonathan Zuck: Lunch was good by the way.

Becky Burr: Thank you. We can go to the core values language. (Robin) thinks four is too narrow, okay.

Jonathan Zuck: Under core values back on the...

Becky Burr: Well I mean it says without signaling out any particular party for discriminatory treatment and her point was you know wouldn't be just necessarily individuals or any particular party or small group. You know it could be more than an individual party; it could be a small group who will be supporting.

Jonathan Zuck: Oh I'm sorry; I just didn't know what page she was commenting on.

Becky Burr: Oh she was talking about number four on the fundamentals, right. (David McCauley) asked a question about whether on the previous document global interoperability and the global internet - the global is coming out of those. I don't know we'll have to metaphysically think on that. Alice could you put up the core values document?

Jonathan Zuck: Oh so (Robin) suggested adding a conditional to the number four?

Becky Burr: Yes, okay so core values this just covers the rest of the core values in here noting that there are references on the far right hand side where that picks up concepts in the affirmation of commitments. I also have a question here. There was rather a lot of discussion about the proper scope of ICANN's competition mission.

We spent some time talking in (Istanbul) about the difference between actually affirmatively you know having an affirmative role of promoting competition and also the sort of making sure that when it acts to further its mission in accordance with the fundamental values and fundamental rights - commitments and core values it does so in a way that does not impede competition.

So there are two different sides of the competition coin and I think we heard from our experts that there was at least some question about you know sort of what role one reasonable could expect ICANN to play in the competition environment.

So I think that is a discussion that is up for discussion. Otherwise the changes from the current bylaws language is pretty clear. I - then the one thing I wanted to draw your attention to is the change in number six which is the one we spent some time talking about that the remaining rooted in private sector recognizing that governments and public authorities are responsible for public policy and dually taking into account the public policy advice of government and public authorities in accordance with the bylaws and to the extent consistent with these fundamental rights and core values.

As we clearly heard that language which I think is intended to articulate what I think is implicit in the bylaws may be controversial but just to be very clear the point here is to say that ICANN's obligations to defer to government

advice should not put it in the situation of having to either follow government advice or violate the - particularly the fundamental commitments. Now I think that that's - I think that that's the situation that applies today but clearly there is some you know it's important to have a discussion about whether that's how we all actually feel about what's going on here. Steve you still have your hand up but I don't think...

Steve Crocker: I lowered it and raised it.

Becky Burr: Okay.

Steve Crocker: So I raised it for a different purpose but let me respond to this thing right here on government advice.

One is - one comment or question is exactly what is this supposed to be doing that's different from what we have in place. So I'll just post that there.

The second thing I want to say about the (GAC) advice, the government advice, there is a delicate balance that and some tension that has not actually been completely resolved about what is the role of advice from the (GAC).

And then (unintelligible) advice from the individual governments compared with inputs and advice or consensus or (unintelligible) from things from all of their stakeholders, all other parts of the community.

It's easy for others to come and say look the biologic impact and premier position, there's specific language that says if we want to not go forward with what the (GAC) says we should do then we have to go through a rather elaborate process which raises the bar considerably and puts a lot of weight on it. The (GAC) on the other hand says gee you guys aren't listening to us and

we want even stronger assurance that you're going to pay attention to us. And they asked that we set a threshold of I think 2/3 with some super majority threshold that if we were not going to take (GAC) advice the board had to do so with a super majority of some sort.

I'll shift to first person singular but I wasn't alone. So my feels was sure because it would be extremely rare that we would - it would be rare in all circumstances that we wouldn't take (GAC) advice. And it would be extra rare that we would do so on a slim majority because that would be a politically stupid position for us to be in for one thing. And so a proposed bylaw change was in the works and there was an enormous backlash saying how come we're giving the (unintelligible) away to the (GAC), to the governments, and so we quietly dropped that.

Now the history so far as I know of actual things where we have not taken (GAC) advice is a grand total of two. I'm trying to remember what the second one, one was triple X, oh and I think the other was going ahead with a detailed program in the first place.

Now going in with the detailed program there have been enormous runoff of years and so forth and we said thank you very much we're going to go forward with this. On the triple X, the (unintelligible) business went back and forth and all around and at the end of the day it went to an IRP and it was the first IRP. And the IRP panel came back and said we screwed up and we should permit triple X and governments - many governments said we shouldn't do it and it put the board in a very interesting position.

And I actually cast the deciding vote or one of the deciding votes. But if I had said no we wouldn't have allocated triple X and I won't burden everybody with my rational for doing that but I thought it was an ugly position for us to

be in all told. But it is a case where we went against (GAC) advice and we did it on a narrow majority, that particular case. That's the entire history.

Becky Burr: Right but in that case just to be clear, the independent review panel conclusion recommendation was that the way in which the board had handled or ICANN had handled triple X was not consistent with ICANN bylaws, the mission and core values. So this is precisely the kind of test where you have a situation where (GAC) advice is potentially inconsistent with these fundamental commitments and...

Steve Crocker: One can take that position.

Becky Burr: I mean that's all - that's exactly, and there are people who would argue that there have been other situations where the (GAC) has provided advice, some of which ICANN had followed and some of which it has not followed.

Steve Crocker: Right.

Becky Burr: That would be intentioned with these. I'm not taking a position on any of those arguments, just saying that there are cases where you know both things could be other cases.

Steve Crocker: Right.

Becky Burr: And so the question is at a certain level you know where - what are these fundamental commitments and core values with respect to ICANN and are they you know is the (GAC) - the (GAC) can provide advice on anything it wants. The question is, is (GAC) advice inconsistent, if the board determines or an independent review kind of determines that (GAC) advice cannot be reconciled with these, what does ICANN do?

Now I would say that doesn't change the current circumstance at all, I would say that it cannot be possibly true that the board has followed (GAC) advice that's inconsistent with its own bylaws.

Having said that there - I have at least heard a lot of arguments to the effect that issues - decisions have been made where someone could make the case that the decision was made because ICANN was following (GAC) advice that was inconsistent. And the question then becomes is that - does that create a cause of action for the aggrieved party to...

Steve Crocker: The governments will say they're responsible for public policy and so they - they cannot be inconsistent with what's in the public interest because they're the determiner of it. I mean that would be their position right?

Becky Burr: That's correct although what I think that there are people who would stay here that you know what public, what's in the public interest, it depends on a million different things. And one of the things that we are going to sort of try to explore is the notion that what's in the public interest obviously is clearly informed by the views of government but that it is discovered through a process of bottom-up exchange.

Steve Crocker: But then you're setting up a potential confrontation in which ICANN says well look we have a process that is broader than government and so - and more embracing of input from this (bottom-up) stakeholder process. And therefore our determination of what's in the public interest supersedes or takes precedence over what merely governments say is in the public interest and boy that's a really difficult position for us to be in.

Becky Burr: It's not difficult for you to be in the position of having to concede that what the governments say is in the public interest in any circumstances and is clearly and inarguably in the public interest?

Steve Crocker: In the privacy of a living room I'm happy to take any of these positions but in terms of saying look we're a tiny little operation you know handful of people and we're making a statement that puts us in position with sovereign governments around the world about what the public interest and their claim is they determine public interest because that's their job.

Becky Burr: It does not put you in - so this is a debate, I'm sorry I'm as Chair I'm not supposed to be having this debate but I would argue that it does not put you in conflict with any sovereign government because any sovereign government has the ability to enforce its laws within its jurisdiction. The question is - the (GAC) is an advisory committee, it is not a sovereign. It is part of the multi-stakeholder process and I think it's critical for the community however we come out on this, however passionate we may feel about it this is a discussion that we can't avoid having in the most respectful possible way.

So I've been talking over Malcolm's hand so I'll defer to Malcolm. Malcolm?

Malcolm Hutto: Thank you, sorry I was mute. Thank you. That was a very interesting discussion, I didn't want to come in and I thought that your debate with Steve there was very useful and I support the things you were saying. What Steve said right at the end though it sounded to me problematic. He sounded as though he was questioning the idea that ICANN could say to governments, power process is broader and while you are an important and value stakeholder in this process you're not the only one and we need to listen to the board of community as well and make a determination.

Now I know that's a very challenging thing for governments to say but that is the multi-stakeholder process.

((Crosstalk))

Malcolm Huty: It cannot be set to be a multi-stakeholder process if you are incapable of saying that to government. If you - if having had the discussion amongst the whole community you must always accept the government's position then it is no longer in my view the multi-stakeholder process.

And in that sense I don't think either we at the CCWG level or for that matter in the transition process and I think it's kind of out of scope for us to even consider that. We have been charged with finding ways to uphold that multi-stakeholder process through this accountability mechanism.

So I would say that - so that I would say is done and to be honest my greatest concern about the previous bylaw's proposals that a super majority should be required to go against (GAC) advice, even when the advice was to do something, not advice to refrain from doing something is that it started to look like the board would always have to go along with whatever the government says.

And that - and that seizes to be multi-stakeholder if you lose the opportunity to do that. Now part of the reason why this is difficult though is because it's a motion of the public's interest. The - governments may claim that what they're opinion on an issue is a statement of public interest by definition but ICANN shouldn't really put itself in a position of saying we believe X is in the public interest. Because ICANN's should be responsible for the entirety of the public interest. It should be responsible for its own mission and should be doing that in a way that supports the public interest rather than supports a private

interest. But the generality of the public interest is - it's matters outside ICANN's scope. So I think ICANN is entirely appropriate for it to apply to multi-stakeholder model to matters within its scope and then to say that other questions of the broader public interest are to be dealt with outside ICANN by others.

And that's why I think the narrow scope is also appropriately deferential to governments in the appropriate way while maintaining the multi-stakeholder model for ICANN's governance.

Steve Crocker: So I'm...

Malcolm Hutty: So...

Steve Crocker: Oh sorry, I'm in 100% agreement with you Malcolm and I think you've nailed the point. I think ICANN's strong point is that we use a multi-stakeholder process and we pursue our mission. What I wanted to avoid was having us - having ICANN be the arbiter of public interest at large and putting us in a potential conflict with governments on a somewhat theoretical or you know abstract point as opposed to a processed point which is this is the way that we do business which is true.

Malcolm Hutty: Absolutely, I agree with you and I recommend that the best way to do that is to be very clear about maintaining ICANN's narrow scope so that it doesn't get outside that. And then within that scope applying the multi-stakeholder model.

My final comment actually I was going to suggest that we actually square bracket around public authorities in this number six because I'm not sure about how that - there certainly I don't think public authorities have the same status as governments in respect of public policy advice. Public authorities

also have a limited scope, it is governments have to be broader overarching view of balancing everything, public authorities don't. They all want the stakeholders.

Jonathan Zuck: So it would be law enforcement, is that what we think of?

Malcolm Hutto: Well for example yes and I do note that when a - when it was recently moved to that law enforcement should be - there should be some structure and structure representation for law enforcement within ICANN, the outcome of that decision is law enforcement discussed that with their governments was that that would be within the (GAC) reporting to the (GAC) is the appropriate mechanism so that governments can balance that rather than for example if the law enforcement community being an additional advisory committee to the boards.

I think that speaks to the same points and actually sets the (GAC) law enforcement between them arrived at the same sort of place as I'm suggesting here. So James you say if they need it they can provide it by the (GAC), they are indeed doing that, they have set up a structure reporting through the (GAC) so the (GAC) will see law enforcement position and choose to incorporate such that they believe appropriate in their community.

Steve Crocker: Before we go too far down this path, Becky when you opened this section before we got into this you also mentioned competition and I wanted to say a couple of points related to competition. When ICANN was formed, completion was - competition of choice I don't remember such words but I'm sure you do was an intimate part of the mission. But it wasn't just how's the (unintelligible) function but it was also to (unintelligible) competition. One of the big things that took place very early in ICANN's lifetime was the creation of the registrar system and the separation of registrar registries. That was an

enormous change in the environment and solely aimed I mean 100% aimed at improving competition and it had a dramatic impact. And you know one could argue about whether it has ill effects but I think one has to count that as a very big success.

The other big thing was the charge right from the beginning to open up the top-level domain space which was controversial and was troublesome and we went through a couple of early starts and experiments and we're now in the middle of a vast experiment or large experiment. But these are two activities that are directly related to opening up competition that did not exist before ICANN was formed and are kind of apart from the basic (unintelligible) function.

Becky Burr: So how does that cut to you in terms of the continuing role of ICANN with respect to competition?

Steve Crocker: Well I would say it's you know it's deeply baked in and we need to continue that. Exactly how is a bit tricky because it puts us in a market shaping I'm not going to use the R word but...

Jonathan Zuck: Market shaping.

Steve Crocker: Activity.

Man: Market (unintelligible).

Steve Crocker: And that opens a whole can of worms as we know it.

Becky Burr: Right.

Steve Crocker: What's our schedule here?

Becky Burr: I think we're about 30 minutes over the time we were supposed to terminate. So I'm proposing we've gotten all the way through this document, it's been very, very helpful. I hope all of you guys will take a close look and send in comments and questions and then you can remove this to the next stage remembering also that I'm hoping that you will bring your sharp eye to the sort of formatting and whether we are communicating clearly enough obviously this is pretty detailed and pretty confusing and there's going to have to be some cover sheet. But presentation and explicability is a huge part of this.

Steve Crocker: I have at the end of all of this the only thing that gives me great heartburn is the ugly possibility that the language related to whois reviews would be baked in deeper than it is already and we need to deal with that. (Unintelligible) upper right we have...

Jonathan Zuck: (Unintelligible) language I think is going to be brought in.

Man: Yes.

Becky Burr: That's one language that's still (unintelligible), not, so the ALC which is the reviews is not baked in but the spec one language which is simply the maintenance of an access to accurate and up to date information.

Steve Crocker: So just for the benefit for everybody who is on this call who hasn't been following this, now two plus years ago (unintelligible) a parallel track. Track one was implementation of the recommendation that came out on the who is reviewed team process and track two was standing back and saying let's take a fresh look at all of this because there is some - there was some deeply broken

things that have been broken for many years that had resisted being fixed within the GNSO. And the board took the position that it was time to kick off a top to bottom fresh look. That effort is actively underway and a couple of things that are very key are potential for tiered access meaning not everybody gets access to everything, different level - different kinds of information being collected.

I'll tell you with expert authority since I was there that the terms technical point of contact and administrative point of contact were created at a time when those had very specific meaning with respect to what you would now call the system administrator and the manager in charge of a time shared system.

And now we are you know 40 years later and you know now 100,000 fold or so expansion and those terms don't mean anything like what they do. The authority that those people had then if you report it now here you ask well who actually does have control over domain name, well it's the person who controls the account with the registrar and that person then puts up - says who the administrative point of contact is and who the tech point - there's no necessary relationship between the names that are published there and any actual authority or control.

So it's amazing that this thing hasn't completely broken down under its own weight but it is completely time to redo it all. So I would be very, very careful about taking these words as if they you know were appropriate to bake deeply in and say oh we're going to continue to just make it better and better and the answer is no that's not the right answer.

Jonathan Zuck: How do you feel about this paragraph on the lower right hand corner because that's really the (unintelligible) which is pretty generalized and not specific to the current Whois structure.

Steve Crocker: So we're talking about maintenance of an access to accurate and up to date information concerning domain name registrations? That's the key word really that's in there.

Jonathan Zuck: Right.

Steve Crocker: The rest of it is separate. So on the surface I don't have any problem but would somebody read that? Would you or somebody else read that and say that information has to be provided free of charge and available to everybody in the world?

Becky Burr: That is - I mean that's just what it does and the debate about the reviews and all of that stuff it all takes place in the context of this language which has been in the contract since day one.

Steve Crocker: Yes it's wrong I mean it just - I mean that goes...

Becky Burr: No, no, no I mean some people will say it means it has to be available for free and others will say it doesn't. But that debate has been going on...

Jonathan Zuck: Yes I don't think that you can, I don't think that you can infer the answer to that question from this statement which is what I think you were asking.

Steve Crocker: I would not want to facilitate people who would use this language and say therefore we are constrained to do this or we're not allowed to change this.

Jonathan Zuck: No, no, right, right but I think maintenance of and access to including hidden access to presumes we include the policies surrounding it.

Becky Burr: Right and it's further controlled by the fact that it involves issues for which (uniform) and coordinated resolution is reasonably necessary to facilitate openness, interoperability, resilience, security or stability. So I think it's about, this is about - this says you can develop policies about maintenance of and access to accurate and up to date information concerning domain name registration. It doesn't say what those policies must be.

Steve Crocker: Okay good so let me request then that in the language associated with the jacket or the wrapper that there be explicit mention and discussion of the fact that current policies are under review, that there's - and...

Jonathan Zuck: That's just temporal to go in bylaws though probably. Or do you just mean in terms of like a cover?

((Crosstalk))

Man: (Unintelligible) intent of language or something like that.

Steve Crocker: In the explanatory language around it.

Jonathan Zuck: Oh okay.

Steve Crocker: So that when people go and say hey I read this language to mean this and you can say no that's not what the framers had in mind and you get to go read the total (papers) or whatever.

Becky Burr: Right.

Steve Crocker And then say oh this is what the discussion - so let's not lose that.

Woman: Okay.

Steve Crocker: Because it's a very big deal.

Man: Okay.

Becky Burr: Alright do we have anybody - any final comments? Questions? I think not.
Thank you all for sticking through this another good conversation. Thanks a
lot.

Woman: Bye-bye.

((Crosstalk))

END