

ICANN

**Moderator: Brenda Brewer
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4:00 pm CT**

Grace Abuhamad: Thank you. All right, this is the IRP informational meeting. And it's the 10th of February, 2203 UTC. And I believe Jonathan and Lise are chairing today's call so I will turn it over to them.

Jonathan Robinson: Thanks, Grace. It's Jonathan Robinson speaking. I'll do my best to do this. This is an area I'm slightly less familiar with and haven't tracked quite as closely so hopefully we can deal with this adequately. The essence of this is - as everyone is well aware the CWG (unintelligible) work and we relied on that group to do some of their (unintelligible) CCWG - the CCWG and indicated a number of areas that we felt needed further work or attention.

In the event that note in combination with various other pieces of feedback and so on, has led to the position we are in now where as you know, the CCWG (unintelligible) supplementary proposal around about one week from today.

The purpose of this call is to discuss the response to (unintelligible) of our commentary letter, which we prepared substantially with the assistance of Sidley Austin and Sharon, who is on the call today. And the topic in question

for today is Item 7 from that letter and that is the - related to the appeals mechanism.

And in dealing with that there was a particular conclusion where - and it may even be useful to post that into the Adobe, but essentially the third draft proposal of the CCWG didn't explicitly address the requirement that an independent review process be available for claims relating to actions or inactions of PTI.

On the back of that some dialogue developed on the CWG list, on our mailing list, and we were helped by the IRP subgroup within the CCWG that was led by Becky Burr, I believe. And Becky's been kind enough to come onto this call to assist here. So really I think the logical thing to do is to turn it over to anyone who is willing to explain how we essentially addressed that concern and how that latest - how that was dealt with.

And in so doing that will confirm it for this group so that we can be satisfied that's been done and also educate Sharon to the extent that she does need educating on that and offer Q&A to anyone, including Sharon, on the call. So we can just be sure that that requirement is met and then in Sidley helping us finally to certify that all of our requirements are met.

So, Becky, I don't know if you're willing to - and able to come on at this stage and give any comments on where we got to. That would be very helpful if you can and how we addressed it. And if anyone else would like to chip in feel free to raise your hand in the room.

Becky Burr: I'm happy to do that. Can you guys hear me?

Jonathan Robinson: Hear you fine, Becky, thank you.

Becky Burr: Okay great. So yes we - I hope addressed this in all of its glory. We looked carefully at the CWG report including the processes that the CWG had for escalation of service related issues both by individual actor - by individual consumers of IANA functions and also by the CSC.

And what we concluded was that we actually needed to provide two things. One, an obligation that the ICANN Board of Directors would obligate the PTI to deliver products and services in accordance with the contract that would be entered into between ICANN and the PTI.

And that automatically, and you don't need to do anything else, ensures that you can bring an IRP against the ICANN Board for failure to enforce that contract if indeed that was the case. But it was thought that a much more sort of direct mechanism was also required by the CWG following the escalation.

So we have resolved in addition to saying that the ICANN Board of Directors had failed to enforce its required contract, we would permit the - an IRP to be brought by an individual once the individual direct consumer had exhausted the various escalation and dispute resolution mechanisms to essentially say - to bring a case under the IRP saying that the PTI had failed to act - was acting in violation of its contract with ICANN. And the standard of review would be a material breach of the PTI's obligations under those provisions.

Now, I will also say that we have included a recommendation that with respect to gTLDs where there is a contract in place between ICANN and gTLD registries and where those contracts directly provide for commercial arbitration, that the scope of arbitration under the Registry Agreement, should be expanded to include service delivery issues with respect to IANA functions.

So essentially there are a variety of dispute resolution mechanisms including the dispute resolution mechanisms that would be, you know, developed through the ombudsman and reconsideration and the like that goes directly to, you know, in the case of gTLDs where commercial arbitration and in the case of both gTLDs and ccTLDs a case either against the ICANN board that it has failed to enforce its contract, or directly against PTI that it was not enforcing its contract.

So it essentially would give individual consumers of IANA functions third party beneficiary enforcement provisions with respect to service delivery under the contract between ICANN and PTI.

Jonathan Robinson: Thank you, Becky, that's helpful, thorough and certainly a better job than I could have done. So I guess the opportunity now is for anyone to ask questions to better understand that. And I see Sharon's hand up so go ahead, Sharon.

Sharon Flanagan: Thanks, Jonathan. And thanks, Becky, for that summary. Just a couple questions. The first question I have is just a clarification. So if you - if, for example, a gTLD has its own contract in place can it then choose either to enforce the - that contract through whatever the contract provides for arbitration or possibly go through the IRP if it can meet the standard. That's the first question.

Becky Burr: Yes, and the notion would be that if we had a situation where all direct consumers of IANA functions had the ability to go directly to commercial arbitration we probably would have recommended that that be the first recourse because we think that that is better fit to purpose than a sort of constitutional IRP.

But the notion would be that either of those options are available and because I don't think that we could cut one off but that - and we need the ability to go to the IRP for CCs do not have the - a contract relationship with ICANN.

Sharon Flanagan: Okay, thanks. And then as a follow up question so I understand if ICANN is not enforcing its rights against PTI under the contract that's one source of a possible IRP. Did I hear at the end, Becky, did you say that if PTI is not enforcing the contract that that would give rise to an IRP...

((Crosstalk))

Becky Burr: So in other words you wouldn't have to - although I think ideally it makes more sense that you would, you know, go to reconsideration and you would say to the ICANN board, can you please make PTI do what it's supposed to do. And if ICANN didn't do that then you would be in the position where you could choose.

One, you could choose under this direct right to essentially go the IRP and say the PTI is not performing its obligations under its contract with ICANN. Here's how I have been materially, you know, I have, you know, it's breached it in a material way. And I want you to require it to perform IRP.

Or you could bring an IRP and say the ICANN bylaws require ICANN to enforce its contract. It's failed to do so, please tell ICANN to do that. So it's sort of an either or.

Sharon Flanagan: Okay got it. Okay that's helpful. And then another question, it's probably more for CWG, and it's more of a finer point, is we talk about in this draft language the right for people who have service complaints not resolved

through mediation, I think the CWG proposal speaks of direct customers with complaints. Is that something that we want to, you know, limit as it is in the proposal or was it intentionally broadened here?

Becky Burr: It should be direct customers. It should coincide with the rights. I mean, unless it's a CWG dependency that it be broader. But I think we are, you know, looking to the direct customers of PTI of the - the direct consumers of IANA functions to ensure that those functions are - those services are delivered.

Sharon Flanagan: Okay so one comment we might have then to the CCWG language is just to put a note that where it says PTI service complaints we would insert "of direct customers."

Becky Burr: Yeah.

((Crosstalk))

Becky Burr: That definitely would be preferable.

Sharon Flanagan: Okay.

Jonathan Robinson: Okay so given where we are and the circumstances, Jonathan speaking, my understanding is that that's a - more of a clarification. Just on process can that be more or less inserted without any difficulty?

Becky Burr: Yes, we will insert that.

Jonathan Robinson: Yeah, okay great because that's really a clarification of intent so that's useful. Thanks, Becky. Any - Sharon, did you have further comments or questions or points?

Sharon Flanagan: I do. I have one last one which is - and I think it was noted in the CCWG draft which is the standard of review for PTI cases where the one of the direct customers would be, you know, seeking some recourse. We have here that there has to be a breach that's resulted in material harm to the direct customer who is complaining, you know, of the service issue. I just wanted to confirm that language came from CWG or that CWG is otherwise comfortable with that standard. I think the proposal was silent on this point.

Becky Burr: That didn't come from the proposal because I couldn't find it under anywhere in the proposal so we came from fully formed from the brains of Becky Burr and Bernie Turcotte. We are willing to entertain any other standard that is administerable but I didn't find one in the CWG.

Sharon Flanagan: Becky, I think that's right. As I said, there's not an inconsistency with the proposal because CWG's proposal was silent on that so it's more just a question of whether the CWG is comfortable with that standard.

Jonathan Robinson: Sharon, can you just reiterate the point, I think I missed the standards referred to.

Sharon Flanagan: Yeah, so if you have a direct customer who has gone through mediation and it's not been resolved then they would be able to bring a claim of the IRP. And the way - the hook they would choose to enforce it would be that PTI has a material breach under its contract with ICANN and, you know, that breach is causing material harm to that direct customer. So the direct customer has to demonstrate material harm, which I think is a standard that is used elsewhere in ICANN.

The CWG proposal just didn't - we just didn't talk about the step standard, we didn't say whether you had to show material harm, it was silent.

Jonathan Robinson: Thanks. That's helpful. Okay so is there anything else, share and comment at this point you'd like to raise or can I go to the next person?

Sharon Flanagan: I'm good, Jonathan. Thanks.

Jonathan Robinson: Wonderful. Thank you very much. So next in line to speak is Avri. Go ahead, Avri. Perhaps no longer. Matthew Shears, your question in the chat then is, "How does the IRP fit either within or without - in or outside of the proposed escalation process outlined in CWG?" Is anyone able to comment or respond to that?

Becky Burr: I can respond to that. I read the CWG proposal to say that the appeal to the IRP came at the end of the escalation process contemplated in the CWG proposal. So this does not replace supplement -- or supplant any of the prescribed escalation processes.

Jonathan Robinson: Thanks, Becky. That's consistent with my understanding as well. And I see a check mark from Avri in the box as well. And Avri worked -- in fact I think led a relevant design team in this area. Okay, your hand is up next. Go ahead, Paul.

Paul Kane: So thank you very much. And first let me confess, I'm not up to speed with this issue. But I would like just (unintelligible) perspective where the majority of CC registries do not have a contractual relationship with ICANN. They will entertain and nondiscriminatory service by virtue of not having a contract.

The difficulty comes when either action by PTI or inaction by PTI over such registries because they have, to use your term, material harm by either the action or inaction. So I think it's very important to there are safeguards in place irrespective of the relationship one has with ICANN because many CCs do not defer to ICANN the authority for their entry in the root zone. They deferred to their stakeholder community who effectively appoint the registry operator to ensure that the entry in the root zone management system is accurate. So that's one point.

The second issue is speed. In the event of there being either action or more accurately inaction to update that PTI IANA service it has and can have a detrimental effect on the operation of the registry. I'm concerned that this PTI approach could take a number of weeks, sorry, the review - IRP process could take a number of weeks. And that would have an impact, could have an impact, on a registry's operation to the detriment and reputation of the registry operator.

So I apologize again for not being up to speed on this issue like if we could make sure those issues are covered that would be welcome.

Becky Burr: I'm happy to respond to both of those issues, Jonathan.

Jonathan Robinson: Please go ahead, Becky. Thank you.

Becky Burr: First of all essentially the proposal, we were keenly aware of the fact that there is no contract between ICANN and many ccTLD operators and that many ccTLD operators were either unwilling or unable and perhaps both to enter into contracts. So the notion would be essentially that we give registry operators, ccTLD operators, the right to, you know, directly invoke the IRP provisions where they have appealed to ICANN and ICANN has failed to

enforce its contract with PTI or to essentially stand in the shoes of the ICANN and enforce ICANN's rights directly where they've been, you know, harmed by the failure of the PTI to do that.

You know, there's quite a lot of sort of standard law on that. And the fact that somebody is a beneficiary of a contract between two other parties does not mean that one of those parties would get some kind of authority over the ccTLD. The Sidley - and Sharon and others can comment on that directly. But that would be, Paul, I think that would be an entirely unexpected outcome of the kind of rights that we've proposed.

Second of all, you are right about invoking an IRP is not - is not, you know, something that (unintelligible).

Jonathan Robinson: I've always thought you should be accompanied by music, Becky.

Becky Burr: Yeah, I know. It's like Chopin, right? Send me back to my ballet days. The - but the escalation processes in the CWG proposal all come before. And generally, I mean, you know, to the extent that this actually has to be resolved through an IRP it would be a sad case. But there are escalation processes for resolution of this that are considerably quicker. And hopefully those will resolve (unintelligible).

I don't think that when you're talking about something that is binding arbitration you can have a process that is instantaneous, the consequences of that, you know, are significant. Now there is, you know, there is injunctive relief under the IRP in extraordinary circumstances but I don't want anybody to walk away with the notion that the IRP is the last place to go to resolve sort of ordinary service level disputes because the IRP is a no, you know, sort of

court or judiciary would ever be a particularly efficient dispute resolution mechanism where we are talking about service-level failures.

Jonathan Robinson: Good. Thanks, Becky. And of course exactly - there is substantial prior opportunity by a customer service committee and the various escalation routes. So there's a handout from Martin Boyle. Martin, go ahead.

Martin Boyle: Thanks, Jonathan. Becky, I'm not sure whether I just missed it or whether there isn't but I'm struggling with how one identifies whether to take an IFR against the ICANN Board or against PTI. Is there any real difference between those two processes? So in other words,?, If I were an aggrieved operator how would I choose which approach I would go down? and then depending on the answer to that I might have another question. Thanks.

Becky Burr: So I don't think as a practical matter there is a significant difference because I think the practical solution is always going to be to first go to ICANN staff and board and say, you know, guys, get this PTI to shape up and do its job. But it may be that, you know, the circumstances that there is, you know, the board is delaying in a way that, you know, somebody finds unacceptable or that is, you know, causing harm in which case at that point you might want to conceivably invoke the direct action. The effect is essentially the same.

We just heard a lack of comfort with sort of mandating that there's always be an action against ICANN Board or staff for failing to enforce the PTI contract. That would have been in some ways a sort of simpler solution but based on input that we heard from the community there was a desire to have this direct access.

And of course, you know, that also parallels the right that gTLD operators would have in the sense of they could go, you know, under the registry agreements to commercial arbitration.

Martin Boyle: Okay thanks. It's Martin Boyle again. If I can put my supplementary please. If I remember correctly, one of the things about the IRP is that it's a learning mechanism and so you have precedence and you can draw on the precedence. Now, if you have two possible processes, both roughly equivalent, is there any problem in ensuring that that which you learn in your actions that happened with the ICANN Board, are picked up in an IRP against that PTI board and vice versa?

And, I suppose sort of associated with that is that if you are having a potential of an IRP against the PTI board does the IRP need to be indicted in the PTI bylaws? Thanks. And I'll shut up now.

Becky Burr: So taking that in reverse order, the contract between the PTI and ICANN can provide that that PTI would abide by the results of any IRP. So and I'll leave it to the lawyers to figure out whether it needs to be in the PTI bylaws. But I think that it can be directly - and, you know, so long as, you know, that the provision and there's a specific third-party beneficiary provision in the contract that at least is I think gets you covered.

Whether the - your counsel ultimately suggests that you want to put it in the bylaws as well is a different question that I will defer to them on. You are quite right that the notion of the IRP is that it would create a precedent that would guide future decisions by the IRP. And more importantly I think, guide the community and the board when they're addressing potential dispute in a way that helps to eliminate or not eliminate but minimize dispute because you have a sense of how an IRP would go.

In truth, the way that the service-level disputes arise, they are much less, you know, they're much more sort of commercial contract issues. You committed to do something in an X-amount of time and you didn't, and that is the kind of thing that I think, you know, registry operator, Cs would be comfortable taking it to a commercial arbitration.

I think that the more complicated issues that at some level might also tend to involve Cs more would be closer to the constitutional line and would benefit from, you know, some precedent. But as I said, to the extent that they're really performance issues, the precedent issue doesn't strike me as compelling one way or the other.

Jonathan Robinson: Okay, I'm sure you'll come back, Martin, if that isn't sufficient but that sounds like quite comprehensive points. And I see you know that in the chat so thank you.

Really the purpose, just to remind you, of this call is to achieve twofold. One, that those from the CWG who have taken a specific interest in this topic are satisfied that the requirements are met and in particular referring back to Sidley's - to the letter that Sidley helped us prepare in response to the third proposal.

And second, that Sidley, Sharon in this case, are satisfied that they understand the rationale and logic behind this so that when we go back to them to say can you update your certification letter they can in good faith and with full knowledge do that.

It feels to me like we have achieved those objectives in the time we've used so far thanks mostly to Becky's comprehensive and thorough input. So I'll pause

now and ask if anyone is not satisfied that we've achieved that which we required of this call, those two points. Okay, I don't see any further comment. I mean, this has been the subject of quite thorough dialogue on this and independent conversations so it's not surprising that we should be relatively easily satisfied. And so that's good.

I think there's no point in laboring the point there. If there are no other questions or points, we've met the objectives of this meeting and hopefully are generally in a reasonable place at least as far as this point, and I hope with the others too, support the work of the CCWG.

Grace, go ahead, if you have a point to make.

Grace Abuhamad: Yeah, I just wanted to remind the group here that the CCWG timeline has the comment period for this recommendation, this text, closing in a few hours. So I just wanted to check with the group and with Sidley if there are any other edits that you see may be needed if you have them now we can put those in before the recommendation period closes. And it would be a lot easier to make sure that these get incorporated on time and keep the CCWG on track.

So I think we've got the one edit from Sharon that Becky has already signed off on, which is in blue in the notes. And Sharon has noted in the chat that she has no others. And just wanted to check with the rest of the group that in terms of comments from the CWG we wouldn't be submitting anything else within the deadline.

Jonathan Robinson: Great. I see a check from Cheryl, thank you, Cheryl. Yes, Grace, that is the point of good order just making sure that because at the higher level when we looked at the overall transition program and we are in a very tight track as far as the CCWG is concerned also, in fact, as far as the CWG is concerned

but that's a separate point. So (unintelligible) timeline for any input on this is rapidly or the time for that is rapidly closing the window. But seeing nothing else so that's good.

All right let's -- so we will be coming back to the CWG and Sidley to deal with the certification of this point and all others, and update of our comment letter which in due course. And that then in an ideal world we will get that out, just so that everyone is aware of the timeframe, based on the production of the CCWG draft which will go to the CCWG on the 16th of February, next week. And then ideally we will be able to publish our satisfaction that the CCWG meets our dependency requirements at or around the same time as the supplementary proposal goes out.

So that's it. Thanks very much and most particularly to Becky but also to everyone else who attended and contributed. And we'll be in touch shortly. Thanks again.

((Crosstalk))

Cheryl Langdon-Orr: Bye.

END