

Subject: Fwd: formal position requirement
Date: Wednesday, October 19, 2011 10:17:05 AM PT
From: John Jeffrey
To: carlosaguirre
CC: Samantha Eisner, Robert Hoggarth, Liz Gasster, Daniel Halloran

Dear Carlos

Thank you for your inquiry. Please see the attached note that I forwarded to the GNSO and the NomCom Chairs.

John Jeffrey
General Counsel & Secretary
ICANN
JJ@ICANN.org

Begin forwarded message:

From: John Jeffrey <john.jeffrey@icann.org>
Subject: Fwd: formal position requirement
Date: October 19, 2011 9:19:12 AM PDT
To: Stéphane Van Gelder <stephane.vangelder@indom.com>, Adam Peake <ajp@glocom.ac.jp>
Cc: Samantha Eisner <Samantha.Eisner@icann.org>, Robert Hoggarth <robert.hoggarth@icann.org>, Liz Gasster <liz.gasster@icann.org>, Daniel Halloran <daniel.halloran@icann.org>
Bcc: John Jeffrey <john.jeffrey@icann.org>

Dear Stephane and Adam,

I write to you jointly as Chairs of the GNSO and the NomCom. I received the attached note from Carlos Dionisio Aguirre regarding the NomCom appointees to the GNSO and noted the need to provide advice on the ICANN Bylaws.

Article X, Section 3.e requires the NomCom to appoint three members of the GNSO Council. Of those appointees, one shall be non-voting, and "one voting representative shall be assigned to each House . . . by the Nominating Committee." This Bylaws provision requires the NomCom to assign voting representatives among the GNSO's contracted and non-contracted party houses. Pursuant to the Bylaws, this assignment work should not be left to the GNSO.

I appreciate that with the GNSO Restructuring, the initial assignment of the single NomCom Appointee (NCA) selected by the NomCom in 2010 did not pose a lot of complexity. However, now that the restructured form of the GNSO Council is in place and the NomCom is making appointments for multiple NCAs, it is important for the NomCom to complete the assignment process and identify the roles of the NCAs to the GNSO. If possible, I encourage the NomCom to complete this assignment process prior to the ICANN AGM in Dakar, Senegal and the seating of the new GNSO Council members (28 October 2011).

Due to the NomCom's appointment rotation (2 NCAs to the GNSO in odd years, 1 NCA in even years), it may be beneficial for the NomCom and GNSO to consult together to determine if the GNSO would be better served by having both voting NCAs rotate at the same time, or if it is preferable to have 1 voting and 1 non-voting NCA rotate at the same time, with the term of the other voting NCA rotating in even years. Further, as the NomCom and the GNSO continue dialogue

on identifying skill sets for the NCAs to the GNSO, skills desirable for each role (Non-Contracted House NCA, Contracted House NCA and Non-Voting NCA) could be identified for NomCom consideration.

I look forward to seeing you in Dakar. If you have any questions, or we can be of assistance to you, please let us know.

John Jeffrey
General Counsel & Secretary
ICANN
JJ@ICANN.org

From: carlosaguirre
To: john.jeffrey@icann.org
Subject: formal position requirement
Date: Mon, 10 Oct 2011 16:09:01 +0000

Cordoba, October 10th 2011.

Dear John Jeffrey
ICANN General Council

I'm writing to you, to ask your formal opinion as General Council in relation with the meaning of one clause of the ICANN bylaws.

First, let me introduce myself: I`m Carlos Dionisio Aguirre, some of my hats are: Lawyer Specialist in business law, teacher of Economy, and Informatic`s Legislation at National University of Cordoba in Argentina , International Director of AGEIA DENSI (Academic NGO), Vice President of ADIAR (Argentinian Cyberlaw Lawyers Association), Former ALAC member elected and reelected by LACRALO, and currently ICANN NCA GNSO Council.

Im very interested in your particular opinion & intelligence (understanding) about the following clause, and as ICANN General Council:

"BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS...

ARTICLE VII: NOMINATING COMMITTEE ...

Section 3. GNSO COUNCIL

1. Subject to the provisions of Transition Article XX, Section 5 of these Bylaws and as described in Section 5 of Article X, the GNSO Council shall consist of:

- a. three representatives selected from the Registries Stakeholder Group;
- b. three representatives selected from the Registrars Stakeholder Group;
- c. six representatives selected from the Commercial Stakeholder Group;
- d. six representatives selected from the Non-Commercial Stakeholder Group; and
- e. three representatives selected by the ICANN Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO Council including, e.g. the making and seconding of motions and of serving as Chair if elected. **One Nominating Committee Appointee voting representative shall be assigned to each House (as described in Section 3(8) of this Article) by the Nominating Committee."**

This formal asking, has to do particularly with the last sentence in the paragraph exposed and highlighted in red.

Some opinions by me, first: (you can contradict if you believe I am wrong, please)

- Bylaws are mandatory into ICANN environment for all and everybody.
- All into ICANN environment are regulated by our bylaws.
- everybody have to respect and fulfill the clauses content in ICANN bylaws.
- If bylaws are representing "the legal" into ICANN environment, not fulfill this rules means "not legal". So, the fact committed after that, is null, or at least could be reviewed.
- Bylaws were made by all community for ICANN community, and it is not possible that "some parts" in agreement (through detour the decisions of the whole community), choose to change, against what bylaws are saying.

Now :

I am asking formaly your position as ICANN General Council, because:

IMHO the sentence mentioned is absolutely clear, transparent, no need interpretation and shows what the bylaws want in relation on it.

IMHO If the NCA appointees were not assigned to each house (into GNSO), the situation would constitute a violation or at least a serious lack of commitment by NomCom.

IMHO if GNSO after that (the previous situation) convalidate this (the no assign by GNSO) and decide "by consensus" of two houses (CPH & NCPH), assign one of them on each, is also a violation of our bylaws, or at least act against it.

IMHO If the situation occur. What happen with the resolutions taken by GNSO? Having in account that the quorum was obtained on this way (with some members bad designated in each houses, or designated against bylaws rules.

IMHO consider that the situation is serious, because is happening right now (and is not new), affect seriously "the transparency" (what is part of CORE) of ICANN. And IMHO is the same to say to all community: "don` t take in account bylaws rules, because somebody can change, in agreement with other, if it is onvenient for they
."

That is what I feel about this complicated situation, and my legal formation forced me to claim for a formal interpretation of this clause, in order to solve (IMO) the serious situation what is happening, and keep safe the concept of "transparency" into ICANN.

Before to conclude, and give in advance my thanks for your prompt response, I want to say that in this event there are not involved my own interests. Im part of the ICANN community, Im part of the civil society into this, and Im currently acting by me, in my personal capacity, and in their representation.

Lastly I Think would be good to get your definition and opinion in order to give advice and define this controversy. Is my intention give publicity to this

Thanks, in advance

All my respect.

Carlos Dionisio Aguirre

NCA GNSO Council - ICANN

former ALAC member by LACRALO

Abogado - Especialista en Derecho de los Negocios

[redacted]