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ICANN67 | Virtual Community Forum – GNSO - New gTLD Subsequent Procedures PDP WG (1 of 3)
Monday, March 09, 2020 – 12:15 to 13:45 CUN

ANDREA GLANDON: If you just want to let me know when you're ready to get started, [cross talk].

JEFFREY NEUMAN: Let's start on time.

ANDREA GLANDON: Okay, great. All right. I will let you know, then, when we're all set to go.

JEFFREY NEUMAN: Great, thanks.

ANDREA GLANDON: Welcome, everyone. This is Andrea from staff. We'll be getting started in approximately one minute. Good morning, good afternoon, and good evening. Welcome to the new gTLD Subsequent Procedures PDP Working Group at ICANN67 virtual meeting held on Monday the 9th of March 2020.

Today's meeting is being recorded. Please remember to state your name before speaking and to please keep your phones and

microphones on mute when not speaking to avoid any background noise. With this, I will turn it over to Jeff Neuman. You may begin.

JEFFREY NEUMAN:     Thank you very much. Welcome, everyone. We have a good number of participants so this is going to be fun. I'm glad everyone could come. I wish I could see all your faces in a face-to-face meeting but, unfortunately, we can't do that this time. Maybe next time for the next ICANN meeting, or certainly the one toward the end of this year.

For the most part, this session is going to be very much like our normal working session except that we're going to start with a little bit of an overview of where we are. Just for those that may be joining for the first time [inaudible], but then we'll get right into starting the discussion on the five topics that we have for this entire ICANN meeting.

So, there is not necessarily a time limit on these topics. We're going to try to spend as much time as we can on each of them, those being closed generics, public interest commitments, role of GAC early warnings and advice, applicant support, and community applications.

We are using a different link for the documents than our standard working document, simply because there are so many other participants in this meeting that we just created a separate document for these five topics but we'll certainly work in the revisions of those to the working document once this ICANN meeting is done.

So, as we start most working group meetings, I will ask if anyone from the working group has got any updates to their statement of interest? I should probably just say, "If you do, put it in the chat," because there are so many people online. Okay. So, not seeing any. If you do, just please make sure you send it to the group that we can all see those changes.

So, I'm going to start with a couple of slides on the "where we are," and then we'll get into the regular business of the working group. We'll just give it a second for that to come up. It's almost up. There we go. If we could just go to the next slide, actually? Great.

Just as a little reminder that there were recommendations from the GNSO in 2007 that resulted in the 2012 Applicant Guidebook that started that round of new gTLDs. Our group, the New gTLD Subsequent Procedures PDP, is focused on considering the 2012 round policy and determining what changes, if any, might need to be made to the original GNSO recommendations from 2007 and/or its ultimate implementation.

The PDP was chartered and began its work in 2016, so we've been around for quite a while. We have been addressing more than 40 topics where we initially broke down into work tracks to try to address all of these issues. If we go to the next slide?

We had an initial report that was published for comment on July 3rd 2018. There was a supplemental initial report that was also published later that year on five topics which we didn't feel like we covered

completely in the initial report. That supplemental initial report, we had comments that were due in early 2019, around the same time as we did a Work Track 5 report. Work Track 5 addressed Geographic Names at the Top Level. Right now, the current status is that we're working on draft final recommendations so that we can publish a draft for public comment.

We'll go to the next slide. It should have the timeline on there. There it is. So, the important thing here is to note that our intent to publish … I know this timeline has, in here, what we submitted to the GNSO Council but I think we're a little bit ahead of this timeline. I'll knock on wood. Our real goal is to hopefully get out a draft final report with draft recommendations, final recommendations, prior to ICANN68. Of course, comments would be due in the third calendar quarter of 2020 with, hopefully, a final report toward the end of this year.

Again, this is sort of the worst-case scenario, on this slide, and we're really trying to beat this timeline so we've been working very hard and diligently over the last number of months to make sure that we can get all this done. Sorry if my audio is not coming in as great. Hopefully, it's coming back in but we'll see.

Can we go to the next slide? Okay. So, these are the five topics that we're going to be going through but before we do, I just took some notes and I wanted to just read from it as a guideline for these discussions. It may sound like I'm reading because I did write this down. All of these sessions—so this is the first of three sessions—are official sessions of the Subsequent Procedures Working Group and

they're all being conducted in a manner that's very similar to the way that we normally conduct our working group meetings.

That said, we realize that we may have many first-time or occasional participants, as we normally do during our face-to-face meetings at ICANN, and we welcome all of your participation. As these are working sessions and the working group has been meeting for several years, the topics we are addressing are topics that we have addressed many times already, have been subject to public comment, and therefore may seem to be in the weeds or very detailed.

In addition, we'll be giving preference to working group members during these discussions if they want to contribute but we're going to end each subject with a five to ten-minute open comment discussion where everyone is encouraged to raise a comment.

Because we've been discussing these topics and many others for a number of years, please do not be discouraged if you get a response from the leader stating, "Thank you for your comment," or, "the working group has already addressed that issue," or, "that issue is being addressed under a different topic." These responses from us are not intended to ignore your comments or questions but just a recognition that we may not be able to discuss all of the topics during this meeting.

And as with all of the sessions, if you can please identify with the bracketed "comments" or bracketed "questions" then they can be read aloud. This is standard for all of these ICANN meetings.

Hopefully, that came across. Let me just see if there are any questions or comments. Okay. Yes, Jim. Please.

JIM PRENDERGAST:     There we go. The dreaded double-mute, sorry about that. You may get to this, and I don't want to steal your thunder if it's on a following slide or not, but one of the things you had talked to the working group about prior to the meeting—and the only reason I'm raising this is because I'm seeing there are like 147 people on this meeting, which is something else—your goals for what I would describe as heavy interaction with the GAC on these issues.

I know, obviously, it would have been much better if we were all in the same room together but I know you and some representatives from the GAC had some ideas on what you might be able to achieve at this meeting through interactions with the GAC, so we could just review that, as well. Thanks.

JEFFREY NEUMAN:     Yeah, sure. Thanks, Jim. In fact, we just got out of a capacity-building session that was hosted by the GAC. And so, absolutely, we still have the same goals to try to get as much interaction from the governments and from the community during these sessions. My explanatory note earlier was really more for is you get responses like "we've already been discussing that issue," or that "that may fall under another topic," it was really just intended to not discourage anyone from participating.

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And so, this is great, to see so many people online. Hopefully, we can get to everyone. I see Phil in the queue, as well. Phil, please. Phil, you've been unmuted. You have a question? Okay. Phil, last time before we go on? You can raise your hand later, as well. Okay. If we can mute? Thanks.

Let's, then, move onto the first topic, which is closed generics. Just give us a couple of seconds to get up the PDF document. While that's coming up—there it is—a number of these sections, for those that are looking at this type of document for the first time, each of the documents start with a section that's either called "affirmations," or "recommendations," or this one, as you see right now, "no agreement."

"Affirmations," what that means is, for those sections where something was done in the 2012 round or that's in the GNSO, that we want to affirm or agree with, that's indicated toward the top. Recommendations are new areas that we choose to make certain proposals on, and recommendations also come with a "must" language. These are things that the working group believes must be implemented by ICANN Org for the subsequent rounds.

And then, in other sections you will likely also see something called "implementation guidelines" or "guidance." Those are areas in which we believe should be implemented by ICANN Org for the subsequent rounds, and when we say "should," it means that ICANN really must consider implementing those and only not implement those if there is

some good reason to not do so. So, we kind of grabbed that language from other groups that use similar terms.

Let me just stop there and see if there are any questions on that. Okay. Jorge says in the chat, "I miss the section with facts and figures on the 2012 round. That would serve as a reference." Jorge, for this document and for the draft final report because we did not want a report of thousands of pages, or even hundreds of pages, what we do here is start with the recommendations or affirmations and implementation guidance followed by a short explanatory section called "deliberations," and then another section on new ideas that were introduced since these topics were out for comment the last time.

All of the other information, the data collected, as well as all of the background materials that were in the initial report, will be provided ultimately with the final report as exhibits to that report. Okay.

So, going back to the section. On closed generics, this refers to those strings that are applied for which are considered generic words for a top-level domain that are used in the manner for which that term is generic, and where an applicant chooses to operate that in a closed manner, meaning that the applicant proposes to use it exclusively for or in connection with their own entity and/or their affiliates.

There is a definition of what is prohibited under what's called the "specification 11" or PICs. The PIC Spec is what others call it. That's where that term is defined. We will get into, I'm sure, a discussion of

that definition throughout this session so that we can go back to it. It was also the subject of GAC advice in 2013 or 2014. It's the Beijing Communiqué.

That communiqué stated that … I want to read it. It's actually in paragraph B. "For strings representing generic terms, exclusive registry access should serve a public interest goal." That has been highlighted on the screen right now.

"The GAC in that advice provided a non-exhaustive list of those strings which they, at the time, believed may be applications for closed generic terms. The applicants were then asked by the ICANN Board to respond to that advice, to respond as to whether they believe those applications served a public interest goal. But ultimately, at the end of the day, the ICANN Board gave applicants a choice that the applicants could either drop the closed generic designation and, essentially, sign the registry agreement with a commitment not to use their TLD as a closed TLD, or they could withdraw their application completely, or they did technically have a choice to defer their application to a subsequent round. For information, there were no applicants that chose to defer. All of the applicants either chose to withdraw their application or withdraw the closed generic designation."

So, this topic has been discussed on a number of occasions by the working group. We received a large number of comments during both community comment number two as well as in the initial report. We got comments back that represented the extremes of positions. In other words, there were a number of groups and people that were

completely opposed in any way whatsoever having or allowing closed generics. And then, there were groups and individuals that were completely open to allowing closed generics to be applied for and to be utilized in that manner.

What we have been seeking the last several months now is to see if we could find some sort of compromise that would actually be in line with the GAC advice which, again, did not ban closed generics, although the board resolution, for all intents and purposes, did.

So, we are looking for any ways of compromise where a top-level domain can be applied for as a closed generic if it could demonstrate or serve a public interest goal. So, one of the things we're trying to do in this meeting is to see whether that is possible. You'll see in the chat a reference to a type of top-level domain that was used as an example, and that was, let's say if the International Red Cross were to apply for something like .disaster and they wanted to use it only for their entity and their affiliates to be in use with any national disaster/international disaster.

Let's say they wanted it to have a coronavirus, for example, coronavirus.disaster, or name-of-earthquake.disaster so that their community or the public would know that any e-mail address or any website using that top-level domain would be an official one and, therefore, could mitigate fraud if it solicited donations to those official .disaster sites.

Now, that's just an example. It's illustrative, it's not real, and it's just one where one could imagine that the public could receive a benefit from having a TLD like that. And so, you'll see or hear that referred to a couple of times because that has been circulated around the working group.

So, one of the things that we did within the working group is we asked for proposals to be submitted to the working group by the end of February to see if there was some middle ground. We received a couple of proposals and I'm going to ask to scroll down to where those are discussed because I thought it would be interesting just to bring those up and then open the discussion.

So, as people are scrolling down here … Okay. So, there was a … Sorry, just still trying to see where that is, if we can scroll to find that. I thought it was in this document but, either way, I could summarize. Hopefully, this will come up. Okay. So, we initially presented, in the initial report, four options that we could pursue in this closed generic issue.

Options one and four were the two extremes, so, for now, we're not going to discuss those two extremes but more for the two and three. So, option two was to allow closed generics but require that applicants demonstrate that their closed generics serves a public interest goal in the application, and then could potentially have an objection process.

The third one was allowing a closed generic but requiring applicants to commit to some sort of code of conduct that could express the concerns expressed by those not in favor of closed generics.

During this working group proposal period, we did get a proposal that was in line with option two. I'm wondering if we could activity being it up because I thought it was this document. That was my mistake, here. That was also commented on from a couple of members that chose to add to that proposal. But essentially, it was initially brought up from one of the working group members and, basically, defined limited circumstances or criteria in which something could be in the public interest.

So, while we are getting that up let me just go back to some of the comments in the chat because there are a lot of them. So, there are some edits that are being suggested. Apparently, my sound may not always be great. I'll see if I can fix that while others talk. There are questions here about, "What if we don't reach consensus?" At this point, I'd like to actually not address that question because our hope is that we can find consensus, and I find that when we get talking about "what is there is no consensus?" it kind of distracts us from the substance of this issue.

It's not that we don't want to address that issue but that's not going to help us right now in defining or trying to reach some sort of consensus. For the moment, we're going to put that question on the back-burner, although a lot of people are talking about the status quo. Let's see. I'm

just trying to scroll down a little bit while staff is trying to find those questions.

I think we have some up there. Okay, there it is. It's up there. Well, I think they're going to highlight it and put it in the PDF. I apologize, I don't know what happened with that document but we're now getting the right one up. Sorry. Let me keep scrolling to see if there is a question in here that doesn't have to do with the status quo. Okay. There are some questions. Wow, lots of questions.

Okay, let me go through the proposals that were submitted. I do see that there are some questions on the definition of closed generics, so we'll get back into that in a little bit. Kathy, let me just go through these examples of what was discussed in the proposals that were submitted, and then I'll come to you. Okay. Sorry about that momentary distraction, there. We finally have it up there.

So, one of the applications or one of the proposals that we had got in, I just want to read these paragraphs here which was "to try to find a way to allow closed generics applications in line with GAC advice only where ICANN Board determined that the top-level domain would serve a public interest goal." Some proposed that the board could only do this is it got some sort of super-majority. One person had suggested 90%. Whether that percentage is the right percentage or not, we can discuss if, for example, the concept seemed acceptable.

So, the board would have to determine that it would serve a public interest goal. Working group members expressed different

perspectives on whether the decision by the board should be appealable through ICANN's accountability mechanisms or whether the board would make a determination and it would just be considered final.

One possibility to reduce the number of potential applications – I should go back a step. Some were concerned that even with this proposal there could be a large number of applications for closed generics that perhaps couldn't be considered by the board, that it would be too much. So, someone had suggested that you can reduce the number of potential closed generic applications by limiting the applicants to non-profit entities. This was proposed because it offered a reasonable way to restrict the applicant pool.

There was another proposal that suggested contractual enforcement provisions to make sure that the TLD, if it was a generic word, was actually being enforced and prohibiting anti-competitive behavior, however that would be determined. If we could scroll down a little bit to just summarize? And then, I'll go to Kathy.

And then, of course, someone had suggested a restriction on use, actually saying that if someone applied for a closed generic TLD and it was approved by the ICANN Board it needed to be used within two years of signing the registry agreement. And then, if we can scroll down a little bit more, there was another working group member that proposed a series of—rather than talking about a complete ban or complete allowance of the closed generics—different use cases and making the case that we should be looking at use cases as opposed to

a definitive rule one way or the other to, basically, help with developing creative solutions and focusing on innovation, in their words, as opposed to focusing on the rule.

So, lots of different views on this subject. I'm going to open the floor to Kathy, and then see whoever else wants to get in the queue on this. Remember that the focus of this is to try to find some sort of criteria where we could measure or allow some form of closed generics. We've heard all of the arguments both for and against closed generics. It's now time to see if we can find a solution that would be agreeable that could hopefully get to consensus. Let me go to Kathy, please.

KATHY KLEIMAN:         Thanks, Jeff. Can you hear me?

JEFFREY NEUMAN:       Yes, Kathy.

KATHY KLEIMAN:         Great, thanks. So, let me as you. As we go out for the initial report, as we go out to the public on this long-debated, long-standing, highly controversial issue, let me ask you a certain basic … And having come into this working group because you invited me to talk about this issue, and stayed and spent probably hundreds of hours in it, I'd like to ask where certain basic things are in the report, and if I've missed them please tell me.

Where is the definition of closed generics, a basic definition so that people know that this is a generic term? This is a fundamental trademark principle, a generic term designating a particular industry where the applicant is engaged in the conduct of business activities in that industry. If we don't have a basic definition I think we need one.

Where is the discussion of the category two advice from the Beijing Communiqué of the GAC to tell us now deeply their concerns … They listed dozens of closed generics in the first round. Where is that list of their concerns? Not just ways they told us we can get around it, which in all these years, four years, we haven't been able to do, but where is their listing, their concern, detailing in great detail the closed generics of the first round? Where is the data of the closed generics that opened and agreed to the ban, agreed to open up to their competitors and all others, that Cloud, that mobile? I mean, the list goes on and on. Where is that discussion, here?

If you could show me all of that, I'd appreciate it. Otherwise, I think this is an advocacy piece for one side, which is reversing closed generics, a position that the board adopted in the first round. Thanks.

JEFFREY NEUMAN:          Yeah. Thanks, Kathy. That is set forth in the Beijing Communiqué and, really, the sole advice—I don't know if it can be brought up but there is a reference to it—is they did list a number of strings but they did indicate at that point that the GAC hadn't done a fulsome review of

those applications. It really just looked at the strings themselves and whether it was proposed to be open or closed.

There was no extensive review of any of those applications and it turned out, in fact, that some of the ones that the GAC had indicated were closed generics actually were not which, again, was not something the GAC had ever claimed that they were. They just flagged these ones to give them a closer look.

The definition of closed generics is actually here because it was in specification 11 of the registry agreement. I should say it is in specification 11 of the registry agreement. I believe it's either referenced as a footnote here or, certainly, spelled out. Here is the definition from ICANN. I'll read it. It's from specification 11, section 3(d). It states that "a generic string means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations, or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations, or things from those of others."

That's the definition that ICANN put into the registry agreement and that is the definition that we are working off of. Okay. I understand my connection is not great for some of you, so I'm going to get a dial-out while … Is anybody in the queue that wants to speak on this? Now, I can get my dial-out. Paul, please go to speak and I will get a dial-out and be back on.

PAUL MCGRADY:          Thanks. I just want to react to one part of what Kathy had to say, which was the implication that this is somehow an advocacy piece for one side or the other on this topic. This is something that, in the board's resolution for the last round, they specifically asked us to look at. They want this working group to come to a conclusion on this piece, and so I don't think it's fair to imply that somehow this is just mere advocacy work. We're trying to do, here, what the board asked us to do. Thanks.

CHERYL LANGDON-ORR:    I'll step in if needs be, unless Jeff's got his dial-out completed. Thanks for that, Paul. Moving onto Jorge.

                       Hello?

CHERYL LANGDON-ORR:    We can hear you, Jorge. Go ahead.

JORGE CANCIO:          Hello, Cheryl. This is Jorge Cancio from the GAC group. I understand the question from Jeff and, I guess, from you, Cheryl, as trying to see if there is any possibility of equating closed generics with the public interest. I think that, at least for me, I see a difficulty in that public interest normally means that there is a public function, also, behind it.

In the end, that function is not a privilege of one, single entity, which would mean the closed generic.

I don't know whether it's really logically possible to find such a possibility where there is a discrimination in who gets to control the registrations under that closed generics while it's being a public interest function. So, at least for me, public interest entails, at its core, normally, the thinking or the notion of non-discrimination, and that sits very badly with this idea of having a singular entity controlling the registrations under that term.

I already made my point on .disaster and how, although we will of course support the International Red Cross, there would be other entities who are internationally as legitimate as is the Red Cross to handle and to have a registration under that TLD. So, I don't know. I'm not against the possibility of finding a possible public interest criteria but for the moment I see a logical problem between those notions of public interest and non-discrimination. Thank you.

JEFFREY NEUMAN:       Okay. Thanks, Jorge.

CHERYL LANGDON-ORR:   Thank you, Jorge. Back to you, Jeff. You're here, sorry. I'll shush up again.

JEFFREY NEUMAN:   That's okay, I just want to make sure that everyone can hear me a little bit better on the phone line. Hopefully, that's better for those. If not, just let me know. Annebeth is saying "much better." Okay, great. Let me go, then. Paul's got his hand raised. I think it's a follow-up, Paul. Is that right? Nope? Okay. Paul lowered his hand. Let me ask … No, his hand's back up. Paul, please. I guess it's back down? Paul, if you'd like to speak … Oh, back down. Okay.

Let me just ask the question, though. When we talk about serving a public interest goal, who are we talking about in terms of "the public?" Jorge, you were talking about other entities that want to use the name but others in the group have been focusing not on potential registrants of a name but the end-user who views the content which the name is directed at.

So, one could always argue, as you have, that many entities have a right to use a name. But if we look at it from the public interest of those that are in receipt of the content, then is that the public that we're trying to look out for, as opposed to whether everyone has a right to use a particular name. Hopefully, that makes sense. It all depends on how you define the public interest and who the public is. Greg, please.

GREG SHATAN:   Thanks. I agree that public interest is a term that has bedeviled ICANN for a long time, and I think that's not just true here but it is something that is difficult to define and depends greatly on who is defining it and

for what purposes. One could argue that the very concept of private property is against the public interest. I suppose that would lead to us all being on a commune together.

But in any case, without a definition of it or if the idea of this is that the GAC is supposed to define the public interest—and we've heard from at least one GAC representative that it's completely orthogonal from the idea of closed generics—this seems to be a test that is better not used to determine whether closed generics are good.

A different definition of public interest that was more toward innovation and the like might lead to a different conclusion. A lot of this goes back to a much bigger question, which is, what do we want the DNS as a whole to be? Are we trying to build a taxonomy of TLDs and essentially crowd-funding it but where each TLD is supposed to represent the ability to register third/second-level domains in a way that is linked to the meaningfulness of the first-level domain, and that's what we're trying to do? Or is it more subtle or less defined than that?

I don't think we've ever stated it was the former, though I think there are some assumptions many have made at times that it should be the former in some way, shape, or form, but until we have an idea that that's what we're trying to do, the idea that closed generics will be against some common idea of the public interest just doesn't make sense. Similarly, there is no larger purpose if we're not trying to build a taxonomy and, if we are, then that's a much bigger discussion than this. Thanks.

JEFFREY NEUMAN: Okay. Thanks, Greg. Let me go to Alan, please.

ALAN GREENBERG: [Question] "can we define it in ICANN?" for as long as I've been around, and I know—

JEFFREY NEUMAN: Alan? Can you start over? Because we missed the beginning of that.

ALAN GREENBERG: I can start over again.

JEFFREY NEUMAN: Okay. Thanks.

ALAN GREENBERG: I said we have tried to define or discuss what the public interest is in ICANN for as long as I've been around, and longer. I think we have generally come to the conclusion that we are never going to have a definition. The best we ever might have, maybe, is a set of examples or some level of hand-waving to describe how we would recognize the public interest in any given example because no specific definition is likely to be useful going forward in some unchartered territory that we haven't discussed yet.

People over time have come up with lots of definitions of public interest in their own areas. There is the famous misquote of "what's good for General Motors is good for the United States," and clearly we understand the negative implications of some of those decisions of General Motors. That is a misquote but it doesn't really alter the definition. We're not likely to come up with a definition. Therefore, I think the best we can do is identify some group, whether it is a consultant, or the ICANN Board, or whatever, who we trust to recognize the public interest in a given case.

If we can't find someone who we can trust to do that with a reasonable degree of reliability then I think the compromise, Jeff, that you're looking for, of "how can we allow ones in the public interest but not allow the others?" is a fool's game.

So, I think it really comes down to not coming up with the definition. Let's not pretend we're going to come up with the definition right now when others have failed to and failed to get acceptance of them. I think we have to come up with a methodology to recognize something that's in the public interest or, if we can't agree on such a methodology, then I just don't see how we can move forward and find a compromise. Thank you.

JEFFREY NEUMAN: Thanks, Alan. I agree, this is a very difficult exercise. I mean, the GAC advice was, in fact, that it serves a public interest goal. Jorge says, "Well, maybe we can try to define what we want to avoid," and that's a

useful exercise, and then leave it to the board whether they can make that decision.

I'd love to see other people in the queue after that. I know I have Kathy but, if we could start to get some things we would like to avoid, that's also helpful without talking in terms of complete ban or complete allowance. Kathy, please.

KATHY KLEIMAN:     Sorry, coming off mute. I guess we would go back to first principles of the 2012 round, and then the 2013 GAC communiqué, and then the 2013 into 2014 huge public comment. People are very concerned about competition, that generic words under principles of trademark law are open/can never be trademarked for their generic purposes.

So, if I'm in a trucking company I can't trademark "truck" except in a design. That's different. But I can't take away the right to use the word "truck" from my trucking competitors. How we protect that open competition principle and that open words principle, so part of the public interest that you're looking to define, I think, would be basic competition policy, that everyone should be allowed to use and register in the top-level domain of the string that is generic to their industry or business. Thanks.

JEFFREY NEUMAN:     Yeah. Thanks, Kathy. Susan, please join the queue.

SUSAN PAYNE: Hi, Jeff. Thanks. I'm not entirely disagreeing with some of the points that have been made, including by Kathy, but I think we still seem to be stuck on this notion that registrants want to register in every TLD and that, unless they're able to, somehow they are being locked out of something they want, and disenfranchised, and suffering a competitive disadvantage.

I think if we just look at the 2012 round, that notion just doesn't seem to be supported by the reality. We see that there are many, many TLDs that have been launched in the 2012 round. They have, relatively speaking, much lower registrant levels than perhaps they had hoped they would. There are many that serve, if you like, the same purpose: car, auto-cars, or whatever. I'm using an example where I think they're actually all owned by the same company but it's just an example.

And so, this notion that, the Red Cross or whatever it is, the only place they could go is .disaster and that they would want to is just a fallacy. This idea that the only way that the TLD can be used and that domains can be used is to allow every single person to have the opportunity to register in them is a fallacy.

It would be really nice – in the e-mail exchanges, we started to go down a path of, "Let's stop doing the binary," and, "let's find a way forward," and we seem to have done a massive step back during this call, understandably so. But it would be really nice if we could try to talk about something like Jorge's suggestions "what do we want to avoid?" rather than this binary notion and this idea that everyone wants to register in every TLD.

JEFFREY NEUMAN:    Yeah. Thanks, Susan. There certainly does seem to be an inherent, and that is that there is some sort of right for everyone to register or use every single TLD. One of the things I just want to point out before I go back to Greg is that competition law is very difficult, or whether something is anti-competitive is always judged after the fact, not before the fact. It usually requires a behavior that is done and then someone says, after that behavior, "Oh, that was anti-competitive."

I'm trying to t of any analogous situation where before something is done it's predetermined to be anti-competitive. If anyone's had got any analogies, that would be fantastic because, otherwise, it's almost like the difficulties we're having with a privacy board where we're trying to send them our proposal and say, "Hey, would this be compliant with your laws?" and they sort of come back and say, "Well, we can't really give you a definitive yes or no until we have actually seen it in practice." So, if anyone has got any examples of that, please., I think that would help us all. Greg, and then Werner.

GREG SHATAN:    Thanks. First, to give you an example of where something is judged before the fact, every merger that goes through anti-trust review, let's say whether it's at the FTC, or DOJ, or in Germany in front of the Bundeskartellamt, or in front of the EU, all of those are analyzed for anti-competitive effects before they are allowed to [consummate]. So that, as a class is, basically, Section 7 of the Clayton Act, and its other

analogies that I mentioned is a field that is entirely composed of … Or not entirely, but that is in many ways composed of pre-judgments that are made.

And also, every private piece of legal advice about whether something is or isn't anti-competitive is also a pre-judgment. Everyone has to get advice, or not "everyone has to get it," but most people seeking to do something that might be a violation of law, or at least requires an interpretation of law, will get an interpretation of it, first.

Of course, legal advice is not definitive but that's the best you can do beforehand. The idea is that it keeps you out of trouble. So, the idea we're talking completely about a pig in a poke is incorrect, recognizing it's not [this positive]. But I think in this case the issue is, are we really talking about anti-competitive in the sense of competition laws? In which case, that is a fairly narrow set of facts.

If we're not talking about it in the legal sense but in some sort of moral or best practices sense, or an, again, "What are we trying to accomplish here?" kind of sense maybe we shouldn't use the word or we should try to figure out what it is that we're trying to encourage or discourage. I don't think there is any legal problem that is tripped up by allowing Mercedes Benz to register .sedan, for instance.

JEFFREY NEUMAN:         Okay.

GREG SHATAN: Thanks.

JEFFREY NEUMAN: Yeah. Thanks, Greg. Sorry to cut you off but I'm just trying to keep everyone to three minutes. I think you gave some good examples of where competition is determined before the fact, so thanks for that. Let me go to Werner, and then Volker. Verner, please.

WERNER STAUB: Yeah. Sorry. Can you hear me?

JEFFREY NEUMAN: Yes.

WERNER STAUB: Thank you. We've been looking at the question of public interest, maybe, a little bit too quickly. Maybe we should look at the question of, what is an adequate level of accountability to the affected community?

The reason why I'm saying that is that I, myself, have been working on a number of generic strings that actually were applied for by communities, and where there was contention against applications from parties that did not have any governance model, that imply any sufficient level of accountability to the affected people.

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But of course, it depends on the kind of word. If the word is "sedan," well, I don't think there is much of a concern about accountability with the affected people. If the word is something like [inaudible] .sport or .radio there is, of course, a much greater concern about accountability to affected people. If it's a word like "disaster," of course, there are a great deal of problems associated with the governments.

If we converge to an idea of trying to determine whether there is an adequate governance model for accountability in line with the importance of the word, and in terms of defining accountability, would probably mean that it should be possible for organizations of the affected community to replace the people in charge of the TLD, and then you are accountable [inaudible] if something happens, then, what you do with a certain resource.

JEFFREY NEUMAN:     Yeah. Thanks, Werner. I think looking at what is proposed to do with that resource is an important aspect. There are some really good comments on the chat and I'd love for some of them to speak up on them, just because it's hard, with all these people and comments, to read them all but we are going to try. Volker, you're next.

VOLKER GREIMANN:     Thank you, yes. I mean, somehow this problem seems like we're trying to square the circle and I'm probably not going to achieve that in my response. But I think one possible compromise could be that public authorities or bodies, non-profit organizations, could make much

better use of a closed generic than the commercial entities could. So, maybe the differentiation between the allowed and not-allowed closed generics could be the question of whether the intended use is commercial of non-commercial, of the TLD. That does not refer to all the domain names.

Potentially, a TLD that is used by a city that matches a closed generic term could still be used commercially in some domain names but the general intent could be that it's non-commercial, i.e. in a governmental function or in the function of the organization that is tasked to fulfill, rather than a profit-making scheme. That could be a solution there but I'm not saying that all commercial ones are to be forbidden, as well. It's a difficult question, just something to think about. Thank you.

JEFFREY NEUMAN: Thanks, Volker. There have been some others that have also suggested that a non-profit motive may be relevant in the analysis. I did note—and then I'll go back to Paul—that Anne Aikman-Scalese had proposed a series of questions. I don't know, Anne, if you want to get in the queue. Otherwise, I can read those. Great, you're in the queue, so I will go to Paul and then I'll come back to you, Anne. Paul, please.

ANNE AIKMAN-SCALESE: Yeah. Thanks, Jeff. I tend to agree with Alan that the only practical way forward here is for the PDP to recommend a public interest goal approach. I would also note that I think it's more likely that that would

succeed at the board level and at the GAC advice level if we were to set out a series of factors that would either be used in a public interest evaluation process by an independent panel or in a public interest goal objection process that could be brought by anyone.

I had suggested that some factors that could be developed to pursue a public interest approach with respect to closed generics would be just, question number one, does it serve a public good? Two, is the proposed mission and purpose of the registry innovative in nature? Because we're talking about the emphasis on innovation, and particularly those who are advocating for closed generics are talking about innovation.

And then three, what is the likely effect on competition of awarding the proposed closed registry? Is it minimal, or is it great? And so, there is a lot of discussion about competitive effect that would incorporate that. Four, is there more than one proposed closed registry application, and how do you evaluate those in a scoring system? I might add to that, is there an application for an open registry that's competing with the application for the closed registry? That would present, perhaps, an implementation issue.

And then, should there be restrictions on resale of a proposed closed registry? Six, what specific public interest commitments are proposed by the registry, and how can these be effectively monitored and enforced? I think there has been a lot of discussion on the list and I recall several posts from Justine on this issue of how the PICs get enforced, which seems to be quite a theme at ICANN67. I would

suggest that we try, as a working group, to at least come up with a proposal that evaluates these types of factors and either phrase it as an objection process or a public interest evaluation process, and see if we can move forward with something rather than leaving a void in our policy process. Thank you.

JEFFREY NEUMAN:     Okay. That's helpful and I think it's a good start on some criteria. I'd like to hear more discussion about that. Let me go to Paul. Sorry, Paul, we skipped you. Back to you.

PAUL MCGRADY:     No problem at all. Thanks. First of all, I'm glad Anne went first because I wanted to thank her for those thoughts. We'd like to see more details around that and agree that it's important for us to try to figure out a framework for this to work rather than just entrench ourselves into binary yes and no's.

Secondly, I just wanted to supplement what Greg had to say about an example of competitive behavior before the event. Yes, some mergers, depending on their size, are looked at in advance by the US Government, but the starting point isn't that all mergers everywhere are banned.

We have to be a bit careful when we say that they're looked at in advance. Those are very narrow situations and the presupposition when you go there isn't that you can't do it, it's that the justice

department wants to look at it for some reason. I think blanket bans on innovation in the DNS are not a sensible starting point any more than blanket bans on all mergers everywhere would be. Thanks.

JEFFREY NEUMAN: Thanks, Paul. Werner, I think you still have your hand raised but I'm pretty sure that's an old hand. Okay. Thanks, Werner. Sorry, you do have your hand up? Nope, okay. Greg, please. Oh, okay. Thanks. Greg, go ahead.

GREG SHATAN: Thanks. Just briefly, first, with regard to what Paul said, when mergers are reviewed it's not because they're all assumed to be bad but rather because they meet certain criteria where it's viewed as possibly, just by dint of size, worth looking at, but the vast majority of mergers that are reviewed get through positively and can close.

So, it really is just a form of guardrails. There is no presupposition at the time that it is good, or bad, or indifferent, just potentially important. Believe me, the numbers are actually pretty low so "importance" is a pretty low bar. A lot of the ones you hear about getting reviewed you don't hear about because there's really nothing – the review is, basically, technical. There is often what's called "early termination" after only seven to ten days.

So, just the general idea that if there is a prejudgment it's one that doesn't have to be made with the idea that it's going to be a hammer

every time. Secondly, at the risk of characterizing other people's arguments, which is always dangerous, I'm going to go back to my taxonomy question. I think that to some extent I would say that Jorge and Kathy are taxonomists and their view is that the second level exists to create a taxonomy of domains at the third level, primarily, and that if that is our one and overarching goal we should decide that.

I don't think we have decided that and I think we have decided that innovation, which kind of creates a tension between taxonomic and non-taxonomic uses of domains and is kind of where it's at. So, I guess we're still in that tension and don't necessarily … But I certainly can't say that we have assumed that the taxonomy is the more important or better use. Thank you.

JEFFREY NEUMAN:    Okay. Thanks, Greg. I want to, again—and I appreciate all the comments, and we've certainly gotten a little bit back into the "why generics are bad or why it's good"—try to get back to the question of, "What is it that we're trying to avoid?

I think Anne's questions or factors are ones to look at in terms of eliciting out those things that we want to avoid. There are lots of comments here but not too many on what it is that we are trying to … What are the behaviors that we're afraid of? Certainly, there is a lot of discussion here on whatever we come up with we have to enforce or have meaningful enforcement, and I want to, for now, take that as a given.

Take it as a given that if we come up with some criteria we will provide a mechanism to enforce, but that's almost, if you talk about enforcement, now you're putting the cart before the horse. We have to figure out what would be acceptable or not acceptable and then determine how that is or is not enforced.

So, again, I just wanted to see if there is anyone that wants to discuss those behaviors that we want to avoid. I'll just give a couple of seconds for people to get in the queue. If not, we might just park this issue because we have others to discuss. Okay. Paul, then Kristine. Paul, please.

PAUL MCGRADY:     Thanks. Jeff, you've asked people to get in the queue and talk about what the harms are. If nobody can come up with any harms then I think that's the answer, right? I think people, if they fear that there is some harm other than some vague use of the word "competition," now is the time because we'd like to problem solve for whatever those harms are that can be identified. Even if not everybody on the call believes in the harms that would be identified, still, it's a good time right now to problem solve for it. Thanks.

JEFFREY NEUMAN:     Yeah. Thanks, Paul. To the extent that you or anyone in this queue can be as specific as possible, saying something that we don't want anti-competitive behavior, like to drill down in that a little bit more as to

what you think is anti-competitive so that we can figure out what would avoid that? Kristine, please.

KRISTINE DORRAIN:    Thanks. Yeah, I wanted, basically, to pick up on what Paul was going to say, so I'm going to pick up on that and what Kurt put in the chat, which is let's start with an example. Let's be specific because, as you know, I put in a proposal that I think does go to some of the questions, because I think we can go round and round and round about the theory of "do we like open or closed?" but we're all coming at it from our own biases and our own standpoints, whereas I would like to come at this from a problem-solving standpoint, so let's look at Kurt's question. DaimlerChrysler wants to operate .sedan, in this instance. What are the harms? Saying anti-competition doesn't help because I don't know who is benefitting and what concern could be raised by an anti-competitive standpoint.

In my opinion, somebody probably thinks that if DaimlerChrysler operates .sedan Chevy or General Motors won't be allowed in, but I'm going to hypothesize that General Motors doesn't really want .sedan, and maybe Daimler is going to do something with .sedan. Maybe they're going to offer some sort of technology that relates to their sedans, I don't know. But the point isn't that it's going to say, "Well, Daimler, you have to spend $10,000 to protect your name, otherwise we're going to do something with it in this space," and that's what we have the UDRP for, that's what we have rights protection mechanisms for, so that people can't do that.

I think the problem is that we are assuming that every single car wants to get a .sedan domain and we're assuming that the entire public has some sort of entitlement to operate .sedan. There are hundreds and thousands of other TLDs and there will be thousands more. No one is going to be bereft if they can't get a .sedan TLD. If I can't get kristine.sedan, there are many other options.

So, I don't really see the competitive angle but I wanted to throw this out there because we need to be specific. I have put a really detailed proposal in and I'm happy to append it to address other concerns, but until I know more specifically about what people are worried about I can't address it, and the word "anti-competition" doesn't help me try to solve that problem. Thanks.

JEFFREY NEUMAN:     Yeah. Thanks, Kristine. Those are big, too, so hopefully those that are following will help with that. Kathy, please.

KATHY KLEIMAN:     Thanks. I'll try to be brief. Years ago, I came in … It's just, I feel like I'll sing the chorus. This is not the time, standing on one foot, to revisit the issues that we did in the sub-team where we prepared, and we prepared tables, and we argued for months back and forth on the issues and the concerns of closed generics, and then we went to the full working group. And now, we're doing it with the public, always going back to the beginning, never summarizing or sharing where we've been fully, because we've done this a million times.

And so, just please go back to the record, go back to the GAC communiqué, look at all the strings that single competitors, often dominant competitors, wanted to use to own all the second-level domains of the words that were most descriptive of their industry. I was called in the middle of the night by CTIA, the wireless association, which did believe that .mobile was the best representation of the mobile wireless industry that it represented, and then both filed public comments in support of the board moving against closed generics, as soon as a community objection.

And so, lots and lots of industries do have single words that represent where most of their members are. And it's a lucrative proposition for the largest or dominant competitor to own all of those second-level domains but we've discussed this a million times, about whether it's fair, whether it's principled. Are we going to do this all again? Thanks.

JEFFREY NEUMAN:    Yeah. Thanks, Kathy. Just to explain, you are right in the sense that we seem to be going back to the beginning, but what we're trying to do is see if there are ways that people who have views at the edges can come off their position in some way to some sort of compromise solution. That's why we keep going back.

If, after this discussion, it seems impossible, then we're going to have to just go with what it says here in the report, which is that there is no agreement. That's what it currently says. That's the readout. What we're really trying to do is, in a multi-stakeholder model, we're trying

to get people, maybe out of their comfort zone, but out of the extreme positions to see if there is something in between.

At the end of the day, if there is not, then we're going to have to come back with no agreement and it is what it is, but hopefully people that are interested in this multi-stakeholder model will try to see if there is a way toward a middle-type of solution. Justine, Volker, then Jothan.

JUSTINE CHEW: Thank you, Jeff. I, too, feel that this discussion is going around in circles. No one has really convinced me of the benefit of having closed generics but I'm still open to suggestions or ideas that would convince me otherwise.

In any case, I am probably more concerned with recourse, the ability to take recourse action if anything were to go wrong. I think that would concern me and interest me more. Thank you.

JEFFREY NEUMAN: Yeah. Thanks, Justine. We've certainly noted that. If we're able to get to some sort of compromise or some solution then enforcement will certainly be an element of whatever proposal there may be.

So, we have three people in the queue, Volker, Jothan, and Kristine. I'm going to cut off the queue so we can move onto the next topic, but let me hear from Volker.

VOLKER GREIMANN: Thank you. I think the argument that nobody or not everybody will want to register a domain in a certain TLD is a fallacy because sometimes it's not about being able to register but rather the competitor being the exclusive one to be able to register.

So, maybe the question should not be who is able to register a domain name but rather prevent certain kinds of use of that domain name, so, say, anything that could be anti-competitive by an anti-competitive body, and we could ask if some bodies would be willing to weigh in, there.

That would be excluded use but they can, of course, try to apply for it, or they would first have to gather letters of non-objections from the most important competitors in the market, that they have no objections against them registering that, something like that so that we would, rather than forbidding it outright, tell them, "Well, you can have it but if you have it then you cannot use it in X, Y, Z ways that would be deemed anti-competitive in the market." That could be another solution, there.

JEFFREY NEUMAN: Yeah. Thanks, Volker. That's helpful, as well. I'm going to go back on what I said about a new topic because there are only 12 minutes left now. This is good because, of the five topics, I think this is the one that's the most controversial. If you want to weigh in, please do. I have Jothan, Kristine, and then Susan. Jothan.

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| JOTHAN FRAKES: | Okay. Hopefully, you can hear me. |

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| JEFFREY NEUMAN: | Yes. |

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| JOTHAN FRAKES: | Okay. So, I'll go really quickly in respect to time. I think there is a big difference. I heard the example of "sedan" being used and I think that it's different for DaimlerChrysler to get .sedan versus .cars. That's far more specific. I think there is a difference between .sciencefiction and .books. I think there is a difference between .seafood and .food. You've got some closed generics that are not only taken but they're not in use, yet. |
| | I don't think that all closed generics are created equal. I think some words have more substance to a given sector or industry and have that competitive touch-point than others that are more specific might. That was my point. Thank you. |

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| JEFFREY NEUMAN: | Yeah. Thanks, Jothan. It's a good comment. There is, at least even in US trademark law, this issue of what's considered is generic is going to the Supreme Court this session in a case, and we may have, at least within the United States itself, some more guidance as to what "generic" actually means. |

Some people put it in terms of scientific classification of things like genus, versus species, versus … I forget what, down the line, it is, but that helpful distinction. Let me go to Kristine, and then Susan.

KIM DAVIES:

Hi, thanks. Somebody has got an open mic in the background. Anyway, I have a couple of points that I wanted to make and I think they carry on well with the points that were just made.

First of all, I think that Volker makes a really good point about the guard rails and I love the suggestion, Volker. I think that when you talk about uses that are anti-competitive you absolutely can write things like that in and say, "You know what? DaimlerChrysler and the sub .sedan instance is not going to use it in a way that's going to make sure that other auto manufacturers … That it targets them or whatever. That's a problem we can solve, I guess is what I'm trying to say.

To Jothan's point about genus versus species, spec 11 actually kind of addresses it already but also, yeah, I think that's really what we're talking about, making sure that …

I mean, obviously, I think the species are fine. I think we're talking mostly here about the genus words. I wanted to point out this idea that—and I mentioned in the chat—there's a differentiation between consumer choice and consumer trust. I think a lot of what we're seeing is everyone's really, really worried about consumer choice. That's fine,

and that's great in a lot of TLDs, and the openness of the program is focused on consumer choice.

I think the difference is that we also have some TLDs that would like to focus on consumer trust, and that's one of the reasons why people, and technology companies specifically, might want to focus on closed generics so that they can innovate.

When I submitted my proposal on February 26th, one example that I gave was .heart. Maybe a pacemaker company, a for-profit company, perhaps, using .heart as one specific way to allocate domains that use those domain names to interact with devices and its technology across different platforms, in different ways, and with different customers, and tracking back to the manufacturer, and to the physician, and to the hospital, etc.

So, when we think about how we can offer consumer trust and innovation in the TLD space, it makes sense. And in that case, the use of .heart is possibly not even public-facing. I mean, if you're a customer of that pacemaker you might know that your URL is yourname.heart in order to access your data, but ultimately it's not a site that people are going to search for. It's not really going to be indexable. It's not going to be, necessarily, even gathering public information.

The DNS is being used for something different, and that's what I want to talk about, and that is why I wanted to have a conversation that's more than just "should everybody get it? Should nobody get it?" Let's

talk about some specific use cases. I would love it, and I really am truly asking for people to weigh in and tell me what concerns are in the proposal that would cause a problem that we can put more guardrails on. Volker has listed one. Jothan has listed some.

You guys, we need some guardrails, but let's talk about how we can let people interact with the DNS in new and unique ways, that something besides just selling domain names to registrants because there are hundreds and thousands of companies doing that today and we don't need that kind of additional … Nobody else needs to play in that space, necessarily. You can if you want to, but let's do something bigger. Thanks.

JEFFREY NEUMAN:    Yeah, thanks, Kristine. Maybe you can just look at the chat and you'll see there are some questions that are to you. You might want to respond. Susan and Alan, and then we'll open it up for any general comment. Susan.

SUSAN PAYNE:    Yeah, thanks. I was reacting to what I think it was Volker was saying, about this notion of "you can have it but you can't use it anti-competitively," and I was sort of trying to think about what that might look lie, or at least one scenario that might be relevant, there. And so, if we're talking about a car company having .sedan, or .car, or whatever the TLD is, then that's fine. They may want to use it for

something really innovative without any kind of public-facing element, and that's fine.

But if there is a public-facing element then they can't be using it in a manner which would take people to a site where they would be misled into believing that they're at something like the general industry body for car manufacturers or that, essentially, where the public believe that they're getting somewhere, where they don't realize they're on the site of a specific commercial interest but they think they're either on one of the competitors or they're, as I say, on some sort of general industry body site, or the site for safety in the auto industry, or something like that.

It's that notion of it's the "use" part that becomes the problematic part and is where the anti-competition could come in. And so, if you're allocating the TLD or if you apply for the TLD and you want it to be closed then it is incumbent on you to operate it in a way which doesn't do that, and that's one example that I could see that might be viewed as anti-competitive.

So, can we set guardrails around examples of things that, if you do that, it's probably not going to be fair use, or rather it's probably going to be problematic use and the sort of use that will get challenged and be subject to a dispute process.

JEFFREY NEUMAN:    Okay. Thanks, Susan. Let me go to Alan, and then we'll have to wrap this up.

ALAN GREENBERG: Thank you very much. I'll be brief. I started off part of this discussion a few weeks ago by saying, "Can someone give me a single example which without any doubt shows it's in the public interest?" So far, I haven't heard one, and I'd like to talk a little bit about the .heart one. As was noted, it might not even be public-facing. Well, if it's not public-facing then .xxx273 would work, as well and there are plenty of names that would relate to pacemakers that are not necessarily a generic word.

I think we really need a real, hard case example to demonstrate to those who believe that these are not in the public interest to those who support the board action last time—and there are plenty of us, and I'm one of them—that there are counterexamples which merit our attention. I still haven't heard them. The .heart case might not even be public-facing, in which case the actually word doesn't matter, and there are plenty of alternatives which could be viable.

So, I really think that if we're going to convince the people who believe that we should not allow generics at all, we need some counter-examples that are viable, and then figure out a way that we can move forward with them. Without those examples, I don't think the case can be made. Thank you.

JEFFREY NEUMAN: Thanks, Alan. Last word from Paul, and then I have got to wrap up.

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PAUL MCGRADY:   Thanks. So, just to address what Alan said, I think the .heart case is a great example and I don't think that a random string of numbers is a good thing. Many heart patients, I'm going to take a wild guess and say that a lot of pacemaker patients are not necessarily spring chickens and may not be able to easily remember a random string of numbers to get access to their account. That account is secure from hacking and other forms of abuse.

But also, there are other diseases that come with impairments. So, .insulin, for example, high blood sugar and low blood sugar for type 1 diabetics who are eight, or nine, or ten years old. A random number may not be as good as theirname.insulin. So, I do think we have real examples and I don't think dismissing them out of hand is really going to move the ball.

I think, instead, the ethos from this conversation, which is "identify possible harms and solve for them," that's the way to go, rather than saying, essentially, "No examples work for me." Thank you.


JEFFREY NEUMAN:   Yeah. Thanks, Paul. There are certainly people who are still on both extremes on this side. We're going to take the notes back from this session and see if, when the working group continues its work after ICANN, there is anything more we can do on this subject.

I know that the GAC has some sessions, as well, on these topics. Please do remember our next session is on Tuesday, tomorrow. It's in the schedule, as to the time, because I only know it in my local time, so please look it up. We will cover more than one subject tomorrow but this one was the most controversial. Thank you, everyone, and I look forward to talking to you all on Tuesday, tomorrow. We can stop the recording. Thanks, everyone.

**[END OF TRANSCRIPTION]**