

TRANSCRIPT
GNSO Bylaws Implementation Drafting Team
Wednesday 31 August 2016 at 1300 UTC

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All call recordings can be found here: <https://gns0.icann.org/en/group-activities/calendar>

Attendees:

Farzaneh Badii
Steve Metalitz
Darcy Southwell
Amr Elsadr
David Maher
Edward Morris
Steve Debianco

Apologies: Matthew Shears

ICANN staff:

Julie Hedlund
Emily Barabas
Nathalie Peregrine

Coordinator: This call will now be recorded. You may now proceed.

Nathalie Peregrine: Thank you very much, (Derek). Good morning, good afternoon, good evening everybody and welcome to the GNSO Bylaws Implementation Drafting Team call on the 31st of August, 2016.

On the call today we have Amr Elsadr, Ed Morris, Steve Metalitz, Steve DeBianco, David Maher, Farzaneh Badii and Darcy Southwell. We received an apology from Matthew Shears. And from staff we have Julie Hedlund, Glen de Saint G ry, Emily Barabas and myself, Nathalie Peregrine.

I would like to remind you all to please remember to state your names clearly before speaking for transcription purposes. Thank you ever so much and over to you, Julie.

Julie Hedlund: Thank you very much, Nathalie. This is Julie Hedlund. And welcome everybody to the GNSO Bylaws Implementation Draft Team call today here on Wednesday 31st of August.

And we do have a couple of people who have put themselves forward as co-chairs. If you don't mind I can go ahead and run the call and so we have our co-chairs confirmed and then I can turn it over to them.

So just the usual first order of business, the statements of interest, does anybody have any changes to their statements of interest that they would like to announce? Hearing none I'll go ahead and proceed to review the agenda.

Our first item is to confirm Steve DelBianco and Amr Elsadr as co-chairs and then to confirm the time, date, frequency of the drafting team meetings. And I see that David Maher is entering, good. Welcome, David. We are just running through the agenda. So item 4, confirming the date, time, frequency of the meetings.

Item 5, to continue to review the table summarizing the bylaws changes affecting the GNSO and consequential procedural changes, additions potentially needed. And Item 6 is next steps.

So does anybody have anything, any other business or any other items they would like to add to the agenda? Hearing none then I'll proceed to Item 3. At our first meeting we had two people who volunteered as co-chairs, Steve DelBianco and Amr Elsadr.

And I have Amr's hand up. Please go ahead, Amr.

Amr Elsadr: thanks, Julie. This is Amr. Yes, just to be clear, I did volunteer but the intent on my part was to assist and support Steve. I'm perfectly happy with him leading this group. I was also thinking that we are meant to be doing work on this group with a very tight time – within a very tight timeframe so I figured just in case he may need some help or support I'd like to be there to provide it when needed. Thanks. So just thinking, you know, I mean, not necessarily co-chairs but, I mean, I'm perfectly happy with Steve chairing this group and me assisting and supporting them in any way I can. Thank you.

Julie Hedlund: Thank you very much, Amr. And I do see in the chat Steve DelBianco says, "Do need the help, Amr." And Steve, you have your hand up. Please go ahead.

Steve DelBianco: Yes, Amr, please do. Let's do co-chairs. As you say, the timeframe is very short and we will need to divide up the work to get this done in time so by all means please do co-chair. Thank you.

Julie Hedlund: Thank you very much for that. And sorry for that interference there. But I have had – I have a dying phone and now I see the other phone I've picked up is also dying. I'm switching over again. Pardon me. Hold.

Hello, this is Julie Hedlund. Can you hear me?

Steve DelBianco: We do.

Julie Hedlund: Hello?

Steve DelBianco: We hear you, Julie. Julie, can you hear us?

((Crosstalk))

Steve DelBianco: While Julie is dialing back in, what does everyone else think about this call time every Wednesday as we move ahead? We have to get this done by the end of September. So what about weekly calls at this time for 90 minutes? What do people think about that? David?

David Maher: No objection.

Steve DelBianco: And, okay. Don't know whether you can hear us, Julie, but certainly Nathalie is on the line. We can dispense of the line item agenda Item 4 just confirm that we will do 90 minute calls every week at this day and time. Fantastic.

Next item is the review of the table as well as the notes concluded on the last call. And, Amr, if it's okay with you I thought we would ask staff to be a little more explanatory about the changes that were made on the 30 August draft particularly Annex D because I wanted to understand whether they have picked up all of the notations that came from Steve Metalitz in the work that the IPC had done.

So the document you've put into the Adobe isn't actually the latest document. The latest document is the one that says Updated 30 August. So I guess you're putting in the one that's the redlining, is that correct?

Julie Hedlund: Actually, this is Julie Hedlund. It looks like that is the Annex D document, not the other document. Hold on please.

Steve DelBianco: Both documents are the same content, it's just that you change the label to say Annex D and put 30 August in the heading.

Julie Hedlund: Actually there are two different documents.

Steve DelBianco: I'm so confused.

Julie Hedlund: Julie Hedlund again. One is the original document we circulated that did not have Annex D. And the other one is a new document that you would not have seen that is just Annex D. And what staff and endeavor to do was, first, with the original document that we had circulated, that was without Annex D, we did a comparison of the staff document with the table that Steve Metalitz had sent around.

And then the new document is just Annex D. But that has also been compared against the table that Steve Metalitz sent and incorporates comments from that table, questions and comments from that table into the analysis of Annex D.

Steve DelBianco: Thanks Julie. So which document do you recommend that's all of us used for today's call?

Julie Hedlund: What I have thought, and was going to try to bring up here now, and I want to make sure I get the right one up, is – and that's Annex D – this one. That we would continue with the document that we had begun discussing last week which is the one without Annex D and the one where staff made the changes to reconcile staff document with the table that Steve Metalitz sent. Happy to proceed in any way that you think would be useful to you.

Steve DelBianco: Steve Metalitz, I would just look to you to give us a view as to whether you think that the IPC comments you submitted have been reflected here or is that something we need a little more time for you to figure out?

Steve Metalitz: Thanks. This is Steve Metalitz. I am going through this document, which just arrived yesterday. I actually had one specific comment on it and one general comment on it. There is one area that I found where I think there's a question or an issue that hasn't been flagged and it has to do with Section 6.3 about acting through – out how the decisional participants will act in this empowered community group.

There's one big question there which actually encompasses lot of the other issues is how will that GNSO – staff has down here the GNSO needs to agree on how such other persons could – in other words we have to designate who will represent us on the administration. But they don't have there how – we have to decide how that person will be instructed. Because there are many new responsibilities for the GNSO acting as one of the decisional participants in this empowered community group.

So one question is who will instruct that – one question is who will choose that person? How will that person be chosen? And the other question is who will instruct that person as to while the different, you know, there's literally dozens of decisions but that – or issues on which that person might have to weigh in as part of the empowered community. So that's the one area I've seen so far where I'm not sure that it's been captured in this document.

My general point is that the document reflects an assumption or a bias that these decisions will be made by the GNSO Council and talks about whether the Council needs new procedures. And, you know, it talks about whether if the GNSO Council receives a petition on a particular topic how it should act on it.

There's nothing in the bylaws about the GNSO Council receiving a petition, it's the GNSO receiving the petition. The GNSO Council, under the bylaws as they now stand, is the manager of the policy development process, period.

And so I think – I'm not going to suggest that we necessarily go through and delete all references to the GNSO Council in the right-hand columns in this chart but let's just be aware that in many cases this chart is reflecting the assumption that this will be done by the Council. And I think we have to look at that in each case and ask if this activity part of the management of the policy development process, because if it's not then we have – we need to figure out who should be doing this job.

If it is then I think it's pretty clear the Council should be handling it. And it may need some additional procedures but that's a separate story. But I just wanted to flag that general comment here as well as the specific issue that I mentioned on Article 6.3. I think it's page 10 of the redline document. And that's, you know, again I've been going through this, it's organized differently.

And as I said on the last call it's organized perhaps more rationally than the document I submitted which just goes through in order of the provisions in the bylaws. So this is more thematic so it's a little bit hard to match up but that's the one area that I found. Thank you.

Steve DelBianco: Steve, an attorney might well walk through the order of the bylaws were the order of the procedures in GNSO. But being an engineer I looked at a little differently and said there's a what, a who and a how with respect to all of this. And if we come up with a general rule for the who and the how, which is what you just said about Council, it'll be a lot easier to apply that to the longer document that we have.

And when I studied our documents last night, it strikes me that there are only two whats that we need to worry about. One is making yes/no decisions. And that could be with regard to exercising a power, approving and instruction that has been proposed to give to our rep at the CSC. That's the instruction part that you just noted.

So no matter what we do is either a yes/no decision or it's a nomination and an appointment. The nomination and appointment feel a lot less like a yes/no decision because you often have multiple people to pick from. And that would be applicable to whether we were appointing members of the review team under the new bylaws, directors, liaisons or the person who will represent GNSO on the EC administration group.

And there may be more but I found those four areas. So I would suggest that if we were able to get a rule for making yes/no decisions. And when you do

that it would be who would make the decision and how. And the who gets to the notion of Council versus some other GNSO structure. And the how gets to the issue of I guess the threshold of voting and whether there's still a how structure involved. And the majority are super majority. So the who and the how still have to get worked out. But the what is yes/no decisions or nominations and appointments.

And Steve, I note that we look in the bylaws and it says that the GNSO Council is responsible for managing the policy development process as described in 11.3. But then 11.3 goes on to describe how Council itself, each house votes for ICANN Board seats. So the bylaws have, for several years, and included actions for Council that don't involve policy development. And the only example I'm just throwing out to you is that the Council picks the two Board seats.

And by virtue of that we know that Council has stepped outside of the policy development process parameter many times and it usually does so with the generic rule of a majority of each house. And like you, I'm not satisfied in assuming that that's the way it has to be in the future. We could suggest that for these purposes we will come up with a new voting rule. This was what you talked about as Track 3, I think on the last call. We could come up with a new voting rule for how Council, if it's Council, decides to proceed.

So what I was suggesting is that if we came up with a rule for making yes/no decisions and a rule for doing nominations and appointments, and we were satisfied with that rule, it would be relatively easy to apply those rules to the entirety of these documents. And that would be a completely different method than going through the documents one row at a time in each table because we are dealing with, in every case, a yes/no decision or a nomination.

So I'd love to hear what you think about that. Steve Metalitz.

Steve Metalitz: Yes, thank you, Steve. I think that's a very useful distinction. And it's probably true that these fall into those two – these new powers fall into those two categories. I would just say that we might not have one rule for all instances of each category. So, you know, it might be different for who we appoint to one group as opposed to who we appoint to another group.

But I think it's a very useful tool for trying to decide – trying to figure out how to respond to these bylaws changes to be focusing on how do we pick somebody to represent us or to speak on behalf of the GNSO in a particular instance? And then how do we instruct that person?

There are also instances in here where it just says the GNSO decides whether, for example, to support a petition that comes in.

Steve DelBianco: Yes, Steve, I was articulating a yes/no decision as to how to support a petition. That would be a yes/no decision. And then here would be a yes/no decision as well; let's suppose you and I came up with a resolution to instruct our EC administration rep...

Steve Metalitz: Right.

Steve DelBianco: ...and we would put that in front of the decision making body and they would either approve or not approve our instructions. And so I was lumping that giving of instructions along with deciding whether to exercise as decisions, yes/no decisions that had to be made.

Steve Metalitz: Yes, okay I think that's, as I said I think that's a very useful distinction and might make our work more efficient. Let me just respond on the question of the existing bylaws. You're absolutely right, the existing bylaws do give the GNSO Council of the duty to select a Board member so I have no problem with that.

That's not the GNSO Council stepping outside the boundaries of what's in the bylaws. It is beyond management of the policy development process and so you're right and my earlier statement was probably much too simplistic.

What we are concerned about is the GNSO Council stepping outside the boundaries of its powers under the existing bylaws. And it's done that quite a few times, most recently on this, you know, selecting the CSC representative. And as I think our IPC councilors made clear during that discussion, we went along with the GNSO Council doing that even though it was in excess of their powers under the bylaws because there was an emergency; we needed to get this committee set up so that other things could happen so that the transition could move forward. So we went along with it.

But I think it exemplifies the kinds of issues that have led to the formation of this group, which is the Council stepping outside the boundaries of the existing bylaws in terms of its actions. So that's what I think we need to address here.

Steve DelBianco: Thank you, Steve. David Maher.

David Maher: Yes, this is David Maher. I just have not seen any good reason for abandoning the president voting structure. I think in the interest of fairness the idea of the majority of both houses is the only acceptable way of voting by the Council on any issue.

Steve DelBianco: David, it's Steve DelBianco. Let me reply to that in one regard. On the first call we did discuss the fact that if Council spoke for the GNSO there isn't an assumption that it must use the de facto majority of each house. It's up to this group to decide whether to do that. And then Steve Metalitz and I both talked about another track which says that there's no requirement or assumption that Council speaks to the GNSO on all matters in always, that the GNSO has a structure, it hasn't been sort of activated as the decision making body yet, but it could be.

So coming from the Registry Constituency you might have the belief that you prefer to use the current mechanism of the Council with a majority of each house, then I understand why that would be the case. But at least at this stage of our work, with five weeks ahead of us, four weeks ahead of us, we should at least consider multiple tracks.

And that's how we laid out the last call. We suggested that one track would be to assume that Council would express the GNSO's views and to go on and explore the decision making thresholds for Council if it did yes/no decisions about PTI or the empowered community, if it made a nomination to the Customer Standing Committee.

And so even if you assume that Council speaks for the GNSO, we still could end up with a new voting or threshold rule. And a separate track was could GNSO structure itself exercise decisions and nominations without having to go through Council? At least, speaking for myself on the first call, I suggested that with the very short timeframe that the first work we should do, in my opinion at least, was to assume the Council spoke for GNSO and quickly come up with decision rules for these yes/no decisions and nominations and appointments, apply those to all the bylaws obligations and opportunities, and see how that shapes up.

That could be a relatively quick project. But in parallel we ought to also explore whether GNSO, the broader GNSO, might have a way of acting without having to run it through Council.

And, David, since your hand is still up, David, go ahead and reply.

David Maher: I understand your position. And I'm not trying to foreclose discussion. But I still go back to the fundamental principle of I see it as the fairness in the voting, whether it's (unintelligible) GNSO or by the Council.

Steve DelBianco: I understand. And I will note that the voting of majority of each house and the splitting of house was subsequent to a GNSO review that was done six years ago. And it really was focused pretty tightly on the GNSO's activity, the Council's activity of policy development particularly policies that affect contract parties.

And that structure of voting has a lot of very specific language in it with regard to PDP and policies and consensus policies. And all of that is certainly tailored to the split between the houses. But that may not apply to holding the corporation accountable and weighing in as the empowered community. That isn't really policy development.

Challenging a budget, challenging a bylaws change, spilling the board, since that really isn't policy development – it might be related to policy, I get that, but since it's not policy development we shouldn't have to assume that the split of houses and the majority of each house is the only fair rule for making those kinds of decisions.

And then, David, before I go back to you I noted in the chat something that really confused me because the new bylaws, when they describe in Section 17 they describe how Council would make decisions regarding PTI, CSC and IANA functions review. And that really struck me because here the new bylaws are saying for certain decisions that are part of the new accountability structure, it is Council itself that does so.

And I'm wondering from staff is that what the underlying CWG and CCWG reports had? Did those reports specifically say Council? Or did they just say the empowered community and the ACs and SOs? Julie or Nathalie, any idea on that?

Julie Hedlund: This is Julie Hedlund. I don't off the top of my head. I'm happy to go back and look at the final report. I think, that it is the same language because I think

that the bylaws – that the drafting of the bylaws is trying to be faithful to the language that the CWG and CCWG had in their reports. But I will check.

Steve DelBianco: Section 17 would be the one that I would bring to your attention. And I do find in Section 17 of the new bylaws quite a bit of inconsistency. There are some times, like for a CSC charter, it'll indicate that the GNSO, not the word "Council." But in other sections of 17 it'll specifically identify the word "Council."

And that inconsistency it could just be a drafting discretion, and that's fine too. I just wanted to understand if the research can be done after the call in how many instances was the word "Council" something we carried over from the community's approved reports? And if so, it carries a lot more weight than if it was just simply a drafting discretion that none of us really caught.

Yes, and Steve Metalitz, you're asking whether it's anything out of 17 – anything outside of 17.3(d) and, you know, I don't know, Steve. That was definitely one place where I saw it. But it may well be that other places – have you looked, Steve, more comprehensively to see if Council was identified in other sections?

Steve Metalitz: I'm just scanning through the chart here and I don't see it mentioned. But I agree with you, let's go back and have a look at that. I think if it's – if it appears in one place that is at least some evidence that it's simply a drafting error. But let's take a look. Maybe something else.

Steve DelBianco: Right. So for the folks on the call, I'll take 17.3(d) and Julie Hedlund is saying it does occur elsewhere. And 17.3(d) looks like this. I'll put it in the chat. Do you see where it says the majority – simple majority of each of the councils. So David Maher, I hope you take note of that because it doesn't say a majority of each house.

And then again at the end of the sentence it says, “pursuant to each organization’s procedures.” But the first part of the sentence says the simple majority of each of the councils. So there’s at least one instance, Julie suggests there are others, where the new bylaws specifically identify Council, not GNSO, Number 1. And Number 2, put in the word of a vote of a simple majority.

And I worked much harder on the CCWG than the CWG and in – so therefore some of this specific instructions on how decisions are to be made and the voting thresholds and who makes them, right, some of that could have come over from the CWG.

Who on our call, in our group, was part of the CWG? Nobody. Wow, so a number of you were active at the CCWG, but none of you were on the CWG. Okay, we’re going to need some help to dive into that.

Amr Elsadr: Steve, this is Amr. Yes, Steve, this is Amr. Matt is not on the call but he was quite active on the CWG so maybe he can weigh in on this question either on list or next – during our next call. Thanks.

Steve DelBianco: Thank you. I would wonder whether we can count on staff because of the short timeline. We can’t really wait until the next call to ask Matt. So I would ask staff if you could please help us to identify instances where Council was called out specifically as opposed to the word “GNSO” and places where 17.3(d) identifies the vote of a simple majority as an example. So it’s the how and the who which was the two concepts Steve Metalitz brought up earlier on the call.

It’s the how and the who, wherever those were explicit, if so, was it a carryover from the underlying report or was it a drafting discretion? And, Julie, given the short timeframe, is that reasonable that that could be done, say, by the end of this week and circulated by email?

Julie Hedlund: This is Julie Hedlund. I'm going to try to do it today.

Steve DelBianco: Fantastic. Thank you Julie. And Farzi, you're right, our deadline is extremely aggressive but we were chartered as a drafting team with September 30, not to complete all the work but in fact we are supposed to – let me see what it says. We're supposed to come up with an implementation plan by September 30. And there's any knowledge meant that after September 30 there would be subsequent work for language and for procedures.

So it strikes me that we don't have to have specific language on each and every procedure, but an implementation plan to get it done. Is that the understanding of the rest of you about our charter?

Okay, so, Farzi, yes, I know this is aggressive but we've got to work towards September 30. Farzi, I think you might agree if one assumed Council made the decisions and you just used Council's default voting structure, which is the majority of each house, we could all agree to that and submit and we would be done. But I don't think that really does justice to this task. These aren't policy development decisions, they're decisions outside, in many cases way outside of the development of policy that affects contract parties.

It's policy – policy matters once in a while, and it might be related to policy but spilling the Board, doing a transparency inquiry, challenging and decision of the Board, those things are different enough that the GNSO is one of the five members of the decisional body called the empowered community and we need to understand how it is the GNSO indicate its decision, its yes/no decision when presented.

Okay, Julie, I'm reading your chat. You say, "Per staff that is the intent of the charter and implementation plan but not development." And so and implementation plan, just to blue sky it, it could suggest that the implementation plan suggests that here is how the GNSO expresses its decisions and here's how GNSO makes nominations and appointments.

And those are really the only two things we have to come up with, the only two tools we have to design. And if we design those tools it isn't really that difficult to apply those tools across the entire Annex D, all 40 pages of it.

Amr, tell me about "just a bit."

((Crosstalk))

Amr Elsadr: It took me a minute to get off mute. Yes, yes, just a bit easy, that was just a little joke.

((Crosstalk))

Steve DelBianco: Oh got it, sorry. No problem. No problem. Hey, Steve Metalitz, go ahead. Your hand is up.

Steve Metalitz: Yes, thank you. I think one other piece of information that might be helpful here is – and maybe it's a question of in the implementation plan, some of these issues, you know, we just went through this with appointments to the CSC. That had to be done on a very short timeframe for various reasons and so the Council went ahead and did it using its normal procedures.

It might be possible to project which of these are going to have to be in place before others. So for example, and I'm not 100% sure about this but if the new bylaws are in place and ICANN has a budget cycle and we know approximately when ICANN will come out with its, you know, next budget, that is the point at which it has to be decided, you know, and maybe the GNSO has to make some decisions here and have somebody to make those decisions about whether to challenge that budget.

That's a new power that we know is going to come up at least potentially come up whenever the next – the first budget cycle occurs that is subject to

the new bylaws. And perhaps it would be – whereas on the other hand other things are much more contingent, at the other extreme you might say, spilling the Board is only after a lot of other steps are gone through. And, you know, that's not something that's going to – we could be pretty confident that's not something that's going to happen next year. There's just not time for all of those steps to occur.

So it might be helpful to think about which of these, you know, new procedures or new structures or new voting processes, if we decide to recommend those, need to be in place sooner and which ones could wait until later. I'm not competent really to make that differentiation but those who are more familiar with the new bylaws and the new powers might be able to do that and give us some guidance.

Steve DelBianco: Steve, let me react to that before going to Farzi. By viewing the certain yes/no decisions as being different than other yes/no decisions I could see where you might come up with that, trying to figure out which yes/no decisions might have to be made sooner because I would say to you that yes or no, should we challenge the budget, yes or no should we still the Board, whether those were initiated in the GNSO were initiated by other parts of the empowered community, they're still yes/no decisions.

And if we adopted the engineers approach of hey, what's our rule for who and how we make a yes/no decision regarding the empowered community we do have our to solve that problem. And it wouldn't have been necessary to sequence our work to say wow, a budget challenge yes/no decision is so fundamentally different than a spill the Board yes/no decision that we might need different thresholds and different groups that make them.

And that's an element of complexity I was speaking to avoid and having a general tool for how, who and how we make a decision, a yes/no decision and who and how we make a nomination regarding the empowered community, the CSC, the PTI.

If in fact, we go through every single row of the table it might well be a single decision rule can apply. And I did want to suggest that let's suppose we never had this drafting team, that Paul McGrady didn't get a bee in his bonnet about this and we never worried about it. Council, by default, would do what it just did for the CSC nomination.

Council would do what it did when it decided whether GNSO would approve the CWG final report or what Council – what the GNSO would say about approving the CCWG final report. Those words policy development matters. And yet the Council debated and voted with the majority of each house, and in both cases unanimously supported it.

So even if this drafting team was never convened there wouldn't be a challenge to answer an October 15 decision of whether to challenge the ICANN budget. The Council would do what it has always done. And it's not as if GNSO would find itself unable to express its voice. It would come through Council using the default rule.

So I assume with your statement that you don't want to have the default rule in place just in case something comes up. Did I get that right?

Steve Metalitz: Yes, can I respond or do you want to have Farzi go first?

Steve DelBianco: Yes, Farzi, would you mind if Steve responded and then we will go to you?
Thank you, Farzi. Go ahead, Steve.

Steve Metalitz: Thank you. Yes, no I do not want the default rule to continue because I do not want the GNSO Council to continue to expand its unconstitutional conduct, and that's what we're talking about. These are powers that it doesn't have under the bylaws and so we shouldn't be exercising them unless and until the bylaws provide for that.

But – and I understand the attraction of your, you know, one rules to fit all for yes/no decisions and if we can do that great. I'm not sure that these yes/no decisions are commensurate. I'm not sure that the yes/no decision on challenging a budget is commensurate with yes/no decision on spilling the Board.

I think whatever mechanism we have, if it's a spilling the Board question, we probably want to have something pretty close to unanimity in our group to go ahead with that. I'm just guessing that. Maybe I'm wrong.

On the budget, maybe not. You know, people might disagree and if we come up with some rule about how that would be decided and by whom, you know, that's a little bit less fundamental, let's put it that way.

So I understand the attraction of what you're talking about but even from an engineering perspective you might have a different yes/no decision on, you know, went to have a coffee break and on when to launch an ICBM. So that's all I'm saying is that we might have to look at these are little bit on a case-by-case basis.

I take your basic point. I think it's a very useful way to proceed. I was just suggesting that if we bog down on some of these, there may be some we can take a little bit longer to work out. That's all. Thanks.

Steve DelBianco: Yes, Steve, I did want to make two observations on that. Number one is that the empowered community have different thresholds for what it defines as consensus once the five elements of the empowered community weigh-in. So for instance, spilling the Board means no more than one of the five empowered communities says no. So we already have some thresholds built into the empowered community consensus counts.

You are suggesting further distinctions about what constitutes a super majority or consensus within GNSO before we throw our vote into the

empowered community. So I just wanted to note that there is a second level of determining consensus within the EC.

And then with regard to constitutional purity, I think you would agree the Council is and has for many years, readily strayed from its constitutional charter on policy development, most recently with the CSC pick, but at hundreds of instances regarding review team members and a variety of things that Council expresses an opinion on or sent a letter, answers a letter.

And I did want to point out as you know, in 17.3 the new constitution actually does say that Council itself makes certain decisions that are outside of policy. So we do have a constitutional confusion and chaos here that is going to make this a challenge to solve. It's not a problem we created, Council has strayed beyond its policy development instruction in the past and probably will do so.

Farzi, go ahead. Sorry to hold you up so long.

Farzaneh Badii: Yes, hi. Farzaneh Badii. So just going back to the implementation plan that we have to come up with, looking at this table I am a little bit confused. For example, under Section 4.3, the questions that are asked in a column on any new procedure required, for example, it said that we should decide on how a decision to initiate an IRP, who would pay for representation. Are these questions that we need to discuss during this period until 30 September?

If not, then I think we need to kind of highlight them and say we will attend them later so that it won't get too messy. Thank you.

Steve DelBianco: Farzi, I mean, you're asking the critical question and there are two ways to answer that. I think the answer, start with the word yes is that our instructions by September 30 has to suggest who and how that IRP decision would be made. That is part of our charter. We don't have to have the exact words of

the procedure but we should say who, is the Council, or some other structure of GNSO leaders. And how is the voting rule. That's the who and how.

And the answer is yes, we are supposed to suggest how that decision, the IRP yes/no decision is made. There are two approaches we could take to get that work done. We could go through the table one row at a time and come up with a de novo rule. And the alternative approach that I was recommending is let's try to design a mechanism for who and how decisions like that and who and how makes nominations.

And those two who and how rules could be applied throughout the table. Others have noted in the chat, like Darcy and Steve Metalitz when he spoke, that's when we apply those rules to the table we may, on our own, suggest that a simple majority of the GNSO seems relatively cavalier for such a impactful decision as spilling the Board. And we may end up wanting to suggest different thresholds which is the how part without changing the who it is.

The challenge in front of us is significant if we try to design a non-Council method of GNSO expressing its will. I am unaware, in my dozen years at ICANN, I am unaware of situations where GNSO and its underlying stakeholder groups and constituencies separately came to a decision and communicated it outside of running it through Council.

If anybody is aware of when we have done it in the past let's discuss it right now to see if we have a model to follow or we have to cook this up do novo. Steve Metalitz.

Steve Metalitz: Yes, thanks. This is Steve Metalitz. I think we discussed it last time, that at least informally we've had a couple of occasions where the heads of all of the constituencies and stakeholder groups got together and presented in the public forum a position on behalf of the GNSO. The most recent example that I recall, and there may have been others, was on this question of whether you

could have a transition without accountability, I mean, to put it, you know, kind of in very general terms.

At the beginning of that process, and I can't remember which I can meeting it was but Kristina Rosette who was...

Steve DelBianco: London.

((Crosstalk))

Steve DelBianco: London meeting.

Steve Metalitz: Thank you. Thank you, your memory is much better than mine. But they said we got together, you know, this wasn't a Council statement as I recall, this was a statement of the various constituencies. So it's been done informally. I agree with you it probably hasn't been done formally, I'm not sure.

Steve DelBianco: Steve Metalitz, I agree and remember you brought that up and fondly remember us expressing that opinion at the mic and yet that isn't anything that's anticipated in the bylaws. It was simply making a statement. And you're right, any group of people can get together and make a statement. But is anyone else aware of an instance where the constituent parts of GNSO formally responded to a public comment period or formally made a decision or took an initiative that didn't involve Council?

Go ahead, Amr. And I ask the question because if we can learn from experience it might teach us what to do or what not to do with regard to this. Because as we explore the track of having something other than Council, we look at the GNSO, and it's a pretty interesting animal. I mean, it has stakeholder groups, it has constituencies; at least one constituency has interest groups, I'm thinking of the Registries. Sorry with, one stakeholder group has interest groups then it. Other stakeholder groups have constituencies.

There is at least one, the NCSG, where individuals join the stakeholder group and not necessarily a constituency below it as far as I understand. And Ed Morris and Amr can correct me on that if I don't have that right.

So discovering how the GNSO would express its opinion, okay thank you Ed Morris, you're agreeing, for us to design a means for the GNSO to express a decision that doesn't involve Council if the challenge that is impossible to do in 30 days, and yet we could start the work.

And I have to wonder whether the GNSO review we've just concluded, it's my belief that it makes no change at all to the structure of GNSO or the structure of Council. But I'm going to ask staff and anyone else on this call to verify that. Does the current restructuring plan that we are implementing right now make any changes to the GNSO or Council's methods of decision-making?

Go ahead, Amr.

Amr Elsadr: Thanks Steve. This is Amr. I believe you are spot on. I think you're absolutely correct. I can't think of any instance where any of the constituent parts of the GNSO made any decisions on behalf of the entire SO. There are – there have been means, for example stakeholder groups or constituencies, to participate in cross community efforts on behalf of themselves apart from the GNSO.

If I'm not mistaken, the cross community working group on Internet governance, for example, began that way as an NCSG and At large effort if I'm not mistaken. It devolved into more than that now; now the GNSO Council has chartered that group along with the ccNSO Council and ALAC.

But, I don't think that any of these really apply here. And mean here we are talking about the GNSO in its totality, I mean, as a decisional participant in the empowered community all the references I see are to ICANN SOs and

ACs. And I can't think of any instance where any decision has been made on behalf of the GNSO that didn't involve the Council. That's just my input.

Thanks.

Steve DelBianco: Steve Metalitz.

Steve Metalitz: Yes, Steve, you're right, it would be a big job to – although I think it may not be quite as big as it you are portraying it to come up with a new structure. And fortunately, we don't have to do that by September 30. But we do, if we can, need to try to decide whether that new structure is needed and if we have guidelines for how we should proceed.

But I think, at least my understanding is, and implementation plan does not necessarily mean we have to come up with a new structure in 33 days or whatever it is, 32 days. So please let's not overstate what the challenge would be. Thanks.

Steve DelBianco: Okay. Fair point. And to David Maher's statement that he made at the beginning of the call, if the structure stayed at Council, that's the who, we could still recommend in our implementation plan that how Council makes a decision on a PTI, CSC, IRP. And that how does not have to be a majority of each house. That was designed six years ago as a de facto way that the Council would make decisions when we were assuming Council would be mostly focused, but not entirely focused on policy development.

So our implementation plan – and we talked about three tracks, one of those tracks is if the who is Council the how doesn't have to be a majority of each house. It could be a majority of Council for instance. It could be a super majority of Council votes. And it might not require a house structure when it comes to a decision on who to nominate for CSC or whether to exercise a decision power like blocking a budget.

And now I think we have to keep all those opportunities alive at this point but acknowledged the fact that if we come up with a simple tool for your yes/no decisions and nominations it's possible that we could lay that out any proposal.

Now if our implementation plan were not implemented the de facto rules would be a majority of each house using the same way Council operates today on non-policy matters. They would continue to do that even if the implementation of our recommendations took several months to go one.

Earlier in the call Steve Metalitz challenged us to consider a prioritized approach. And a prioritized approach would try to predict which kind of new decisions would be required in the short-term and try to propose a new rule or confirm an old rule for how to make a decision on things that might come up in the short-term.

I'd like to sound out the group as to whether Steve's prioritization approach is the one we should pursue. And Julie Hedlund, thank you for confirming that the changes – there are no changes to the Council structure or voting rules as part of the GNSO review, but it's not just Council, Julie.

I would ask whether there are any recommendations that we are going to implement as part of GNSO review that affect say the Commercial Stakeholder Group or that affect the Registry Constituency with regard to the brands. Are there any other structural changes that are in there? And I'd look for you to answer that if you could, Julie. Thank you.

I'm hearing a signal. Okay it's gone. Thank you.

Steve Metalitz, let me ask you to speak again to the prioritization approach and that out a bit because if we're going to pursue that path that's very different than the general rule path that I was proposing. I'd like to figure out which of them we are going to do. Go ahead.

Steve Metalitz: Well I'm not sure I was suggesting a prioritization path. I was actually asking if anyone could assess which of these are likely to be needed or we'd likely to need to have an answer on sooner than later. And again, I gave the example of a budget where we know a budget is going to come and so we could predict with some certainty that, at least in theory, someone could seek to challenge the budget the next budget cycle that occurs during – after the new bylaws come into effect.

That's probably something where you'd need a rule faster than you would need it on spilling the Board. That was my only suggestion, it was not to prioritize our discussion but just to have a sense of which of these decisions, and again I agree with your basic methodology of figuring out who makes the decision or who gets appointed in some cases and then what are the basis for making a decision. I think that's a very useful way to proceed. I was just adding to that whether we can get some assessment of which of these things will be coming up faster than others.

Steve DelBianco: Thank you, Steve. I'm told by staff we only have two minutes left on this slot. Steve, let me suggest that it would be challenging to predict which empowered community decisions we would face. But you could certainly say that a budget one might come sooner than a spelling of the Board one. But in IRP could come soonest of all. So for standpoint of realism, it's likely to be in IRP where the empowered community is presented with a decision should the community back in IRP.

And in those cases if we were unable to finish our work and get the rest of our group to approve it in the GNSO, the de facto method would be Council is the who, the Council makes the decision; and how would be a majority of each house.

And so let's acknowledge that it could happen in the next 30 to 60 days. And if it did do we feel so strongly that we don't want to support that who and how

that we'd like to propose a new who and a new how in the next 30 days?

That's a quick question for you, Steve.

Steve Metalitz: Well, look, I'm not going to – if you think that it complicates things to have the assessment of which things are most likely to come to ripeness sooner then I'm happy to drop it. I'm not going to, you know, let's not get into a Latin battle here. But de facto is not the same as de jure. And you shouldn't...

((Crosstalk))

Steve DelBianco: Sorry.

Steve Metalitz: ... assume that just because the Council has acted repeatedly outside of its constitutional limits that it will always continue to do so.

Steve DelBianco: Understood and I'm terrible at Latin so...

Steve Metalitz: I only know lawyers' Latin so that's not even...

((Crosstalk))

Steve DelBianco: Okay. All right but let's keep alive as one of our action items is that if be empowered community is faced with a decision, we need to understand if members of this group have a consensus to say we are not content to allow that to be done by the Council with the majority of each house. And that would become a priority item for us in the next four weeks to suggest a different method of addressing empowered community decisions.

And did in fact we come up with that as a general tool we will have solved that by keep alive the idea that spilling the Board could require a different majority threshold than something like challenging a budget or nominating a person.

All right so given that this was scheduled for 60 minutes, I am guessing that staff and participants want to respect that 60 minutes but I'm happy to expand if people wanted to. And Steve, I do see your hand up, go ahead.

Steve Metalitz: No, that's an old hand. Sorry.

Steve DelBianco: Got it. You would have to drop if we tried to go 90 today?

Julie Hedlund: Steve DelBianco, this is Julie Hedlund. Unfortunately, I would have to drop, I have a standing call at 10:00 which I will have to change for future calls.

Steve DelBianco: Thank you, Julie. And I note that Darcy would have to drop as well. And if we're going to lose our key staff member then I propose that we conclude today's call now and we will talk again next Wednesday for 90. But in the interim I will try to circulate some thoughts about this. And I know we are counting on staff to do a couple of things that were requested on today's call.

Are there any other comments before we close the call? All right hearing none, let me think everybody. I think we've made some progress but we've got a lot to do. And Nathalie, I thought we covered this earlier in the call, we confirmed same date, same time, 90 minutes weekly. Thank you.

All right thanks everyone. And have a great day.

Steve Metalitz: Thanks, Steve.

Julie Hedlund: Thanks, everyone. Thanks, Steve. Have a great day.

((Crosstalk))

END