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The GNSO Intellectual Property Constituency (IPC) offers the following comments on Draft Recommendations of the Accountability and Transparency Review Team 2 (ATRT-2). See http://www.icann.org/en/about/aoc-review/atrt/draft-recommendations-15oct13-en.pdf.

IPC commends the ATRT-2 for an extensive and comprehensive report. We comment here on only a few of the Draft Recommendations that we consider to be most salient.[1]

Draft Recommendation 2: Develop Metrics to measure the effectiveness of the Board's functioning….

IPC supports this recommendation and believes that one important metric that must be included is instances in which each Board member recuses himself/herself from deliberations or decisions based upon a conflict. Importantly, the data should indicate whether or not the recusal is based upon a one time conflict or if the conflict is a recurring one. Obviously, a Board cannot be as effective as possible if Board members are unable to fully participate. For example, the new gTLD program – one of the most important initiative's in ICANN's history – has been delegated to a subsection of the full Board due to recurring conflicts. This is not an ideal outcome. Including a set of recusal metrics will help the community gauge the extent of this problem and help it formulate solutions during the next review of the Board.

Draft Recommendation 7: Explore mechanisms to improve public comment….

IPC supports these recommendations but believes they should be made stronger and more extensive.

IPC believes that ATRT-2's evaluation of how well ICANN has implemented the recommendations of ATRT-1 regarding the public comment process is too charitable. Although there have been some noticeable improvements in recent months, overall the public comment system remains somewhat dysfunctional. IPC approaches this issue from the perspective of a heavy user of the system, and notes also that several of its members submit public comments nearly as frequently as does IPC as a whole. We believe that the experience of all these submitters is that their comments are often not seriously considered, and that their ability to have meaningful input via the public comment process is questionable. This reality does not reflect well on ICANN's assertions that it exemplifies a successful implementation of the multi-stakeholder model for addressing important policy issues.

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[1] We note that IPC's comments on these specific ATRT-2 Draft Recommendations are largely consistent with those filed by other commentators, including the US Council for International Business, the At-Large Advisory Committee, and the personal comments of Becky Burr, Paul Diaz, and Chuck Gomes.

ATRT-1 recommended that "timelines for public notice and comment should be reviewed and adjusted to provide adequate opportunity for meaningful and timely comment." It was obvious that the public comment periods on major policy issues was far too short to allow for meaningful review of extensive documents, sometimes hundreds of pages in length. In IPC's case, in order to adequately represent its scores of members (including organizational members that themselves consist of hundreds, thousands or even tens of thousands of members), comment deadlines must allow time for a deliberative process of reaching consensus on IPC positions, especially on new or significantly changed issues, and for drafting and reviewing formal public comments for submission. Deluges of simultaneous or overlapping ICANN public comment proceedings on major issues greatly intensify the problem.

ICANN's response to the ATRT-1 recommendations, to our amazement, was to shorten the standard public comment period from 30 to 21 days (though it later seemed to retreat from this change). It also added a reply comment period. The fact that the reply comment period has often been used to submit initial comments is not, as the staff evidently told ATRT-2 (see p. 37), because community members were ignorant or resistant to education about "the proper use of the Reply Comment cycle"; rather, it was a rational response to ICANN's seemingly irrational decision not to provide longer public comment opportunities on major and complex issues.[2]

IPC is pleased to learn from the ATRT-2 report that "staff … is considering lengthening the time periods for comments, having heard complaints from the community that the current time period allowed was too short" (pages 37-38). Staff should not have waited until the ATRT-2 process was almost complete before actually listening to and acting on these complaints, which have been consistent for years. But late is better than never.

It should not be an insurmountable task for ICANN to differentiate among two or three broad categories of public comment processes. Proposals that address major policy issues; that have resulted from contentious debate and discussion among broad segments of the ICANN community; or that address topics that have attracted large numbers of detailed and analytic public comments in the past, should fall in a category for which extensive public comment periods (and reply periods) should be allotted, perhaps up to 90 and 30 days respectively. Issues that are less broadly applicable, that are more technical, that have moved swiftly and without contention up to the point of public comment, or that concern topics that have not, in the past, attracted much public comment, could be on a faster timetable. Although ATRT-1 called for such "prioritization and stratification," this has not occurred. ATRT-2 should insist on it.

IPC urges ATRT-2 to flag, in its final report, at least three other serious problems that have been encountered in the public comment process in recent years:

(1) The ICANN public meeting hiatus. The "clock" for setting comments deadlines is supposed to be suspended during ICANN public meetings, on the reasonable supposition that

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[2] ICANN staff also publicly colluded in this so-called "improper use" of the reply cycle. On numerous occasions, ICANN staff filed comments on behalf of the At Large Advisory Committee, consisting solely of the statement that ALAC would submit its initial comments during the reply cycle. See, as recent examples, http://forum.icann.org/lists/comments-draft-picdrp-02oct13/msg00002.html and http://forum.icann.org/lists/comments-igo-ingo-final-20sep13/msg00004.html.

many of the people who would otherwise be involved in drafting and debating comment submissions are otherwise engaged on business of importance to the community. While the hiatus is often observed, there have been a number of exceptions, including this public comment process itself, in which the initial 32-day round closed the day after the last day of the ICANN Buenos Aires meeting. ICANN should use the hiatus period consistently to exclude the dates of ICANN public meetings in calculating comment deadlines.

(2) Actions taken before or immediately after completion of public comment periods. In some cases, the timing of public comment periods has cast grave doubt on whether public comments would actually be considered before decisions were taken, or whether ICANN was simply "going through the motions" of providing an opportunity for public comment. For example, the public comment deadline on the draft FY 12 budget was June 17, 2011. http://www.icann.org/en/news/public-comment/op-budget-fy12-17may11-en.htm The Board Finance Committee met the very next day and approved the budget without changes.[3] http://www.icann.org/en/groups/board/documents/minutes-bfc-18jun11-en.htm As IPC stated in its comments, http://forum.icann.org/lists/op-budget-fy12/msg00001.html, "the community's first opportunity for meaningful comments now closes June 17, barely a week before the Board is scheduled to approve the budget, and less than two weeks before the beginning of the FY12 fiscal year (July 1). We fully expect to be told at the Singapore meeting that it is too late to make any significant changes in the budget and operating plan." When we asked in Singapore how Board Finance Committee members had reacted to a specific budget proposal contained in our submission, one BFC member candidly stated "the answer is I never saw it." See http://singapore41.icann.org/meetings/singapore2011/transcript-fy12-op-budget-20jun11-en.pdf at 26. As IPC noted in its comments, such behavior "lacks accountability and transparency, and raises serious questions about ICANN's fulfillment of its obligations in this regard under the Affirmation of Commitments."

(3) Clarity about the scope of public comment sought. ICANN staff does not always make clear the scope of issues on which comment is sought.[4] For example, on March 7, 2013, ICANN staff posted for public comment a draft revised Registrar Accreditation Agreement, noting that it was "the first time in the nearly 18 months of negotiations that community comment is formally sought on this document." http://www.icann.org/en/news/public-comment/proposed-raa-07mar13-en.htm There was no indication that any part of the draft RAA was "out of bounds" for comments. IPC submitted extensive comments, including detailed recommendations for changes in Whois-related aspects of the RAA. See http://forum.icann.org/lists/comments-proposed-raa-07mar13/msg00012.html, especially at pages 7-9. ICANN staff made no substantive response to any of these comments, revealing for

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[3] In fact, due to time zone differences, the Board Finance Committee meeting actually preceded the expiration of the comment deadline by a few hours. See http://singapore41.icann.org/meetings/singapore2011/transcript-fy12-op-budget-20jun11-en.pdf, at page 8.

[4] There have also been several instances in which ICANN has been unclear about the deadline for receiving public comments. The most recent example involves this public comment period. The main public comment page, http://www.icann.org/en/news/public-comment, states the deadline as: 13 December 2013 [23:59] The specific page for ATRT-2 recommendations, http://www.icann.org/en/news/public-comment/atrt2-recommendations-21oct13-en.htm, states the deadline as: 13 December 2013 - 11:59 UTC. This carelessness adds unnecessary confusion to the public comment process.

the first time in the final paragraph of the summary of public comments that it had decided that "further revisions to the WHOIS related obligations in the draft 2013 RAA were viewed as inappropriate," citing various Whois-related activities then underway, none of them relating directly to the RAA, and all of them already in process at the time the draft RAA was released for public comment. See http://www.icann.org/en/news/public-comment/report-comments-proposed-raa-22apr13-en.pdf at 19. As IPC noted at the time, "this behavior undermines the credibility of ICANN's stated commitment to meaningful public comment procedures." [5]

Recommendation 12: Financial Accountability and Transparency

IPC strongly supports the five recommendations made on page 8 of the ATRT-2 Draft Recommendations, and also urges that these recommendations be accorded priority status in the Final Report. ICANN's explosive recent growth in revenues, expenditures, and staff levels – well documented on pages 63-64 of the ATRT-2 draft report – has simply not been matched by corresponding improvements in how it explains to the community its spending priorities and decisions, nor in how it engages stakeholders in setting these priorities and making these decisions. The impression is given that ICANN gives top priority to opening new offices around the world and diving headlong into new policy areas such as Internet governance, without directing sufficient resources to "operational excellence" in the organization's core business of administering the systems for IP addresses and domain names. The only effective way to dispel this impression is through the types of reforms spelled out in these recommendations, including (as sketched out in the preceding section of these comments) by "ensuring that sufficient time is given to the community to provide their views on the proposed budget and enough time for the Board to take into account all input before approving the budget." ATRT-2 Draft Recommendation 12.5.

If anything, the ATRT-2 draft report understates the scope and intensity of concerns expressed by a wide range of ICANN community entities about this issue. Besides the statements of the GAC and the comments on the FY14 budget cited on pages 62-63, the IPC has frequently expressed its concerns about the lack of transparency and accountability in the ICANN budget process and its financial reporting to the community. For example, in its comments on the FY 13 budget, see http://ipconstituency.org/PDFs/IPC_comments_on_FY13_budget_framework-2-23-2012.pdf, IPC cited to its extensive comments in previous budget cycles and noted that "a recurring theme in these comments is our frustration over the lack of transparency and high level of obfuscation in the ICANN budget." Similar themes have been struck by many other entities in comments submitted over the past few years.

Unlike many organizations, both for-profit and not-for-profit, which must face tough decisions about spending priorities in the face of flat or diminishing revenues, ICANN has enjoyed years of increasing revenues. But this makes even more critical the need for a transparent process for setting spending priorities, and an accountability mechanism to ensure that the results of that prioritization process are fulfilled. IPC urges that Recommendation 12 be

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[5] For further details, see footnote 4 of IPC's comments on the final draft version of the 2013 RAA, at http://forum.icann.org/lists/comments-proposed-raa-22apr13/msg00002.html .

given a high priority in ATRT-2's final report, and that achievement of a much higher level of financial accountability and transparency be enshrined as a strategic objective for ICANN over the next few years.

IPC appreciates the recent statements of ICANN board leaders and senior staff supporting this ATRT-2 recommendation. See http://audio.icann.org/meetings/buenosaires2013/board-csg-19nov13-en.mp3 (audio file of ICANN board meeting with Commercial Stakeholder Group in Buenos Aires, November 19, 2013). (An unofficial transcript includes: Cherine Chalaby – "You make an excellent point. You have not seen the strategic plan in its entirety. There will be a five year financial plan inside the strategic plan as well…. We one hundred percent agree with your point and want to raise it even higher to a completely different level." Fadi Chehadé – "We are hugely upgrading that whole area. We have a new Chief Operating Officer who is focused on that. As Cherine Chalaby said, it is the first time we moving away from expense management to financial planning within ICANN, not just budgeting, and now leaning to true financial reports—the kind you would expect from any organization our size.")

Respectfully submitted,

INTELLECTUAL PROPERTY CONSTITUENCY

By Steve Metalitz, Vice President