
TORONTO – Accountability Structures Expert Panel
Wednesday, October 17, 2012 – 08:00 to 09:00
ICANN - Toronto, Canada

BRUCE TONKIN:

Okay. We've got Mervyn and Rich online. Great. Well, I guess this session being sort of 8:00 in the morning and certainly this week there's lots of events in the evening, I think it's always a struggle to get an audience unless we invited those that get here by 8:00 go first in the queue for new gTLDs. Then we could fill the room.

[Laughter]

But, you know, one of our topics that we're looking at as a board and as a requirement under the Affirmation of Commitments is to sort of look at our accountability structures, and there are essentially three.

There's an ombudsman function which really is pretty open in the sort of issues you can bring before the ombudsman, and the ombudsman is essentially are the mediator. So they mediate between the two groups and see if we can find a mutually acceptable outcome.

The next level up from that is the board reconsideration process and that's fairly formal, and so the first step is to find out, you know, whether there is materially information that the board didn't take into account. It's a fairly narrow thing, and most of the requests that come to the board don't meet that threshold, and so the board never really has a prolonged discussion about that issue because it hasn't met the criteria for reconsideration.

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And then finally, we have an independent review tribunal, which has really only been used once at great cost.

It was several million dollars on both sides. And our fear is that that really means it's only available to the most wealthy organizations and, you know, not something in its current form that's easy to use for, you know, perhaps a smaller group that might be aggrieved.

So that's kind of where I had our starting point.

We appointed an independent expert panel. We have Graham McDonald with us face-to-face today and we also have two other members of the panel on the phone, and really it's an opportunity here, I guess, for people to give feedback, perhaps hear from the panel on the work that they've been doing so far.

One piece that I've received in terms of feedback from others -- actually not from the panel itself, but others that have been interviewed by the panel have identified various pieces of material in the past that have been used in reviews, and, you know, they had suggested that the panel should have more time to review that material.

So I -- we're certainly welcome to hear from the panel, if the panel believes it needs more time for its work, because I think we'd rather get the work done properly, rather than feel that you're being rushed with a lack of material to work on.

So at that point, I'll hand over to you, Graham, for perhaps an update on the work you've done so far, whether you have any comments and



whether you'd like some more time, and also hear from audience members.

GRAHAM McDONALD: Thank you, Bruce, and good morning to this very large audience that we have here. It will certainly allow for plenty of personal interaction, I think.

Well, as Bruce has said, the panel was established by the Board Governance Committee in August of this year. We've developed a project plan to guide the review. We've held intensive workshops. We've had both telephone and meetings. Let's see if I can get some of these things up here.

Is this where we're at?

Yeah, here we are.

We've called for expressions of interest and we are really seeking community input as to the processes that currently exist, and perhaps the difficulties that members might be facing in accessing those, and I guess our next performance really is –

BRUCE TONKIN: Do you want me to click it?

GRAHAM McDONALD: Oh, thanks. We're getting there. Yeah, that's right.



You'll see we've looked at the previous historical development of the structures. We've considered the President's Strategy Committee recommendations that came out earlier. We've reviewed the history of the cases. And I can report that I looked through the annual reports for the reconsideration and there were apparently, over the years, only 11 applications have come for reconsideration to the board -- the BGC, board, for consideration.

We understand that there's community concern and hear a lack of consensus on the implementing of some of the recommendations that have been made in the past, and we hope that we will get sufficient feedback from our work in order to address some of those concerns that people apparently expressed before.

Could I turn to the things that have guided us?

And there are a number of sort of things that we've looked at, but we hope to bring a fresh perspective to ICANN, looking at what are today's circumstances rather than what might have occurred in the past.

We want to build on the prior recommendations, where that's possible, rather than wipe out what's occurred and start all over again.

And obviously we want to look to future improvements.

Now, the things that we have -- that have guided us: Enhancing the effectiveness of the structures that currently exist; looking at the efficiency of the processes, including the cost, which Bruce has already mentioned; and we want to try to accelerate those processes so they can get a more expeditious resolution, particularly at the stage of the

independent review, which as you would all be aware, the one case that has gone ahead took 21 months from the time the application was filed to the time the recommendation was forthcoming; and also enhancing ease of access to the structures, but at the same time trying to define as much as we can the issues that are between the parties as early as possible, so that the most appropriate methodology can be applied.

Now, the principles that have guided us are obviously found in the ICANN articles of incorporation and the bylaws. We've looked at the Affirmation of Commitments and the requirement that there be an inclusive, efficient, and open review system as part of ICANN's processes.

We have to say that the legal requirements are such that the board retains responsibility for decision-making.

As you would be aware, ICANN is an incorporated not-for-profit Californian company, and the corporations law of California applies, and as part of that law, the board has to retain responsibility for decision-making, so that in any recommendation that is made for -- or that arises out of a review, the board still has the final word on.

However, we note that the board has to act in ICANN's best interests and with objectivity, fairness, act neutrally, and take into account the community ICANN interest.

As I've said, we've looked at the previous ICANN recommendations relating to review mechanisms, and some of the things that we are



recommending are things that have been discussed and raised for consideration in the past but remain relevant.

Bruce has briefly outlined the current review structures of the ombudsman, which as you would all know, the ombudsman proceeds on the basis of there being any unfairness, and that is a fairly broad remit for the ombudsman.

The second thing is the reconsideration request to be considered by the Board Governance Committee, which is a committee of the board. There, the committee can look at two things. One, action or inaction by the staff; and the second is whether there has been compliance with the bylaws in a board decision.

Again, the BGC makes a recommendation to the board that must consider that recommendation and decide to act on it whichever way it sees fit.

The final and probably the most controversial is the independent review panel system, and that's currently administered by the International Center for Dispute Resolution, and as Bruce has said, there has been one completed case and there's one pending case which has been with the panel now for the last 11 months. As far as I know, it hasn't reached the hearing stage yet, let alone a stage where any decision is -- or recommendation of the board is imminent.

In terms of our thoughts to date, as far as the ombudsman is concerned, we don't see the need for any change. The remit is broad and sufficient and the ombudsman seems to be operating reasonably accessibly. He's



certainly been very accessible here, and always turns up to the ICANN meetings and is available to anybody who wishes to approach him.

As far as the -- looking at reconsideration and review, there are a number of things that apply that we think apply equally to those processes.

The first is that we think the scope needs to be broadened to include allegations where the board has acted on incorrect information, where there's been some misrepresentation or where there has been fraud.

Currently, that doesn't appear to be open, and we think that that is something that ought to be open.

Secondly, we think the processes should be clarified, including by defining the terms that are used. For instance, what is meant by "policy"? Policy can be something that the board has endorsed as a formal policy or a policy might be something that just comes into existence that everybody accepts as being the accepted way in which things are done and, by virtue of that, becomes regarded as a policy.

There are other terms such as what is meant by "material misinformation" that, if they're defined, will lead to greater clarity in terms of people accessing the system.

We also think there needs to be greater consistency. For instance, there are no time limits with respect to applications for independent review panel processes. There are time limits that are applicable for the board reconsideration, and we're looking at whether -- there's a 30-day time limit there at the moment -- whether, in fact, that should be

shortened, but we certainly think there should be a time limit introduced to the IRP process.

Apart from anything else, once a decision has been reached by the board, not only the parties that are the direct subject of that decision are affected but other parties act on it as well, and there needs to be certainty of outcome, and this is something that we are very conscious of in looking at the processes.

(Speaker is off microphone.)

GRAHAM McDONALD: Yeah.

(Speaker is off microphone.)

BRUCE TONKIN: Cherine, if I could just comment, if you could use the mic because there are those who can't hear you.

MERVYN KING: I cannot hear, Bruce.

BRUCE TONKIN: Yeah. We're fixing that. Just be patient for a moment.



CHERINE CHALABY: Sorry. Thank you. I apologize. I didn't realize we were --
We talk about the reconsideration request here, right?

GRAHAM McDONALD: And review.

CHERINE CHALABY: And review. And the first point, you mention that "broaden scope to include allegations where the board has acted on incorrect information or fraud."

GRAHAM McDONALD: Yes.

CHERINE CHALABY: Just can you give an example of how the board would have acted on fraud, just to –

GRAHAM McDONALD: Sure.

CHERINE CHALABY: And is it the board or is it the Board Governance Committee?

GRAHAM McDONALD: No. It's the board.

CHERINE CHALABY: Okay. If you'd give an example.

GRAHAM McDONALD: Well, sure. If somebody makes an application for a gTLD, for instance, one of the new gTLDs, and provides fraudulent information and the board has accepted that information and acted on that information, for instance, to grant the new gTLD and it transpires there has been fraud in the application, an intent to deceive the board, then I think that is something that another party who is maybe a competitor for another gTLD may well wish to raise and have dealt with.

Now, the board might, of its own motion, because it is fraud, take some action, but there may be a dispute over whether there is or there isn't fraud and there needs to be some method to determine that.

Ray?

RAY PLZAK: Thank you. Ray Plzak.

The discussion was brought up yesterday when we met with the GAC, too, as far as if you were -- you receive some information and later on you find out it was fraudulent, was not correct, what would you do.

And I think that we said yesterday that, yes, we really need to figure out exactly how we -- what we do and how we do it, and I do believe there



are some provisions in there. And I don't know, Bruce, if you want to talk to that, but the thing is, is that it's a process issue. And the thing is, is that I think that's different than the idea that there may be a perception that the board took an action because some things were misrepresented, or even more diabolically that they are doing it as part of a cabal type thing because something wasn't exactly open or the documents or whatever.

So I think that this has to be looked at in several different dimensions, because if you're looking at it in terms of the board acted open- -- acted in -- acted upon a specific set of information that was later found to be incorrect, that's one thing. If, however, the thought is, is that the board did this in some way that could be construed as it did a fraudulent type of activity, that's an entirely different notion.

GRAHAM McDONALD:

Yeah. I don't think we were thinking that the board would be engaged in fraud. It's more applications and decisions and information on which the board acts being presented in a fraudulent manner.

And I'm sure there is more than one way in which that can be dealt with, but here, we're just suggesting this is another mechanism that may be -- that the review processes can be broadened to include.

BRUCE TONKIN:

Yeah. I think the current review mechanism is essentially saying if there is new information that you could not have reasonably provided at the time the board made a decision, that's in scope for the board to



consider. I think what's not considered in there is if the board was provided incorrect information, as opposed to additional information.

So at the moment the focus is on that there's some new piece of information that the parties raising the issue couldn't have provided the board in advance, so that's the focus on new information.

I think what Graham is saying is he would extend the situation to an allegation that whatever information the board operated on was incorrect in some way, which could be through fraud or misrepresentation, but I guess the key word to underline here is "incorrect information." That, you know -- you know, that the board, therefore, made its decision on bad information.

I think we had –

MERVYN KING:

Bruce, it's Mervyn. You're absolutely right. What our thinking is, is that there's a very narrow platform that triggers the reconsideration. Namely, new information which the board should have had available, didn't have available, that then it reconsiders.

But we think this should be added to that misinformation.

So it's new -- information the board never had, which is not put before the board, and misinformation that the board was misinformed about something can trigger a reconsideration process. So you are correct.

BRUCE TONKIN:

Thank you, Mervyn. Bill just moved. It confused me.



BILL GRAHAM: For use of microphone management, Bill Graham here. I completely agree with the notion of broadening the scope and this makes sense. The one flag that goes up for me is on the question of fraud also. How would we -- what burden of proof would it place on the board if someone were to come in and say you have acted on fraudulent information? It strikes me that opens up a huge door for possible activity to determine that. Thank you.

MERVYN KING: That's why I use the language "misinformation." Misinformation might be innocent. But if it is misinformation, then it triggers a reconsideration, whether it's done intentionally or innocently. So you now have two platforms. You've got information which was available that was not before the board, and you've got misinformation before the board innocently or with malicious intent but it is misinformation. So you just broadened the scope.

GRAHAM McDONALD: But it would be up to the person making the challenge to bring some evidence and some supporting evidence so that that could be examined. You can't just come along and make these allegations and say, well, I want the board to re-examine it because I think there might have been fraud. There has to be some substance to it before it can be progressed.



BRUCE TONKIN:

Okay. Bertrand and then Ray. Go ahead, Bertrand.

BERTRAND DE LA CHAPELLE:

Apologies for having arrived a little late. I would like to make a general comment that came to mind after the discussions we had on this thing.

I'm wondering whether we're not trying to use one single tool to do a lot of things like one type of rifle to kill elephants and small birds.

In that regard, I'm beginning to see the reconsideration mechanism that is included in the bylaws a little bit like the trouble we have with WHOIS. Let me explain. With WHOIS, we had something that was perfectly adapted to a specific period, very early days, to basically solve technical contacts. And it has evolved into something that has been used for so many other things that now it's entangled completely and very difficult to manage unless we finally distinguish the different uses and develop the tools accordingly.

Here it is a little bit the same because, for instance, one of the mentions that was done yesterday regarding -- in the GAC, what happens if a gTLD, for instance, is not following what it has promised. This is not going to be a reconsideration thing. It should be a compliance mechanism. And so this is not a matter for the board to reconsider. It's a matter for the process to have the enforcement mechanism that allows somebody to say, you know what? This entity has said it would do X and it doesn't.

Furthermore, if we consider the notion of misleading information, I had an interesting discussion yesterday evening, for instance, by somebody



who was quoting an applicant saying: Because the information that is published on the application is public, of course, we didn't disclose exactly what the intention of this TLD was and what our policy for using it is going to be, which is a little bit problematic when we take on the other hand a very strong commitment to the GAC to make sure those declarations are being respected to the letter.

And just to make a long story short, the challenge we have here is that we have to build an apparatus of quasi judiciary functions rather than just one reconsideration tool that was initially designed to answer the problem of the staff has misbehaved with one of the persons in the community and we need something for this person to appeal to the board.

We're talking about a range of enforcement compliance and review mechanisms. And as I said in some of the private discussions, I have a concern when the structure that is doing the reconsideration of the review is the same as the one that took the first decision.

BRUCE TONKIN:

Just let me comment, Bertrand, because I think there are a couple of things you're combining there and let me separate them out a little bit.

When you're talking about a process where somebody is applying for some form of accreditation -- and there is several of those. There is the new gTLD process, but there is also routinely staff-received applications for accreditation to be registrars. And you might be applying for a job is another example. You might be applying for a job as the chief financial officer of ICANN.



In that situation, you're actually relying on a set of material that's provided for you to assess whether someone qualifies for something, which is essentially the new gTLD process. And where reconsideration would come in could be that, well, this person that you appointed as the chief financial officer actually doesn't have an accounting degree. That was actually a false declaration. And on that basis, you would go back on that decision.

So that's the kind of decision they're talking about here, is when you are making a decision based on some information.

The thing you are talking about and we were talking a bit about with a GAC is a different thing. And that is once you have given someone accreditation -- you might have accredited someone to be a doctor. And then they subsequently do something, then that's a compliance function. That's not related to you granting them a medical degree, but you might stop them being a doctor if they start doing the wrong thing later on. That's the compliance piece. I just want to separate that.

The reconsideration is at the point you decide someone is qualified for something, if the information was false at the time that you made that decision, then that's where the reconsideration comes in. Is that clear? So they're quite different, a compliance function versus an approval function.

BERTRAND DE LA CHAPELLE: Absolutely agree with the distinction. This the case that you are mentioning regarding the clear reconsideration part by the same entity,



there is the question of delays as well and whether it is just within a certain period or almost up to the end of time.

BRUCE TONKIN: Ray?

RAY PLZAK: This discussion has focused immediately on new gTLDs. And I thought we were talking about the reconsideration.

GRAHAM McDONALD: We are.

BRUCE TONKIN: We are.

RAY PLZAK: In the case of reconsideration, all the reconsideration requests we have had to date has nothing to do with anybody applying for a new gTLD.

So looking at it from a perspective of not an application for a new gTLD or not an application to become a registrar but looking at the broader terms here -- they're putting up here, the notion of -- well, I will make reference to the small discussion that occurred last night in New York, which is between Mr. Obama and Mr. Romney. The networks went crazy all night long doing fact checking. We are talking about due deliberation here, when the board makes its initial decision, what is the



degree of due deliberation that has to take place to make sure that they are acting on all of the available information or is the information that's being presented to them considered to be all of the available information, in other words, whoever is advocating something says "here is my case," if you will. And, therefore, I have presented all the information.

Is it then incumbent on the board to go out and do a whole bunch of other things and at the same time check the veracity of that? If that's the case, it will make the process much longer. And it becomes important because when we get to reconsideration, we say, well, you need to do that and ask the question about was there other information available or was the information given to the board not correct.

Well, if I have to do that on a reconsideration, it would seem to me logical that I would do it in the first place so there won't be the possibility of a reconsideration. So I think I want to hear some discussion about what is the role and responsibility of the board with making a decision in the first place if you are saying in the reconsideration we have to broaden the scope.

GRAHAM McDONALD: I think there is –

MERVYN KING: Can I try to help there, Graham?



GRAHAM McDONALD: Yes.

MERVYN KING: A board is entitled to rely on information placed before it and the veracity of that information unless something in the information gives rise to inquiry, that you believe you should inquire about something. Then you must inquire.

If something you read doesn't give rise to inquiry, you tend to accept what is put before you. If something happens which you have some feeling of a lack of confidence or you feel it needs inquiry, then you must inquire. Otherwise, you accept it and carry on. This is an international principle, otherwise boards cannot function. They will run into exactly the kinds of problems with the person who raised it, that you have a never-ending inquiry about the veracity of the facts, et cetera, et cetera.

So I think when you are put on an inquiry, that you inquire, otherwise you accept that which is before you and you proceed to make a determination.

GRAHAM McDONALD: Can I just add, in this case, of course, if somebody is making a challenge, as I say, they are ones that will have to present the evidence to support their allegation. So it is not then a question of the board determining whether the wrong information has been provided. It is the person that's actually applying for the review that has to produce the evidence

and convince the BGC that there is something wrong that needs to be looked at.

RAY PLZAK: So you're saying –

MERVYN KING: The information could be a request for further reconsideration.

RAY PLZAK: So you are saying then that there's new information that comes -- that existed at the time that the board didn't have, that it is incumbent on the person to present that information. You're also saying that it's upon the petitioner, if you will, that they have to be the ones that make the argument about the veracity of the original information.

GRAHAM McDONALD: Yes.

RAY PLZAK: And so we then as a board have to accept their argument about the veracity of it, or do we have to go back and fact check that as well?

GRAHAM McDONALD: No. That's a question then for the BGC to determine using its processes. It will either accept or it won't accept what it is that's put before it. And the material that supports the petitioner's case has to be presented by



the petitioner to the BGC. I don't see it involves any activity on the board unless the BGC accepts it and says, yes, "there has been some misrepresentation or misinformation we have relied on and the board needs to reconsider taking into account the correct information." That's the way I would see that process as operating.

BRUCE TONKIN:

There is really two filters, Ray. Basically, the filter is have we verified that new piece of information is correct and then based on that, then we would reconsider the decision. It is really two steps. First is deciding whether we agree with the petitioner, as you say, that the misinformation is correct. Presumably we would get lawyers to do a bit of analysis for that. Once that fact is established, then we take action on the fact.

Ray? Becky?

BECKY BURR:

Becky Burr for the record. I want to first say that I hope you do not take the attendance here as a sign of any indication of how important this is to the community. I think that there is a lack of awareness about this process in the community. It is really an important issue and I had the opportunity to speak with you. And I think the community is very excited about the process.

We're really in the weeds here. We know that the reconsideration issue has some limitations, but it is always going to be limited by the fact that it is the board reviewing the board's action or the staff.



GRAHAM McDONALD: Yes.

BECKY BURR: We only have an hour here, and I would really love to get to some of the other issues with all due respect to my friend Ray. We haven't seen, like, a written report here and I assume that we will have plenty of opportunity to look at the weeds. But I would hope we could use some of this time to get to the other thoughts that you have.

BRUCE TONKIN: Yeah, thank you. That was my thinking as well, Becky. We have got 20 minutes left and we got fixated on the definition of "incorrect information." Bear in mind, this is PowerPoint. This is not the final form that will go into some bylaws revision.

Ray, if I could just let Graham finish the slides.

RAY PLZAK: I would like to make one more point, if I could.

BRUCE TONKIN: Okay.

RAY PLZAK: Which is, is the reconsideration the final? Is there a -- does a possibility exist of a reconsideration of a reconsideration? I don't necessarily need



to have that answered now. But when a matter has been brought before -- I want to raise a question. A matter has been brought before the BGC for reconsideration and the board accepts the fact of whatever was done with that reconsideration, is that the final act on this particular issue? Or does the possibility exist to keep this thing going? I don't need an answer now. I just want to raise the question.

GRAHAM McDONALD:

Could I say -- we will come to this a bit later on.

Sorry, Mervyn. You go.

MERVYN KING:

We have considered that and in the request for reconsideration, we believe that a lot of terms and conditions are added in that the requester or petitioner knows these the terms and conditions with which he or she is making the request. And one of those terms is that the decision of the board is final and he accepts it as final.

GRAHAM McDONALD:

And we're also looking, as we will see when we come to look at the specifics that relate simply to reconsideration where it is staff action or inaction. We don't even think it has to go back to the board. The BGC should be able to reach a decision with respect to that and that should become the decision.

But that only relates to any challenges as far as it relates to any staff action or inaction, not to anything that relates to board function clearly.

BRUCE TONKIN: What I suggest to do, Graham, if you could finish the slides and then open up more generally for comments.

I will take Becky's comment that we should try to keep it at the principle level at this stage because there will be a report and further information later on.

GRAHAM McDONALD: As far as reconsideration review, both of them we are considering there should be page limits imposed on the submissions that can be made. That is not to limit the material -- the supporting evidence that a party wishes to put before the BGC or the independent review panel. But, clearly, they should be able to state in short form and we're considering something like 25 pages as being the upper limit for stating their case so that the issues can be clearly identified.

We're looking at class actions, whether class actions should be allowed, where we say, as you will see, there are causal connections between the circumstances of the complaint and the harm identified. Then the cases can be joined.

We're also looking with similar issues that are raised in a number of cases whether ICANN itself should have the power to consolidate the hearings of those cases so that the issue can all be determined at the one time in the one process rather than separately.

Looking specifically at reconsideration requests, we certainly accept that the American jurisprudence is that a board can have a subcommittee to reconsider actions of the board. But we think the function must be



retained by the full committee and not further delegated to individual members or subgroups of the committee.

As I've said, where reconsideration relates to staff action, then we think the BGC should be determinative body that should not necessarily have to go back to the board for further consideration.

We agree we should be maintained as a no-cost unless there is prior notification that extraordinary circumstances exist. We think this should be a provision for an expedited hearing to negate the need for a stay and part of our reasoning there -- and Mervyn might like to take this up -- is that other people also rely on decisions reached by the board. And if you grant a stay, it can affect the operations of other people. It's better to have an expedited hearing so that the matter can be determined rather than it is to grant a stay and the matter remain open for a lengthy period of time. And there is another factor, that is if other people are relying on a decision that has been reached a stay is granted, if other parties incur damages as the result of the stay being granted, they have no recourse to any remedy currently. And they can only do that through a court process.

We don't think mediation and conciliation is an appropriate part of the function involved in reconsideration, and as Mervyn has said and as Ray has already raised, there should be no appeal once the matter is determined. Then that is the end -- should be the end of that process.

And I turn to the independent merits review requests, and here we do think there should be good faith negotiations available to the parties before proceedings issue. There should be -- we're considering a short - - shortish time frame in which this can occur over two or three weeks.



And it's an informal process between ICANN and the party, trying to find their own solution to the problem without necessarily involving legal counsel.

We also think that there should be a formalized conciliation process after an application for independent review has been lodged, and this is something that should be controlled by the independent review panel and we'll come to how that should be constituted in a moment.

We think there should be an overall aim that matters can be disposed of within six months from the time that an application is initially filed. As you -- as I've already said, the XXX case went on for 21 months, and we consider that's just far too long.

Rather than have an ad hoc appointed panel to hear matters, we think there should be an internationally-sourced standing panel of six to nine members appointed and the parties then have the right to choose, if they want to go to a three-person hearing, who from that panel they would like to have the matter determined. If they're unable to reach agreement then we would suggest that the chairman of the panel can choose the panelists to determine the matter. We think the appointment of a -- if you like a standing panel there will both expedite the proceedings because they will be people who will be able to be trained, have a better understanding of the ICANN processes, and that should shorten the need for the -- for the hearings.

We also think that once a recommendation has been made there should be closure, that there can be no further rights of appeal, and that it would be very valuable for ICANN to have a precedent bank. And if we



have these sorts of panelists determining matters and giving decisions, then they can be relied on in future cases as issues have already been determined and for consistency sake the precedent would be followed in future -- in future cases.

So that's a very brief overview. Could I say we are not in any way committed to any of these changes in final form. We will be publishing, towards the end of next week, a discussion paper and we would very much welcome input to the discussion paper that will provide a lot more detail than we're able to cover in the time this morning, and then we -- we'll have to consider Bruce's very kind offer to extend our time. We rather thought the time -- the mind was being concentrated by having to have this before the Board before Christmas, before the end of this year, but Bruce, can we take just a rain check on that and see how we feel after we've prepared our paper and after we see what -- what response there is to that when it goes out to the broader community?

BRUCE TONKIN:

Yeah, I think it's probably twofold. A, are you getting enough information that you need to make your recommendations, and then obviously, I guess, the public feedback you get. So it's an open offer. Let us know if you need more time. It's absolutely fine. Mervyn.

MERVYN KING:

I just sent you -- one of the drivers for our recommending a standing panel is the question of cost. Because we were all horrified by the \$8 million cost of the latest IRP panel area. And what we thought is if you



have a fixed panel that's six or nine members who understand the processes of ICANN and you have a chairman of that panel, you pay each one a retainer fee at the beginning of the year, I don't know \$20,000 whatever that but then when they sit as panelists we ought to limit their per diem fee of two and a half thousand dollars a day, whatever we agreed to, so that you know that the costs are limited. Otherwise, the cost is run away. If you have an outside retired judge and you have expert lawyers charging per diems of \$600 an hour, then the cost is run away. So one of the drivers for this was A, trying to harness expertise, and B, to limit costs. So I just wanted to give you our thinking, Bruce.

BRUCE TONKIN:

Yeah, thank you. I was going to ask actually what the rationale for that was. I thought it was B, because it's faster because you don't have to go and find new panel members.

MERVYN KING:

And it's also B, you're absolutely right. It's also expeditious.

GRAHAM McDONALD:

Speed and expertise that will develop as the result of doing a number of cases rather than coming freshly to each case and not having any background on ICANN.

>>BRUCE TONKIN:

Yeah, that makes sense too.



MERVYN KING: And context.

BRUCE TONKIN: And context, yeah. Okay. We have Ray in the queue. Anyone else? Becky? And Mike Roberts. We've got about seven minutes, so I might -- if we could be fairly brief with the questions. Ray.

RAY PLZAK: Yeah, it's not really a question. It's a comment on the reconsideration process discussion. I notice that there's a large creeping of judicial-type language into that discussion which then tends to form the opinion of what a reconsideration process really is. And so I think care must be taken to remove, as much as possible, the judicial-type language from the discussion of the reconsideration process.

BRUCE TONKIN: Thanks, Ray. Becky.

BECKY BURR: I would just like to say I really like the idea of a standing panel and the ability to build precedent here. I think this is incredibly important and will increase a lot of efficiency. So I just can't say I don't think that there's anything more important and more -- more positive that you could do. The one thing that I would say -- and I'm going to use a lawyer word, sorry, Ray, but we're not talking about reconsideration -- is that some thought be given to timing and when, if this can be brought.

There is a tendency to push the ability to go to these panels to the back-end of a whole process, and in my experience a lot of pain could be avoided if there were earlier points to get to some discussion on this.

GRAHAM McDONALD:

Becky, we're certainly looking at the panel taking greater control of the process earlier on so that it gives -- it can give directions and it can move the case forward and there will be, we anticipate, time limits and cost repercussions if you don't comply with the time limits so that the parties are encouraged to move the case forward and get it to a hearing as soon as possible so that the matter can be determined. We're certainly looking at those mechanisms.

(Speaker is off microphone.)

BECKY BURR:

I was making a slightly different point which is that, you know, there's a whole proceeding -- or there are a whole series of considerations going on and there may be an event in the middle of something that could -- if resolved could prevent a very big dispute down the line. So it's sort of a -- that getting to an issue quickly while it's happening and maybe while the whole thing isn't yet resolved.



GRAHAM McDONALD: Yeah, and I think if the panel itself has control of the proceedings that's something that can be easily incorporated and that's -- that's certainly something that we -- thank you, we'll bear in mind.

MIKE ROBERTS: Mike Roberts. I was -- pardon me -- CEO when some of these provisions were first put in place, and I wanted to commend you for your attention to trying to clarify and streamline the process. Reconsideration cases in a number of situations are part of a gaming strategy for delay and their - - pardon me. The community really shouldn't have any patience with that sort of behavior.

I'd also encourage you to be a little bit clearer in your documents that you produce that aggrieved parties always have recourse to the provisions, it's still the criminal law in California and beyond that in some cases to federal statutes in the United States. I understand that the internationalization of ICANN makes some people uneasy about that, but on the other hand, you don't want to pretend that ICANN, as Ray I think has implied, is trying to create a judicial -- quasi judicial procedure that's independent of the basic legal foundations on which -- under which ICANN operates. There are some analogies with UDRP here that you might draw out in your material.

GRAHAM McDONALD: Yep. Well, thank you.



BRUCE TONKIN:

Okay. Any further comments? Okay. I'd like to close the session, but really thank the panel for its guidance. It does seem there's a fair degree of support for the recommendations we've received so far. They seem very sensible, and we look forward to the report. So thank you all. And thank you all for attending this first meeting, or first meeting for most of you, today.

MERVYN KING:

You're welcome. Thank you, Bruce.

>> END OF SESSION

