

**ICANN**

**Moderator: Brenda Brewer  
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Coordinator: Excuse me, your recordings has started. You may begin.

Becky Burr: Thank you very much. Thanks everybody for joining in. I know we've had - everybody's had millions and millions of calls, and volunteer fatigue is probably at its highest. I'd like to accomplish a relatively discrete activity on the call today.

I think that we have some work to do in two main areas with respect to the WP2 contribution. The first is with respect to the mission, core values and commitment statements. I think we have some significant comments and concerns that we need to go through from the comment period. And then we also have significant issues on the IRP.

And what I'd like to do today is focus on the mission, core values and commitments portion and really try to have a substantive discussion about the issues that we saw. Just - I'm going to encourage Malcolm to sort of participate with me in high level kind of discussion and about the comments that we got. And I wonder, Malcolm, if you would like to just start by sort of sharing your observations that went into the categorizing document.

Malcolm Hutty: Yes, Becky, I'd be happy to. Okay the categorizing document, of the aim of that really was to move - it was simply to change (unintelligible). It was to index and to access the comments that we received so that we can find them better and make sure that we don't miss a comment and that comments are - can be taken into consideration, and also to help us to organize our thinking so that we consider, you know, any substantial topic that needs to be discussed all one time rather than keep coming back to the same topic and again and again as we proceed through each individual comment.

So the approach was taken that I went through -- well with some colleagues actually; I must say I had some assistance -- went through the comments that we received in the public comment, seeking to identify where there were common topics under discussion. Now these aren't - these common topics aren't not necessarily common themes because people were grouped together even when they expressed diametrically opposed points of view, if they were discussing the same basic issue.

So I went through looking to see where we can find the same issues being discussed regardless of the points of view that was taken on it and grouped those together so that we can then say, "Okay well there was all these people that were having comments on that subject" and then we can refer to them and see what their views were and see whether these are being fully addressed.

So if I work through these and, let's see, looking at the documents I produced, if you turn to Page - well actually sort of starting off, if you turn to Page 2 of that, you can see that there was - we managed to identify a relatively small and manageable number of areas where there were such topics. We managed to get down to seven main topics and 16 detailed subtopics that were identified.

And as you can see in the table on the third page, a significant number of commenters on each of those topics, which to my mind acted as validation that these groupings made sense, because we didn't have, you know, a vast number of smaller topics implying that we'd been too granular in the approach, and each of these topics had significant numbers of people speaking to it.

So working through, if you look at the third page of my document, and you can see what we discussed, what the topics were that were being spoken to. And if I work through those one by one, if I walk you through those one by one, the first of those was the notion that we introduced into the bylaws changes that explicitly stated that ICANN's powers should be specifically enumerated or defined as powers.

And anyone that spoke to that is categorized under this section. And that includes those that spoke about seeking to exclude ICANN from undertaking activities outside those defined powers, and comments that specifically referenced the need to protect human rights or freedom of expression and infringement of human rights and freedom of expression as being outside those powers were all grouped under that heading.

So then we have three sub-headings therefore that we came up with within the defined power section. There were 17 people that said generally spoke to the idea of there being enumerated powers as being something that they wish to comment on, and I can say they were all most exclusively in favor of that, but that's from memory.

But anyway, 17 people spoke to the idea of enumerated powers, and then 19 people spoke (unintelligible) to this concept of where ICANN should have a

general regulatory power, as in a general power to use it, obviously in the domain name space so as to affect regulatory outcomes or to speak to regulatory behavior of the views of domain names (unintelligible) or who spoke to the issue of human rights and freedom of expression as being outside its current powers, and also those that spoke to contract compliance.

And from memory, those that spoke to contract compliance came principally from the intellectual property community, and they were concerned to ensure that contract compliance was - continued to be available as a tool to ensure that essentially the UDRP, where trademark infringement stuff could be addressed. So that again spoke to defined powers in the sense of seeing in - for those people the - certain things needed to remain within the scope of those defined powers and that there needed to be mechanisms to ensure that that could be - action on that could be taken by ICANN.

So you may have people, you know, with potentially opposite views or at least views that need to be reconciled between the human rights community and the IRT community. I don't think that should be any great shock to us, but they all are speaking on the same topic and so they've all been grouped into that barrier so that they can easily be found where the comments on those issues are.

The next main topic area was on balancing core values, and they were grouped under that topic if they were comments that spoke to how the core values and commitments should be balanced each other. And we particularly - we introduced some new wording into the proposed bylaws that spoke to precisely how that should be balanced against each other, and we had a number comments back in relation to that.

The third area was the relationship of ICANN to governments and to the law and matters like that. And there were three sub areas that we identified. We didn't have any - didn't group anybody as being speaking to that generally but I just used that to link three subtopics. And one was the concept of being private sector led versus the idea that maybe it should be for the public interest or that it should be in support of public policy or so forth. So there were some that spoke to that statement about it being private sector led.

There were a number of other comments that spoke to the difference that should or should not be given to either the GAC or to governments and comments that related to that, comments that related to for example the deference that it is given by the current level by the board for GAC advice or any alternative ways of structuring that, either to increase or to reduce the deference to GAC or government.

And also in this section are comments that discussed the requirement to comply with local law or with international law, and there were some that spoke to each of those or both of those. So those three areas there are grouped under relationship to government and law, and that will provide a means to find those that discuss those. So for example, five people spoke to the compliance with local laws, compliance with international law, and that will help to find those and discuss those together.

The next area that I grouped together: the correctness of core values, which is really those that worked through and had comments on the core values that we proposed where they wished to either say that they support the vote or said actually we have some concerns or some divergence or some new suggestions as to what the core value should be. And there were three main areas again of comments that I managed to identify there regarding that.

One was about multi-stakeholderism, and there were a number of comments that were received about multi-stakeholderism and ensuring the adherence to that. Then there was another group of comments that discussed the use phrase "the public good" or the "public interest" within the core values, and there were a number of comments that spoke to that and precisely how it was used. It's been used more than once within the core values, and some people approved or disapproved of that or suggested adjustment in the terms. And they've been grouped under that category.

Thirdly, there was a section that was a much more, slightly more technical section about consumer choice. There was - that was really the reference to the objective of ensuring consumer choice in domain names and was also - there was some commentary, quite a number of comments, that compared Paragraph 60 of our proposal which proposed the new core value that spoke in that area with Paragraph 337 of our proposal which was an explanatory paragraph that explained what the purpose and what we're seeking to achieve there.

And we had a number of comments there that sought to contrast that with Paragraph 60 and actually what was being said was being done in 337 in their view was not actually being achieved by the wording that we proposed. So all the comments that spoke to that were included in that section.

The next section was the issue of enforceability. I think we had quite a lot of discussion of enforceability in the - within the CCWG itself. There were unsurprisingly a number of people that commented on that, so they've been grouped together.

There were then - the next section was mutability and mechanisms to change the core values. You know, that particularly goes to the issue of, you know,

fundamental bylaws should be - should the core values be fundamental bylaws, should they be easier to change, should they be harder to change, should they be impervious to change. I believe we had some comments that might have suggested that as a possibility.

Then there were a few more comments that were more specific. There were some that were specific - a small number of comments that were specifically things that really didn't relate to either ICANN as a whole or to DNS policy but specifically related to the non-DNS elements of ICANN's role through the numbers community, the protocols community and root servers and ccTLDs.

And when I say ccTLDs I don't mean policy, I mean really I think that was particularly talking about the relationship of ICANN to ccTLD operators and the first thing being the importance ICANN's lack authority to make policies with these ccTLDs. Essentially though, and maybe I'm speaking a little loosely here, but my own impression of those that we grouped under that category were those that really was talking about preserving the independence of those communities from encroachment by ICANN in what their role was or what they understood their role to be, whether that's the protocols community, the numbers community, obviously the ccTLD community.

Moving on then, there was - there were a number of general, essentially nonspecific comments. These sound a bit miscellaneous but mostly they spoke to the proposal as a whole rather than to any particular elements of it. There were a number of sort of individual comments that made one of the proposals for things that they saw as being new or missing from the text, and because they were not included the proposal, they were the only person that spoke to them.

And then the final category that I identified spoke to issues that weren't actually comments on the text at all but were text on other matters such as what the process should be and the CCWG should follow in consulting and arriving at the final proposal.

So those are the categories that we identified. And then at the back of the report, you can see the identification of the individual commenter and the reference number for the comment number that was made that refers to each of those topic areas.

Now it's worth noting that of course some of those commenters spoke to multiple of these so this hasn't been a move of each comment into one category or another, it's been an identification that when we come to discuss that topic, we will - we can find comments on that issue if you look at that particular comment from that particular commenter.

So if we choose, as I would suggest we should, to work through these as - in order as they - in some sort of order, not necessarily this order for considering these issues if we say well we're going to look now at the defined powers and the question of whether or not ICANN - there is community support for the idea of enumerated powers, we could turn to that back table and see right well here are the list of people that have commented on that issue and there is where we can find what they have said.

And that will allow us to validate that we, as I believe we do, have general support from the community for that issue and work through it in that order. So this is my first attempt to identify whether there has been support or to characterize the comments. I've provided an index so that anybody who is participating in this can easily and readily find the comments themselves and evaluate the level of support for themselves. Thank you, Becky.



Becky Burr: Thank you very much, and thank you for the work that you did. I do think that this is a hugely helpful organizing tool for us. I went through the comments over the weekend and I was able to figure out how things fit into these categories and I do think they sort of nicely sum up the general powers - the general issues. I see Steve's hand.

Steve DelBianco: Yes I wanted to echo that point. In the other work party, Work Party 1, instead we were doing piecemeal comment analysis, and that makes it so much more difficult to make updates to our draft when you have to visit dozens of different public comments to see what the general trend of concern was. And many of the public comments conflicted with each other.

So having them consolidated makes it easier for the step of updating the draft and then going back into the public comment tool, because sometime in the next three weeks all of us have to update the public comment tool and explain to the public commenters what we did in reaction to their comment, maybe we clarified, maybe we updated. But you'll be able to make that job be much easier as a result of this initial work. So I wish we had followed the same model in WP1; we didn't. But I think you're going to come out ahead for having done this. Thank you.

Becky Burr: Great. Thanks. So does anybody have any comments on the sort of categories of comments that are being proposed here as sort of organizing our work and our thinking about this? Any concerns about proceeding on that process? I see no hands so I'm going to assume that we're good on this.

I think that there are some of the issues that are, you know, sort of I don't know if we want to take this in order or not but the issues that jump out at me

in terms of big groups of comments is, one, I think that there is a concern that the balancing test needs to be refined and thought about more carefully.

And as I understand it, part of that goes back and ties into concerns about public comment and public interest and the definition of those things and how that gets processed. So that is one that I would put as something that we should definitely spend some time talking about tonight if possible.

Anybody have an objection just to going through this in the order that we've got here in front of us? Okay no objections so let's just go right to it.

If you move to the part at the back of the appendix of the topics received, so I'm going to move again to Page 5 of the issues, you'll be able to go along with the comments. And although I have to say some of the comments are a little bit out of order in my space.

So in terms of the defined powers that people raised, boy I'm looking at the wrong one. Let's just have a conversation about those issues. And I'm stalling because I'm looking at comments that are numbered differently. So that's going to make me very screwed up.

David McAuley: Becky, it's David. Could I just ask a question while you're doing that?

Becky Burr: Yes.

David McAuley: And the question I have is I think what you suggest is a good idea, it's a good approach. I'm just wondering if anyone is having the conceptual difficulty that I think I have. Maybe I missed something, but not knowing the reference model, whether it's membership or the empowered member model, the empowered designator or - and I know there's a third potential option sort of

emerging, it just strikes me that it would be - has anyone heard, does anyone know where we are on deciding the reference model? And I have missed a little bit, so. Anyway I'm just saying I'm struggling with dividing things up among those concepts. Thank you.

Becky Burr: So I think that we're in a state of some flux. I think that, you know, the designator model and the membership model enhanced and modified, plus an altogether different single-member model are still under discussion. I think for our discussion today though that they're really model-neutral in a way, that whatever the model is, you know, it's going to be - the underpinning will be the mission statement, the commitments and core values at some level. So I'm not sure that we need have a fixed model in mind, which is a good thing, since I don't believe there is a fixed model in mind.

Steve, I see your hand.

Steve DelBianco: Yes thank you, Becky. I think you asked about the balancing test and the core values. Is that right?

Becky Burr: Yes. I think that - I mean if we could start with that, that is a big issue that a number of people raised. And so why don't you go ahead. And I have a sort of summary of it too.

Steve DelBianco: Right thank you. And the threshold question that I couldn't answer in the business constituency was our proposal, still on Page 17, of the balancing test articulated a way to improve it. But we didn't explain in our proposal why it had to be improved, and if we did I missed and I'm sorry. But the BC worked me over on that saying why are we changing this, and I didn't have a good answer.

So the BC's comment, which I pasted into the chat, is really seeking clarifications about why and wanting to be sure that the improvements in the balancing test would make it easier to resolve the balance question as opposed to stopping us from taking action when we had the balance test against each other. So if you think there's a good place in the document, I can find that fine. I don't think to suggest a change to your proposal, it just says we have to explain why it is we thought we needed to improve the balancing test.

Becky Burr: Okay. So if we look at Paragraph 68 in the report, it has the existing language of the balancing test, which says, "These core values are deliberately expressed in very general terms. They're not prescriptive and the way they apply is going to depend on a lot of factors that can't be fully anticipated or enumerated.

"So the bottom line is any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are more relevant and how they apply to the specific circumstances at hand and to determine, if necessary, an appropriate and defensible balancing among competing values."

The notion when we talked about it, and I will take some ownership for that, is that the discretion given with respect to balancing is very, very, very broad and in any kind of a test, you know, in an IRP or any of those things, there's going to be enormous deference to a decision-maker with respect to the balance.

So the question becomes are we comfortable with that? Is that workable? Are there some parts of the commitments and core values that we believe are, you know, so fundamental that, you know, the balancing has to take note of their

sort of fundamental or, you know, priority? And if so, how are we going to do that?

So the test that is in the new proposal basically says, you know, to the extent that you're reconciling these, the reconciliation and the way, you know, that if you sort of discount one on, you know, in favor of another, that you're doing that with some important and articulated public interest goal within ICANN's mission that is balanced.

Now people responded two different ways to this approach. And one of them I think is - well it looks like in every case you're talking about sort of sacrificing things to these values to the public interest, which we've already decided is difficult to determine, and isn't this going to get us into just a quagmire where we're not moving forward. So I think that's part of the commitment.

Malcolm?

Malcolm Huty: Becky I think there were two things that stood out for me in the way that people responded to this. And I must say I'm speaking now personally as a participant, not as the person that organized that categorization. I think some people responded to it quite positively, seeing the language that has been written as an attempt to say that these core values must be met and if what you're doing reaches any of them then it's not okay, we have a problem with that, and were supportive of it in those terms.

And then there are others that looked at the language, and particularly references to strict scrutiny, in the balancing and said this is importing a set of essentially prior case law from American constitutional approaches. This is a very sort of technical jurisprudential, to use that sort of language, but it is not necessarily appropriate for applying to this.

And that doesn't necessarily disagree with the idea, with the more general idea, the more principled idea, that's coming from most that supported it, but it does potentially suggest that the language that's being used is too specific in its nature as to the methodology of balancing there and that what's needed is to get back more to the principle that each of these core values are fundamental that we don't expect them to be balanced against each other. We expect them to be each upheld in all cases and move away from the language of things like strict scrutiny, which had some criticism.

Becky Burr: Okay. I think that's correct. And interestingly, I think that the test is actually pretty commonly used but there's another concept in Canadian and European law that is a little bit more general. It talks about proportionality.

Malcolm Hutter: Actually, Becky, I think it was the fact that it was commonly used was what was being criticized as an approach. I think they were - the comments that were criticizing were suggesting we shouldn't be modeling too closely on an existing jurisprudential methodology, particularly one from any particular jurisdiction, but instead should be making a more, slightly more general statement that these are not core values that we expect to be oh well somewhat achieved, created up against each other but if there is a clear case that any one of them has been violated, then that is a violation.

But the particular methodology we shouldn't be so specific about. I think that was more of the case. And so we're not so much looking for a different methodology from some other jurisdiction to be tightly modeling ourselves on, but more the suggestion of actually be stated at a higher level of principle.

Becky Burr: Okay. I think that's a very helpful way of thinking about it. What do other folks think about the issue? And this is something that I think people,

commenters, did feel, you know, it was quite an animating piece and we do - we should be responding to it, I think. And I think it was thoughtful, very thoughtful comments. Do others sort of agree with the more generalized and sort of less model-specific approach that Malcolm is suggesting that people were suggesting? I guess, I don't know if you're actually suggesting that, Malcolm, as something that you would endorse.

Malcolm Hutto: Well I'm fine - what I think is a possibility of a consensus here. I'm looking at the criticism that is being raised and looking at the support that has been raised and looking for a way of reconciling those in a way that might potentially reach a consensus. And those that are expressing support weren't saying we think that strict scrutiny is the right standard, they were saying we think that a clear statement, that these core values should never be violated is the right thing to say.

And those that were criticizing or diverging were not saying that we object to the idea that these are core values that should be upheld in all cases, they were much more narrowly targeted to criticizing the importance of the jurisprudential background of the strict scrutiny standard from U.S. law. And I think they - those two points are potentially reconcilable so I'm putting up as a proposal this is how I think they might be reconciled and then if everybody salutes, then we have a way forward.

Becky Burr: Okay. So could you articulate how - just one more time so that we all get it, because we're looking at three different pieces of paper here, how you would reconcile them?

Malcolm Hutto: Well I think if we move the language so as to remove some of the more specific statements that you have in that balancing section and then say into

something that is a little, if you like, vaguer or higher level that says that these fundamental commitments are expected to be adhered to in all cases.

Becky Burr: Okay. Others?

Malcolm Hutto: So that we do not expect that these principles are saying things that are not adhered to that will come into conflict with each other. We expect that any significant failure to adhere to these fundamental commitments should be treated as a violation. It's that kind of thing. And then how that is analyzed, at what level of failure or what level of thing amounts to a violation is less unstated and really is a matter for the development within the community and within the IRT's own development through its own jurisprudence. It would leave that open.

Becky Burr: Okay. Steve, for purposes of paragraph numbers, we're talking about Paragraph 71 through 76. And so the notion would be I think, paraphrasing, that we'd keep Paragraph 71 or something like that and then we sort of replace Paragraph 72 through 76 with a more general statement that in carrying out its work, ICANN should strive to fully adhere to these commitments and core values.

Now is that a fair statement, Malcolm?

Malcolm Hutto: That reflects what I was suggesting.

Becky Burr: Okay. So I can imagine somebody saying yes but what if you can't reconcile deferring to the GAC advice -- I'm just trying to find a good example of this -- you can't reconcile operating with efficiency and excellence with, you know, employing open, transparent and bottom-up policy development processes. That's probably not a very good example. But do we need to have any kind of



guidance about where these things are in tension with each other in any particular situation, what the approach should be?

Malcolm Hutty: Becky, I think you've - the structure actually answers that, because we have designed a distinction between commitment and core values. And this statement on the very strict balancing statement actually applies to the commitment and not the core values.

So when you spoke about the operating with efficiency, that was actually drawn from the core value section, which is the kind of thing that there is an expectation where there will need to be tradeoff, but it's in the area of the fundamental commitments where there is an expectation that there should be no tradeoff and there should never need to be a tradeoff between those and that it should always be possible to find a way of improving on those all of these fundamental commitments.

Becky Burr: Okay. Avri, I see that you have in the chat that you think we need Paragraph 76. Are you saying a general Paragraph 76 or Paragraph 76 that's in here?

Avri Doria: (Unintelligible) I was basically saying that in relation to core values we still needed to retain a Paragraph 76, and I was uncertain whether that was something that was being eliminated. Now in terms of commitments, I mean there is a certain appeal in what Malcolm is saying that core values have a much, you know, kind of different sense than the commitments and that the commitments should be written in a way that none of them every needs a tradeoff.

Now as you were saying, I'm not sure that that's always possible and if it's not always possible, then I think we need a statement equivalent to 76 also on

commitments. But I'm not sure. And so I didn't raise my hand but just to say for certain on core values I believe we need to keep that kind of statement.

Becky Burr: Okay. So I think that I'm sensing some appeal to this approach and I think that we feel like we need to see text really to feel comfortable proceeding with it. Does it make sense for us to say, "Okay we're going to take this as a kind of, you know, next step way forward. We'll try to get some language into the list that accomplishes what we've been just talking about here and try to run this to the ground through conversations in the list."

I don't see any objections to it. I don't hear - okay so it sounds good. Okay so that is going to be first issue to take that on. And, Malcolm, could I suggest that you and I work together on this? Anybody else who wants to be part of just taking a stab at the language?

Malcolm Hutty: I'm happy to assist.

Becky Burr: Okay great. All right, terrific. Another big issue that came up in this is that - is the language about the public interest, the concerns about on the one hand how you identified public interest and on the other, concerns about that the public interest wasn't getting enough attention or enough - it wasn't sort of the primary issue.

I think that in our previous discussions we had attempted to kind of address the concerns about the vagaries of the public interest by really focusing on the fact that the public interest would be identified through the bottom-up multi-stakeholder process.

So this language is in Paragraph 105 of the report, where we said that as a core value you would perform this by seeking and supporting informed,

broad, informed participation reflecting the functional, geographic and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that decisions are made in a global public interest identified through the bottom-up multi-stakeholder development process.

I think that there was at least some concern that - two competing concerns that maybe they are reconcilable that sort of the public interest wasn't getting enough focus and - on the one hand, and, two, the public interest was very vague and sort of manipulatable (sic) concept, so that the notion that it was getting identified through the bottom-up multi-stakeholder process needed to be more prominent.

Does anybody have a view on that issue? Steve is asking the question about whether we think that the bottom-up multi-stakeholder process will inherently reflect the public interest. And I think that what we are saying and have been saying is that you can't - that the public interest is not determined from on high. It is the result of - identifying it is the result of a process. Now the process has to have all of these other things feeding into it but indeed, you know, with all these core values and commitments in place, that identification of the public interest is a process.

Steve, I see your hand, and then Avri.

Steve DelBianco: Hey thank you, Becky. Yes the key is that statement in 105 is that there's no comma before the word identify, and that implies that we believe that the multi-stakeholder bottom-up process inherently identifies the public interest within the context of whatever decision is being made.

And I have for years have advocated a more explicit definition of public interest, mostly to constrain ICANN's remit. And I used to propose that every

meeting, that it be the availability and integrity of registrations and resolution. And even on the CCWG we had a several week discussion about maybe trying to push that through.

But I've come to believe that if we can constrain ICANN's remit with core values, restricted mission statement and the IRP that looks to that as a standard, that that might be a more effective way to constrain ICANN's mission and that it might be okay to allow public interest to be inferred as anything that the global Internet public declares that they're interested in. We would only know that through the bottom-up multi-stakeholder process.

So I'm just sharing that sort of evolution of ideas on that. And I did want to clarify that it was our intention to not have a comma before that key word and that 105 implies that public interest is identified by the bottom-up multi-stakeholder process. Thanks.

Becky Burr: Okay great. Avri?

Avri Doria: Hi yes. I guess when I listened to (unintelligible) I don't that as (unintelligible) each other in terms of it is important. I think when you ensure decisions are made in the global public interest, I'm not sure how you make that stronger. And then I think that what Steve says is right is that we did intend to say and that we discovered that global public interest through the bottom-up policymaking process, multi-stakeholder, bottom-up.

So I think we're already doing it and I'm not really sure how we could make it stronger on either the two sides. And so I guess I'm a little confused as to what we could do, because, you know, perhaps those that were saying global public interest are thinking of some, you know, external perfect form of the global public interest, and I think we're saying whatever it is, we only know it as

discovery through our processes. So I don't know what we could do because I think the statement is really meeting or trying to meet both of those requirements. Thanks.

Becky Burr: Great. Paul?

Paul Rosenzweig Yes hi. I'm in the position of kind of agreeing with Avri that the public interest is a chronic ideal of some form that takes content in the eye of whoever it is that's beholding it. I guess I'd have to disagree slightly with Steve in saying that I'm uncomfortable with a rule that says that whatever the bylaw process that decides in the public interest is because I feel as though the public interest has to be constrained by the remit of ICANN.

And so, you know, I could easily imagine many things that people think are very useful and good to spend money on that I would approve of spending money on but that I would think if they take account of the bottom-up process we would to exclude. So, you know, I'm happy with a nod to it in text as a platonic ideal but as a grounded decision I just don't think it works.

Becky Burr: Are you saying that it works in 105 or it doesn't work as currently constructed in 105?

Paul Rosenzweig I can't tell because I don't know how it's going to applied in the long run. If it's (unintelligible), you know, kind of like (unintelligible) languages, you know, we are in favor of things that in the public interest, I'm happy. But if it's grounds for a decision that actually allows whoever the (unintelligible), whether it's the (unintelligible), the board or the IRP to go beyond the powers, I don't like that. I mean, so I'm struggling with it I guess is what I'm really saying. I don't know if that makes sense to you all.

Becky Burr: Okay. I can understand that. Malcolm?

Malcolm Hutto: Yes thank you, Becky. There were a number of comments that were supportive of that last comment actually, that the public - inclusion of the phrase "public interest" should not be an excuse to go beyond the scope of ICANN and that - or to expand the scope of ICANN.

And it suggested actually that what we ought to be identifying here is the ICANN work within its mission needs to be done for the benefit of the public as a whole rather than opposed to the interest of some private individual, rather than the idea that ICANN should do anything that is thought as being in the public interest however they been arrived at.

And looking quickly at this index, I mean at the MM93, link 104, MM115, LAB122, have all made that point. So I'm sorry I did see who was speaking last, but whoever it was I think there's a lot of support for that point of view from the public comments.

Becky Burr: Okay. I think that I agree with that. (Robin) has suggested that one way of addressing the anxiety, the discomfort that Paul expressed, was to make sure that it's both the bottom-up process and within ICANN's remit. So I think what I am hearing is general support for the balance that we have attempted to strike here, suggesting that we strengthen that by ensuring that this is a cabined by a reference to ICANN's remit but not - I mean I think that there's - that's sort of the road that I'm hearing. Is that the road we should go on?

Malcolm Hutto: Becky, I should say if you want to go down that road, I think that if you then go back to the public comment, several of the commenters have suggested wording to apply that, you might find useful.

Becky Burr: Okay great. I will do that. Okay. I want to get to the - another big bunch of comments referenced the language, the private sector led language. I think that most of them -- and Malcolm you can correct me if I'm wrong -- were actually supportive of the private sector language, private sector led language.

There was one - there were one or two comments that said private sector should be understood or is well understood to mean just not government led as opposed to, you know, business or anything like that, but by private sector we're taking an inclusive view of that. But as I said, I think some of the governments have, you know, wanted to remove the private sector led.

I did not sense a lot of support in the comments from that. Other views on this? Malcolm?

Malcolm Hutty: I don't remember the broad generalities of thoughts for this term, but I do remember that there were comments certainly that specifically said that what they understood by the terms is that this should not be government led thing and indeed some linkage with the NTIA requirements that ICANN must not be a governmentally or inter-governmentally led organization, and that they understood this terminology and those terms.

I think that those that diverged from that, which were mainly government, did not necessarily see it in those terms but saw it potentially as being something that would exclude noncommercial interest or that would reduce the leverage on commercial interest, which was not a view that was held by those that were supporting the term.

So possibly there is scope for some clarification there around that to ensure that, you know, so as to avoid that difference of opinion as to what the term

means, either by removing it and replacing it with some other language that is more explicit as to what it means or maybe just clarifying that.

Becky Burr: Okay. This is - this comes up in Paragraph 110 and raises another issue that was raised by several of the governments objecting to the language that says that ICANN should take dually taking into account the public policy of advice of governments and public authorities to the extent consistent with these fundamental commitments and core values.

Any sentiment? I didn't hear sentiment outside of the government here for getting rid of that, but I'd like to hear other views if there are or the same. So Steve and then Avri. Steve, you may be on mute. Steve?

Steve DelBianco: Can you hear me, Becky?

Becky Burr: Now I can hear you.

Steve DelBianco: Can you hear me?

Becky Burr: Yes now I can hear you.

Steve DelBianco: I'm sorry. Thank you. Becky, I pasted 110 into the chat. You read it; I pasted it. I wanted to acknowledge that the words that we are adding starts with the middle of it: "the public policy." Right in the middle of the third line. That's the new language we're adding right now. And I wanted to suggest that you may have had some objection to it but the rest of us who commented on it -- I shouldn't say the rest of us -- those of who commented on this, supported the core values as written. And that means we supported the red text.



In fact a number of us think the red text is essential to making sure that we give our board an IRP panel the backbone and the standard necessary to from time to time say no to GAC advice. So we see 110 as essential. Maybe we didn't call it out in particular because that's not the way the public comment questions were written, but the red part of 110 is necessary if we ever expect our board to say no to GAC advice from the basis of the rest of the bylaws. Thank you.

Becky Burr: Great. Avri?

Avri Doria: I agree with what Steve said. The government notion of sovereignty and public policy knows no bounds and in their expectation when they say something is public policy, it is public policy and that's the end of the discussion. So we really need to be explicit and as, you know, perhaps a different way of saying it than what Steve said was basically to be explicit that there are limits set in this to the extent of their public policy because of sovereignty notions. Thanks.

Becky Burr: Thank you. Explain to me actually the next - oh Malcolm I see your hand. I'm sorry.

Malcolm Hutto: Yes sorry. I've just been going again back to the index and looking at those that commented on this specifically. And actually what I've seen does rather support these comments there that those that chose the spokes piece specifically about that paragraph so in support of it and you can see that by going back to the index.

Those that have concerns didn't speak so much specifically to that paragraph - in objection to that paragraph but more spoke more broadly to the issue of deference to the GAC what the government sought to compliance for local

international law which does suggest that service of court or for - or that we should look for our consensus in leaving that red text untouched and looking at how the issue of deference to GAC and governments and local law can be addressed in the way that those consensus in a way that is consistent with that red text remaining untouched.

Becky Burr: Okay. Okay good. Good so I'm not sensing a lot of support for doing anything with the language, rather sensing support that the comments notwithstanding the exceptions that were taken to the comments. So support this approach and we'll leave it in. We have had this funny language in sort of square brackets about avoiding capture.

That's paragraph 111. I have to confess that I frankly have had trouble figuring out how to build this in as a concept. One commenter and I'm not sure who it was but one commenter made the comment that basically we should really focus on the structures and the, you know, checks and balances as a - as the capture mechanism and focus on the mechanisms as opposed to trying to articulate a sort of more general concept.

I don't know how others feel about that but I, you know, we have had for awhile this sort of awkward square bracketed text about capture that I have to say I quite frankly don't know what to do with. Other news on that? So David I think is agreeing with the notion. Avri? The question is...

Avri Doria: (Unintelligible).

Becky Burr: Let me just - Steve has asked for a repeat of the question which is we have language - square bracketed language about avoiding capture as a core value. The question is whether that is text that we should seek to write or whether we should best think of that as the result of a process. Go ahead Avri.

Avri Doria: Thanks. Avri speaking. I think it's valuable to include it explicitly and so I would tend towards thinking we need to get the right wording there and include it. I think yes it can be inferred from a lot of other stuff and the process should result in that. But I think it's a really good thing to say explicitly. Thanks.

Becky Burr: Thank you. Steve?

Steve DelBianco: Explicit would be my vote but don't expect it all to be in the core values. There are many other places in this proposal where we have taken steps to avoid capture, not only by say government but capture by other forces that might seek to capture with an AC or an SO. So we have work to do in that area but don't assume you have to do it all right here.

But I do think that paragraph one can - is an appropriate balance against one particular group, the GAC's ability to have advice carries with it the obligation of trying to find initially acceptable solutions because it says that the board can seek a mutually acceptable solution but not if it's in conflict with the rest of the bylaws. And that's a vital improvement to what we're doing. The question I would have given - the answer I would have given had I been testifying this morning in Congress.

Becky Burr: Okay. All right anybody who would like to propose language for this? That would be great because right now we just have this - the and maybe we just leave this language as it is.

Steve DelBianco: We're talking about 110?

Becky Burr: One eleven. It's the 111 language that I'm talking about. Okay. If we could move to the numerous comments that we got regarding paragraph 60. I'm sure it's paragraph 60 Malcolm. This is the consumer choice paragraph 337 which I believe is from the affirmation of commitment. ICANN will ensure that as it expands the top level domain space, it will adequately address issues of competition, consumer protection, security, stability, resiliency, malicious abuse issues, sovereignty concerns, and rights protections.

And I think to sort of - to summarize what folks said is well we did okay on some of that in terms of competition and security and stability but we didn't necessarily - we didn't port the language of malicious abuse issues, sovereignty concerns and rights protections in the same manner. Do you want to talk to that point?

Steve DelBianco: Thank you Becky. Avri and I, (Matthew Shears), Fiona found a number of other folks in work party one were tasked with bringing the affirmation of commitment to reviews into the bylaws. And that meant two things. The first paragraph of each of the affirmation reviews is a commitment. The subsequent paragraph of each of the reviews are the process by which the reviews are done.

And in that regard, we would sort of pass the buck to you to make sure that the first paragraph commitment from ICANN are bundled into the bylaws and then we paid special attention to the process of getting the reviews done. So with regard to the affirmation of commitment to review of the new GGLD expansion, it was the BC and perhaps even several others who identified that there was some omission.

There's an assumption stated in our proposal that the commitment to that review would have been imported into the core values somewhere, into the by

- I should say into the bylaws, not necessarily the core values somewhere in the commitment. But you're right. The entire second half of that sentence was left out. So I consider that merely a clerical omission and we'd leave it to you to decide which paragraph it belongs in. But it keeps with our commitment, one that was reiterated today in Congress, the commitment of bringing the affirmation commitment and reviews into the bylaws.

Becky Burr: Okay. So is it the view of the group that we should be essentially looking for - it is the - it is starting with malicious abuse issues right Steve?

Steve DelBianco: Okay Becky I'll take the entire commitment from the affirmation into the chat - into the.

Becky Burr: Well I understand that paragraph 336 is I think that the - that is what the affirmation right. So we - so I think that we have competition choice, security, stability, resiliency. Those concepts are covered. I don't know about sovereignty concerns. But malicious abuse and rights protections are the ones that I sort of understood people being concerned about being missing. Malcolm?

Malcolm Hutter: Yes. I'm wondering if there was any context in the AOC as to what these terms meant. The ones that were - I note the ones that were included that weren't permitted are ones that we used really elsewhere in the bylaws that are in - exist already in the bylaws. They've got a bit more current understanding as to what they mean. I'm not really sure what the scope is to malicious abuse issues, sovereignty concerns, even to rights protection.

I know the UDRP is what's done at the moment but I don't know if that's intended scope. So I wonder if this was left out not as a clerical matter but because there was lack of clarity as to what was being referred to that was

sought - that was important in order to maintain the very strong level of support that there was for - the ICANN scope being clearly enumerated. So if we do seek to include this, I would - I'd be asking how do we know what this actually means.

Becky Burr: So I can confess that I did not bring it in here because those three things didn't - they seemed either encompassed in other things or in the case of sovereignty concerns quite vague to me. So it wasn't a clerical error but I mean I hear everybody on this commitment. So, you know, we need to figure out what the way forward is. Steve?

Steve DelBianco: Thanks Becky. Malcolm the first part of the sentence is the context. Quote ICANN will ensure that as it expands the CLD space. That's the context and it's the only context. So in that context, sovereignty means that dot Brazil, dot V-R-A-Z-I-S would be subject to the sovereignty concerns of Brazil. I very much doubt it meant that dot Amazon would be subject to the concerns of those countries through which the Amazon River might flow because that's not part of it but we'll leave that for another day. But that's the context question.

And to Becky there wasn't an easy place for you to put it because in the core values part of the bylaws and the commitment part of the bylaws it wasn't obvious where to put should we expand the new TBLD. Now you found a place to put competition. So it's my guess is that that's the place it belongs but maybe we ought to add the context that Malcolm asked about and the same context is right there in front of us in the AOC. As it expands the TLD space.

Becky Burr: Okay it's...

Steve DelBianco: So that's where you can close to give you the context we need to make it part of the bylaw.

Malcolm Hutto: Steve the - as it expands it's slightly unclear language. Would do the - do you mean by this and would you be content with that's the measures that ICANN takes to its stand the top level domain space would adequately express those issues.

Steve DelBianco: Well and the conception is great Malcolm. Yours is probably fine. We'd have to explain why that's better than just importing the affirmation verbatim. But it has to be followed with a comma and then the full set of commitments that are in the affirmations. If we are to - when I stand up in front of Congress and claim that the key commitments in the affirmation have been brought into the bylaws so yes it's inadequate for us to allow the affirmation to expire. We do not want the affirmation...

Malcolm Hutto: But what I'm attempting to identify is when you say that is the concept do you mean that ICANN is committing to do these things, to take these things into account in its sublevel domain expansion program or is - as an alternative, which would be a much broader thing is the commitment that in return for being allowed to (unintelligible) the domain run program as a quid pro quo it must also address these other issues. Now they are two different concepts and I think it's to understand the commitment...

Steve DelBianco: No. Yes let me answer the former not the latter. There is not implicit quid pro quo as for the permission to expand. It's really just saying that as they expand they (unintelligible)...

Malcolm Hutto: (Unintelligible) language. That's why I suggested that alternative to clarify that point because that's what I thought and like what I'm suggesting that its

proposals to expand the top level domain space will adequately address those, scope these issues around that program, yes, as opposed to and eliminates the probability this won't mention some sort of quid pro quo but something more general. Do you follow?

Becky Burr: I - yes.

Avri Doria: I don't.

Steve DelBianco: Right I don't.

Becky Burr: Okay...

Steve DelBianco: I don't Malcolm. You're being too - this is a commitment Malcolm that ICANN already made. It's already obliged to this commitment. It's not a quid pro quo. And given that it's a commitment in the affirmation, we went into the bylaws because that's one of our goals.

So that the affirmation can disappear and we no longer have a bilateral agreement by which only the U.S. government is obliging ICANN to certain things. And we've made the promise we would bring them into the bylaws. We need to do so and there were only a couple of phrases that we're missing. And yes they can all be contextualized only with regard to expanding the TLD space.

Becky Burr: I see (Malcolm's) hand and then Greg's hand.

Malcolm Hutto: This is complex and I've written in the chat.



Becky Burr: So the issue that - the point that Malcolm is making which I think is correct is that what to give it the proper context it says that the notion would be that the commitment would be in expanding the top level domain space. ICANN will do the, you know, add part of - as its expansion will incorporate these things so that commitments are context - the context is that in respect of steps to expand this space those things will be taken care of. Those things will be addressed. Greg?

Greg Shatan: Thanks Becky. Greg Shatan for the record. I'm very concerned about the concept or practice of re-wordsmithing the affirmation of commitments language which has been committed to and adhered to, interpreted for the last six years or so. I find the language that's in the AOC as it stands to be quite clear. Sure I can make it stand on its head and spit nickels if I want. I do that for a living but I really don't think that it's ambiguous.

I don't think it - that it's, you know, maybe there is - it's capable of another interpretation but I think, you know, looking at it, it really doesn't say anything other than that - I think it says what we need it to say. And I think that if we're going to start redrafting the affirmation of commitments we get into a whole different issue. Then we're no longer really importing the affirmation of commitments. We're renegotiating them.

I think we are doing that in very specific places but I really think we only should do it when we're substantively trying to change or add something to the affirmation of commitments or if there's something that's truly been a stumbling block when people have attempted to deal with it in the past. I think we've, you know, this is really way too deep into the angels dancing on a head of a pin type of thing and I think we'll only trip ourselves up if we start wordsmithing this because other people will start questioning that and it opens it up to other potential wordsmithing issues.

And as much as I love to smith words, I think that's going to get in our way. There's going to be enough substantive issues and changes to deal with. Adding kind of minor stuff like this to the pile is just going to obscure what we're really trying to accomplish here. Thanks.

Becky Burr: Okay thank you. I've just put some potential language - compromise language in the chat that basically says ICANN will ensure that it's expansion of the top level domain space will adequately address etcetera which I think nicely takes care of the ambiguity that Malcolm and I have but does carry out the full intent of the language. So can you try and take a look at that Greg to see if it works for you?

Greg Shatan: No change works for me. We should keep it the way it is. I'm arguing against the concept of changing this but I'm doing that because I think the language that's there works perfectly well.

Becky Burr: Sorry there's a motorcade going.

Greg Shatan: Sorry not my motorcade unfortunately. So I'm not sure what Becky is - what you're suggesting Becky just.

Becky Burr: I just want...

Greg Shatan: So you're suggesting changing the text I.

Becky Burr: I'm suggesting getting rid of the parenthetical phrase that I think confuses it so that it would read ICANN will ensure that it expands - its expansion of the top level domains will adequately address issues of competition, consumer

protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns and rights protections.

Greg Shatan: Right so you're changing the few words that are in the affirmation of commitments as it stands.

Becky Burr: I am getting rid of as it expand will ensure - well I'm - I am - yes I'm getting rid of that weird phrase that says as it expands the top level domain space and says that if expansion will.

Greg Shatan: I get. I don't...

Becky Burr: But I hear you. You're saying...

Greg Shatan: I don't think it's weird language and I think that your language actually changes the meaning of what's there and not necessarily clarify it but actually kind of meaning that it needs to be kind of a goal of the expansion to accomplish these things. I think it's - that isn't quite what was being committed to.

Becky Burr: Okay David you had your hand up. Did you go away?

David McAuley: Can you hear me Becky?

Becky Burr: Yes.

David McAuley: I did go away. I listened to the base but I was - I actually came out. I disagreed with the premise that Greg made. I think the language is ambiguous but I ended up agreeing with him. I think it's best not to have a change. This

language has stood some test of time. It's just - it's a close argument but I agree with Greg. Thank you.

Becky Burr: Okay. Other views on this point? Greg is your hand up again?

Greg Shatan: I guess just looking back at the actual affirmation of commitments and at least as it's posted, I find the language there is yet still different. So maybe we're - is it - I believe this is unless I'm reading the wrong affirmation of commitments which is entirely possible. But looking at the September 30, 2009 AOC ICANN will ensure that as it contemplates expanding the top level domain space.

Is that the several - same place or is it - are there - no it's. The various issues that are involved open paren (sic) including competition, consumer protection, security, stability, and resilience, malicious abuse issues, sovereignty concerns and rights protections will be adequately addressed prior to implementation. If and so that's the sentence.

So I guess we're all - we've already changed it. So at this point it's our language. So I don't know if we want to go back to the language that is actually in the affirmation of commitments or go to our first level draft. I have no problem with us wordsmithing our own language. We could do that until we're blue in the face. But the question is then do we actually want to adopt the language that is actually in the affirmation and which I'm about to paste I the chat. So.

Becky Burr: Views on that?

Greg Shatan: I had - I apologize. I had thought that the language that was in our proposal, you know, in our initial report, was the AOC language and not an already

amended version of it. So my desire to stick to original scripture was actually based on revised scripture.

Becky Burr: Well it may have been in the, you know, translation from Aramaic. That was a joke.

Greg Shatan: Aramaic (unintelligible).

Becky Burr: Other views on the text? Well thank you David. I appreciate that you got my joke. Okay well I think we just.

Avri Doria: No we did I think for the joke and (unintelligible) works fine. That's for good events. That's not (unintelligible) was the notion that we talked about contemplating expanding a name space that we just expanded, you know, was confusing in itself and therefore extracted the language. And that created an ambiguity. So we took a fragment out.

And in fact the whole importation of the AOC is, you know, fragments where things changed either because history happened or because it was an NTIA commitment or some such. So a lot of it, especially at the beginning and ending of things, is fragments. And so I think what Becky offers sort of, you know, deals with that ambiguity that some found and does not change the meaning.

And while, you know, what do I know what Congress likes. I mean I'm not, you know, the one that ever goes to their house. I'm trying to think of something that they would probably like but Steve could answer that better.

Becky Burr: Okay thank you. Greg?

Greg Shatan: Thanks.

Becky Burr: All right well Steve if you are okay with the language that I pasted in there we can go with that. I'll let you guys think about it and you can get me - let me get back to me on it. We're at the hour and a half here. I think that we have gotten a lot of the big issues at this point. And so, you know, there were some specific calls about a more express - a more expressly articulated commitment to freedom of expression as opposed to our language in the mission statement that says for the avoidance of doubt.

And on that point, we did have some specific language suggested by the New America Foundation folks on the mission statement. That's the David post and company comment. I'm going to ask people to read it and maybe we can have a conversation about that language in the chat as well. Other things that you think we need to get to tonight or shall we consider this a wrap and good progress for the evening? I'm hearing no comments so I figure everyone is ready to call it an evening. Okay. Thanks everybody for coming on this and...

Avri Doria: Adam had a request.

Becky Burr: Oh David's hand is up too. And what is Adam's request? Oh Greg is good for another few hours. Well you better do it another call Greg. Or yes. Adam has asked if anybody is just calling in and not in the Adobe Connect for purposes of role. It doesn't sound like it. David McAuley?

David McAuley: Becky could you just briefly run through what you are looking for on Monday's call?

Becky Burr: On Monday's call I think we're going to really have to focus on the independent review and that's - I think that's the critical issue. The comments

there are no organized in quite the same way. So I'm going to - I find that this structure is helpful to - for us to be able to flip back and forth and look at the actual text of the comments. But that's - that is what the hope will be. What I'm hoping to do is circulate another version of the mission commitments and core values reflecting the conversation that we're having tonight and see if we can - even if we don't come to absolute, you know, closure on the words I think it will help us understand how we're responding to various comments in the comment tool.

David McAuley: Okey-dokes. Thank you.

Becky Burr: And Greg I'm really sorry. There's no 2:00 am call for you. But, you know, I'm sure somebody in your household will appreciate it. All right thanks everybody. Oh Malcolm I see your hand on (unintelligible)...

Malcolm Hutty: Yes. Yes sorry Becky. On the - there's also the public comment. That's the paper from the set passing which relates (unintelligible). Do you (unintelligible)...

Becky Burr: Oh yes absolutely and we do have to do that. And so we'll put that on the agenda because that was - that's definitely the independent review.

Malcolm Hutty: Yes.

Becky Burr: So that works well with it. I do have a question for you on it which I will send you and copy the list on it because I actually think in connection with the directly affected parties were the whole that you've identified is I think I have an answer unless I'm misunderstanding that. On the other issue I think, you know, it's definitely an issue.

Malcolm Huty: Wonderful. Thank you.

Becky Burr: Okay. Thanks everybody.

Malcolm Huty: Thank you.

Becky Burr: Bye bye.

Woman: Bye.

END