

Minority Report of GNSO Bylaws Drafting Team

Section 11.2(d) of the ICANN Bylaws creates “A GNSO council responsible for managing the policy development process of the GNSO, as described in section 11.3.” Section 11.3(d) repeats that “the GNSO Council is responsible for managing the policy development processes of the GNSO. It shall adopt such procedures ... as it sees fit to carry out that responsibility....” .

The recent revisions to the Bylaws accord some additional responsibilities to the GNSO Council, either expressly (e.g., ratification of amendments to the Customer Standing Committee charter, Section 17.3(d)) or by implication (by reference, e.g., in Section 18.2(c), to “a GNSO Supermajority,” a phrase already defined in Bylaws section 11.3(i)(xix) in terms of voting by Council members).

However, the revised Bylaws also confer scores of important new powers upon the “GNSO,” either by itself (e.g., to request inspection of ICANN accounting records per Section 22.7); in coordination with one of more other ICANN structures (e.g., to define, along with ccNSO, the method of review of the CSC Charter, per Section 17.3); or as a Decisional Participant in the Empowered Community which the revised Bylaws creates (e.g., most of the powers set forth in Annex D).

The threshold issue before this Drafting Team is whether all these new powers, few if any of which bear any relationship to “managing the policy development process,” should be assumed by the GNSO council. The majority of the Drafting Team answered that question “yes.” Our three constituencies say “no.”

We are particularly disturbed by the conclusion reached by the majority that, because the Bylaws do not prohibit the Council from arrogating to itself new powers unrelated to policy development, it is free to do so unilaterally. This reasoning is not sustainable because it is fundamentally inconsistent with a commitment to a transparent and accountable ICANN that abides by the rules and structures set out in its governing documents. This reasoning is also completely inconsistent with one of the core concepts of the Accountability changes that created these new powers – that ICANN, and the ICANN Board, must be limited by the stated mission and enumerated powers in the ICANN Bylaws. This is a common concept in construing the limits of a group’s powers, and is applied to the charters of GNSO Working Groups. The GNSO Council should be held to this same standard.

The current structure of the GNSO council, including the House structure and allocation of votes among constituencies, was designed solely to address perceived issues in the policy development process. The current and all previous GNSO councilors were elected by their respective stakeholder groups or constituencies, or appointed by the Nominating Committee, to play the roles allocated to council members in the policy development process. There is no basis for presuming that this is the right group to exercise the significant new powers accorded to GNSO, and we believe that it is not, unless or until the Bylaws are further amended to accord it these powers (an option rejected by the majority during the Drafting Team’s deliberations).

The Bylaws make clear that the GNSO Council is not coextensive with the GNSO. Besides the Council, and the Houses into which the Council is organized, the GNSO consists of

the constituencies and stakeholder groups (Bylaws section 11.2(a) and (b)). We believe that outside the policy development realm, and particularly with respect to the new powers accorded to GNSO under the revised bylaws, the constituencies and stakeholder groups should speak for the GNSO. Each stakeholder group and constituency has an elected leadership, accountable to the members of that stakeholder group or constituency; a committee consisting of the chairs of each such entity, or alternatively of one member of each SG or C's leadership team as designated by the SG or C in question, could be constituted relatively easily to exercise these powers. We stand ready to discuss and refine this proposal (including whether this committee would act by consensus or by some other decision-making mechanism); but the insistence by the majority that the GNSO council should take over these responsibilities, without regard to the council's limited (though extremely important) policy development role as set out in the bylaws, made it impractical to have that discussion during the very limited time allocated to the drafting team to do its work.

We also note that it is the stakeholder groups and constituencies, not the GNSO Council, that should take the lead in deciding how these new powers should be allocated. It was abundantly clear in the deliberations of the drafting team that the council's self-interest in expanding its powers make it imprudent to entrust this decision to the council alone.

Steve Metalitz, IPC

Wolf-Ulrich Knoben, ISPCP

Steve DelBianco, BC