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Avri Doria  
Chair, GNSO Council  
ICANN

Dear Avri,

Please find below a response to the GNSO Council's ("Council") request for advice regarding the following resolution, relating to the proposed introduction of a system of proxy voting:

*"To confirm EITHER that voting by proxy is possible under the current by-laws or if not, to advise what Bylaw change(s) would be needed to enable it.*

*In considering this request the Council asks the ICANN General Counsel to consider implications of recusal when using a proxy."*

### **Proxy voting**

Article X of the current Bylaws, does not contain a provision on proxy voting. Additionally, when considered with section (3) 8 the Bylaws appear to prohibit proxy voting. My reasoning is set out below:

It should be noted that while a draft entitled "*New Rules of Procedures of the GNSO Council* " exists which sets out the use of proxy voting, such procedures have never been recommended by Council or approved by the Board of ICANN.

It is also worth noting that, proxy voting appears to be inconsistent with the *Article X, Bylaws, Section (3) 8*, which deals with conduct at meetings of the Council. This section notes:

*"... the GNSO Council shall act at meetings.*

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*Members of the GNSO Council may participate in a meeting of the GNS Council through use of (i) conference telephone or similar communications equipment, provided that all members participating in such **a meeting can speak to and hear one another ...**"*

Also the section provides that ...*"all actions or votes by the GNSO Council are taken and cast only by members of the GNSO Council and not persons who are not members"*

It would seem that under the current Bylaws, the only persons able to vote are members of the Council and that a Council member who is unable to speak to or hear other Councilors may not "participate" (including voting) in a Council meeting held in person or by telephone since they are not "present".

It should also be noted, that the reference in same section of the Bylaws provides that;

*"Members entitled to cast a majority of the total number of votes of GNSO Council members then in office shall constitute a quorum for the transaction of business, and acts by a majority vote of the GNSO Council members present at any meeting at which there is a quorum shall be acts of the GNSO Council ...."*

The above appears to be related to the weighted voting provision <http://www.icann.org/general/bylaws.htm#X-5.2> and not to any otherwise unreferenced scheme for voting by proxy.

Proxy voting is not permissible under our interpretation of current Bylaws.

It should also be drawn to Council's attention, that this advice is consistent with advice that I have previously

provided, to the previous Chair of the GNSO Council Bruce Tonkin, on 17 February 2006 via email. *See annexed email.*

This theme of “presence” being required for voting, which enables the voter to at least hear (or interactively participate) in the arguments surrounding a discussion topic, is prevalent in many decision-making bodies, and it is likely that this was consistent in the original framing of the Bylaws.

This specific inclusion may stem from the body of law that deals with corporations and voting of directors under California law, where ICANN is organized. See for instance the California Corporations Code 307(6) and 5211 (5) and (6) in relation to non profit public benefit corporations [www.leginfo.ca.gov/cgi-bin/calawquery?codesection=corp&codebody=&hits=20](http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=corp&codebody=&hits=20)

Similar provisions also exist (as to the requirement that directors be “present”) in Corporation codes dealing with directors in other jurisdictions.

The rationale and argument for these requirements is an important one. It is to ensure that all members get full access to the thoughts and concerns of the others on the issue at hand, to enjoy the opportunity to debate the issues and consequently be fully informed and understand the issues prior to voting. It is understood that this is not the only important issue to consider when considering the burdens on volunteers to participate in the council and the different time zones that many councilors must call from in order to participate in the regular telephonic meetings.

## **Changes to the Bylaws**

Drafting changes to the Bylaws (depending on the method of voting chosen) would need to be made to permit proxy voting.

Prior to suggesting actual drafting changes to the Bylaws, I believe that further consideration of the implications of and actual proposed method of proxy voting should be considered by Council. A proposed change to these Bylaw provisions relating to proxy voting must be weighed against the above-mentioned considerations. It seems possible that the importance of reflecting the voting by volunteer counselors, across many time zones, is a value that should be weighed against the benefits of "presence".

That said, if the Council determines that proxy voting should be utilized, section (3) 8 would need to be redrafted to allow members to appoint proxies. The terms of and conditions for such appointment could be contained in procedures adopted by Council and the Bylaws redrafted to state this. This would minimize line-by-line changes to the Bylaws.

### **Issues in proxy voting**

Council's question as the implications of recusal can only be considered once a scheme of voting is proposed which also considers potential conflicts of interest.

By way of example, some of the issues that require consideration are:

- A) In what circumstances would proxies be used?
- B) What happens to the requirement for the presence of members, for instance should they be required to active in some part of the voting discussion?
- C) For instance, how would a majority be reached with the use of proxies, also supermajorities? What would constitute a valid quorum?
- D) Who would be entitled to hold a proxy and should there

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be a limit to number they can hold?

E) If a significant number of members were not present, could only a few members hold all proxies and vote?

F) How would 'weighted voting' on the Council work via proxy?

### **Recommendation**

Based upon the above it is my recommendation that Council set out a "sense of the Council resolution" on the issue of adoption of proxy voting for the GNSO Council and the possible implication(s) for the Council. This resolution might be offered to the Board of Directors for consideration, as part of the review of the Council that is being generated from the Board Governance Committee's work.

I hope that this is helpful in your consideration. Please let me know if you have any questions or concerns relating to this proposal, or if I may be of additional service, please let us know.