

I. **Introduction**

- a. The purpose of this discussion is NOT to address the substance of the Trademark plus 50 proposal OR to discuss whether ICANN followed the appropriate process in coming to that decision.
- b. It should also not be taken as a desire to interfere with the ultimate decision of the BGC to uphold the Trademark plus 50 proposal.
- c. Rather, the purpose of bringing up this topic is to address the overly legalistic, aggressive and flawed rationale used by the BGC to justify that decision.
- d. Many of us believe that if the rationale is allowed to stand (and ultimately set precedent), the GNSO's role in the multi-stakeholder model, and in fact, the role that the Internet community plays in ensuring the stable and secure operation of the Internet's unique identifier systems will have effectively come to an end. Instead, the movement to a system in which those employed by ICANN the Corporation and its Board of Directors can act unilaterally without any meaningful checks and balances.

II. **How could have the case been decided**

- a. **Standard for Reconsideration:** Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
 - i. One or more staff actions or inactions that contradict established ICANN policy(ies); or
 - ii. One or more actions or inactions of the ICANN Board that have been taken without consideration of material information; or
- b. **The Board could have said there is no established policy with respect to the issue in the request. Some would not have been happy with the decision, but we most likely would not be here discussing this.**
- c. **But they did not. Instead, they used this as an opportunity to make a statement on how they really view the multi-stakeholder model and who ultimately controls the policies and decisions that are made.**
- d. It is also worth noting that the Bylaws currently state that the BGC's determinations are final and are intended to establish precedent for future actions. ([Article IV Section 2.15](#))

III. **What did the BGC do Wrong Here?**

- a. First, there was a lack of respect shown to the party bringing the request for reconsideration.
 - i. The BGC uses a litigious and disrespectful tone throughout the entire decision. The BGC uses common litigation terms like "In support of its argument", or declares as both the party defending the action (and ultimately the judge) that arguments are "without merit", etc. These are very common litigation tactics intended to undermine the credibility of the opposing party. This should never be language used by the ICANN Board in dealing with any one of its institutional structures. Its ok for the BGC to "disagree" with a position raised; but it does

not have to use this as an opportunity to attempt to mock or undermine those who have volunteered so much of its time, energy and resourced defending the very existence, purpose and mission of ICANN.

- ii. The BGC Dismisses arguments by the Non-Commercial Stakeholder Group's by engaging in legalistic word play. (eg., yes the staff said if *could* be considered policy....but saying something "*could be* policy" is not saying the same thing as "it is policy." It was clear to the world what was meant when the statement was made by the CEO. If the CEO made a mistake in that statement, own up to it. Tell us you made a mistake, make the correction and move on. Don't engage in a legalistic debate as to what the term "could be" actually means in order to try and rewrite history. We expect more from an entity charged with protecting the public interest.

b. To the merits:

- i. Problem 1: Despite not being essential to the decision of whether the ICANN action was in contravention to existing policy, there is a large focus on whether what it did was in fact policy or implementation of an existing policy. Rather than stating that the NCSG was unable to show a violation of an "existing policy" and ending the debate there, it states that if anything, the ICANN action may have contravened " a previous implementation of a policy" and therefore, that would be ok.
 1. It assumes, we believe wrongly, that if the ICANN action involved "implementation of an existing policy", there is no need to follow any sort of multi-stakeholder process.
 2. In fact, if it is implementation, the BGC asserts that ICANN staff and board is free to act as it sees fit.
 3. And who is the ultimate arbiter of whether something is implementation or policy...it is the ICANN staff and board with no mechanism for appeal or challenging that assertion.
 4. Stated differently, if the ICANN staff or board believe that something is implementation (i) no one can challenge that assertion, (ii) there is no obligation for the ICANN staff or board to listen to the GNSO or the community for that matter.
 5. **WE BELIEVE THIS IS WRONG, AND FOR THIS REASON, NEEDS TO BE STRUCK FROM THE DECISION.**
 6. Even if something IS implementation, that should not be a reason to circumvent the multi-stakeholder model. It is true that different processes and procedures may be applied, but that does not mean you should be free to ignore the rest of the community (who may have much more experience and knowledge in the subject matter than the staff or board).

- ii. **Problem 2:** With respect to the role of the GNSO, the BGC essentially argues that if the GNSO acts or takes any position in any manner outside of a formal PDP, there is nothing that requires that the ICANN Board adopt any such action. **{and this is technically true}**.
 1. But it goes further in stating that even if staff acts in direct contravention to a GNSO act or position outside a formal PDP, there is not even a requirement that the Board even consult with the GNSO.
 2. So, if the GNSO goes through its bottom up processes and takes a position or gives advice, the BGC states that the Board is free to completely ignore that advice without even engaging in any dialogue with the GNSO, (the body “responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.”)
 3. The GNSO should not allow this to stand even if what the BGC is legally in accordance with the current Bylaws. There is no reason why we should not be afforded the same treatment and respect as the GAC when recommending Policy to the Board (whether through a PDP or not).
 4. This is why I have recommended that the GNSO propose to the ICANN Board a change to the Bylaws requiring that the ICANN Board, at a minimum, consult with the GNSO (the body under the Bylaws responsible for developing and recommending substantive policies related to gTLDs) if the ICANN Board is going to take an action that is not consistent with a documented GNSO action, statement, advice or position, it MUST consult with the GNSO.

There are a number of other flaws, but due to time constraints, my formal asks are the following:

1. **To the ICANN Board (or here the New gTLD Program Committee):** Even if you adopt the ultimate outcome, to reject the reconsideration request, you throw out this rationale.
2. **To the GNSO Council:** Move forward with making our views known to the Board and to formally recommend changing the Bylaws to respect the GNSO’s role within the ICANN structure and the Multi-Stakeholder model.
3. **To the ATRT:** Review the accountability measures, including the reconsideration process, which to date has demonstrated that it is a meaningless accountability mechanism.
 - a. In the last 10 years, there have been 15 decisions all denied reconsideration
 - b. All it looks at is whether process is followed or if an action contravenes an existing policy.
 - c. But, what if on the substance, the staff or board just plain just get something wrong.
 - d. In that case, there is no review or accountability.

Thank you.