Committee on ICANN Evolution and Reform
Recommendations for the Evolution and Reform of ICANN:

Comments of Tucows Inc.

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The ICANN Mission

Tucows accepts the ICANN mission statement as set forth in "Working Paper on ICANN Mission and Core Values". Tucows accepts that ICANN has policy-making responsibilities. It agrees with the six implications that the paper draws with regard to the reform of ICANN that flow from the discussion of ICANN's mission.

Board Composition

Tucows agrees that the ICANN Board must be responsible for managing the ICANN policy-development process, and that to do so it must have input from the various components of that process.

Tucows considers that the Board of ICANN should be composed of 15 members, as follows. Five should come from *appointing organizations*.

- The CEO of ICANN
- The Chair (or delegate) of the GNSO Steering Committee
- The Chair (or delegate) of the CNSO Steering Committee
- The Chair (or delegate) of the GAC
- The Chair (or delegate) of the RSSAC

Tucows considers that the Nominating Committee, to be discussed further below, should nominate 10 other members of the Board, until such time as a suitable electoral system can be worked out.

Directorships for the chairmen or delegates of the Address Supporting Organization (ASO), Security Advisory Committee (SAC) and the Technical Advisory Committees should not be automatic, though we think the Nominating Committee would normally think they have a strong claim to be made directors. Our concern here is to find a way to keep down the total number of directors by diminishing entitlements.

All members of the Board should have a vote.

Members selected by the nominating committee should sit for periods of three years, with staggered selection.

Board Selection Process

The members of the Board who sit *ex officio* from supporting organizations and the like should be determined by their organizations according to written rules that have received the general approval of the Board. The sole basis of challenging a chairman or delegate of the supporting organization would be violations of the rules of selection or election of that constituency.

Second, competence at the Board level should be the supreme criterion for the selection of members. Competence, character, and ability to contribute to the work of the Board should be the highest desiderata; geographic and cultural diversity will follow naturally and should not be selected for separately from competence.

Third, Tucows does not consider that a nominating committee should select in perpetuity all the members of the Board who do not come from appointing organizations. The Nominating Committee formula exists to overcome problems of defining an electorate and an election process. We acknowledge that these problems are real and cannot be solved in a relevant time frame of the coming year. Ultimately however, an electorate of several thousands or tens of thousands may be identified, and in that case, it would be appropriate for there to be an elected element to the Board of ICANN, of say one third its membership. Otherwise the risk is great that over the long term, the Nominating Committee and the ICANN Board will not receive enough outsiders to leaven the process.

Nominating Committee Composition and Operations

Confidentiality of Discussions

Tucows considers that the Nominating Committee can usefully consist of people selected by supporting organizations and ICANN constituencies. It is important that these people have complete freedom to decide whom to nominate for the Board, and that they not be bound to party or constituency positions.

They should be allowed to discuss matters in complete confidence. They should not be bound to reveal the nature of their discussions. It is vital that members of the NC should be able to make candid remarks and observations about potential members of the Board whom they are discussing.

Prohibition on Transfer to the Board

It is also highly important that members of the Nominating Committee not have further ambitions within the ICANN organization for a Board seat. The risk in an unelected system is that a lack of electoral competition will produce a clique or set of cliques who will mutually reinforce each other, to the long-run lessening of the effectiveness of the organization. A condition of sitting on the Nominating Committee should be exclusion from the Board of ICANN, either for a period of ten years, or forever. Nominating committee members should not be sitting on the Committee to enhance their chances of being on the Board.

A transfer of retiring or departing members of the ICANN Board to the Nominations Committee should be allowed, but not the other way around.

Size and Composition

The Nominating Committee should consist of ten to fifteen people.

Tucows believes that if the At-large community has found a way to hold valid elections, or if some comparable subset of people linked to ICANN can organize itself appropriately, then it would be desirable for that group to elect, say, half the members of the Nominations Committee. In other words Tucows has not given up hope that there will be in time some suitably sized group of people, sufficiently interested in the issues that ICANN faces, that they could form an electorate and elect, if not the members of the Board, people suitable to sit on a nominations committee. Tucows is not offering concrete proposals at this time as to how this group should be constituted; it is however saying that the goal of an electorate, even an indirect electorate, should not be abandoned permanently.

On the assumption that such an electorate will not be defined and organized in a relevant time frame, Tucows proposes the following.

The Nominating Committee should be selected by the following organizations. Tucows believes that those organizations have a sufficient interest in the success of ICANN that

they can be relied upon to produce members of the Committee able to do its work effectively.

Appointees to the NC should be appointed or selected from the following appointing organizations in these numbers:

- Board of ICANN – 2
- General Assembly – 2
- Registrars in the GNSO – 2
- Registries in the GNSO - 2
- CNSO – 1
- ASO – 1
- Technical Advisory Board – 1
- Root Servers – 1
- Government Advisory Committee – 1

It will be objected that the composition of the NC is largely from the organizations that constitute ICANN. We think that is its particular merit. The members of the nominating committee are debarred from sitting on its Board. They cannot advance themselves. They are drawn from those who have an interest in the future of ICANN, from constituencies with diverse origins and interests, which diversity may serve to blunt partisan interests and provide for multiple voices at the table.

Term of Office
In addition, the term of office of members of the Nominating committee needs to be given some thought. If selections for the Board are to occur every three years, and if they are also to select people for the Steering Committees of the Supporting Organizations, their choices will carry more weight with the passage of time, if they lean in a particular direction. Nominating committee members should probably have an upper limit after which they can no longer sit on the Committee. The organizations that appoint them should have their own rules for selecting and removing their Nominating Committee delegates, but an upper limit of six years, or two rounds of nominating ICANN Board members, is recommended.

Terms limits for Nominating Committee members, and the process of selecting them from appointing organizations, illustrate and important idea which has not received enough attention in ICANN reform proposals, in Tucows' view. Tucows considers that considerable attention will have to be given to the by-laws of the constituent organizations in any reorganization of ICANN. We shall return to this theme later.

No Selection by the Board of Nominees
We do not consider it wise to allow the Board of ICANN to select from among the nominees or to decline to accept a nominee to the Board. It is our view that the Board should be obliged to accept all nominees in a given selection.

Policy Development Structure (and Contract Adjudication and Enforcement Structure)

The principal problem for registrars has been that ICANN has proven incapable of making decisions or enforcing its contracts on matters of commercial practice. Transfers and deletes are the bread and butter of the registration business. Matters that could have been settled within the registrars, with the assistance of ICANN's Board or staff, have become matters for consensus building rather than contract enforcement. In that case the party most threatened by change or by clear rules can always claim that the absence of silent parties undermines the clear wishes of the vast majority of people or businesses who choose to express themselves in working organizations. The second fault of the constituency structure has been that players without a direct economic interest in the outcome are automatically involved by reason of their membership in the constituency.

In short, ICANN's dispute resolution processes have been confused with policy development. They are not the same. Processes appropriate to policy development, such as consensus building, are not really germane to the interpretation and enforcement of contracts. The DNSO has been assigned a task for which it is not by nature suited, and the recommendations for a GNSO, while an improvement, do not sufficiently focus ICANN on commercial dispute resolution.

Accordingly Tucows is as much concerned with a **policy enforcement structure** as it is with a policy development structure. This implies that the organization needs to recognize the centrality of contracts to ICANN's existence and organize itself around solving the issues of those who have contracts. The current proposals do not do this.

Tucows notes that the Committee believes that "standing policy-development bodies, combined with proper staff support, a structured policy-development process, and time limits for action, are more likely to encourage consensus where possible than single-purpose working groups or task forces".

It is our experience that task forces and working groups have been ways for the constituencies to get the work done; they have been tools of the policy development bodies. They do not stand in opposition to policy development bodies. Policy development is necessarily slow, and should be based in consensus. Dispute resolution, on the other hand, works differently, has different purposes and requires different structures.

The substance of the committee's proposals regarding the GNSO is to;

- Put the country codes in a separate group;
- Use the existing set of constituencies, minus the country codes, as the basis of the GNSO (viz. IP, Business, ISPs, non-commercial, registrars, registries);
- Add some more members of the GNSO steering committee appointed by the Nominating Committee to break any logjams;
- Work more closely to timetables;

- Permit ICANN staff to support the process;
- Appoint the Chairman of the GNSO by the Board of ICANN; and
- Place ultimate responsibility for policy development with the Board of ICANN.

It is Tucows' opinion that these will not suffice to fix what is wrong with the current DNSO, though several proposals have real merit. Competitive issues among registrars and registries are the core of the registration business. Many constituencies have only derivative interests to defend or advance in relation to contractual interpretation of transfers, deletes, and the like. The problems of the DNSO, and its successor, are

- There needs to be a means for *policy and contract enforcement issues* to be dealt with ICANN staff, or by specialist bodies under the general direction of the CEO of ICANN;
- Failing which, policy and contract enforcement issues should be able to come to the Board for rapid resolution;
- There needs to be a means of keeping extraneous players and parties out of certain competitive issues among registrars and registries;
- There needs to be a way of getting away from ill-defined *consensus* and towards particular voting majorities among players whose interests are directly at stake, and
- There needs to be means for the adjudication of contract issues, subject to the oversight and approval of the Board.

Tucows thinks that much more thought needs to be given to

- policy enforcement,
- rapid processes for the staff and ultimately the Board to determine what ICANN's own contracts mean, which are by nature partly contract enforcement and partly policy determination; and
- contract dispute resolution forums and procedures within ICANN.

Contract interpretation and adjudication are as important to the businesses ICANN has generated as policy development. This aspect of ICANN's work is vital, and because it is far away from the Board's attention, it does not receive the attention it deserves in proposals for reform. Software-defined businesses are extremely susceptible to interpretations of rules. Registrars and registries need ICANN's Board to pay as much attention to this are as policy development.

ICANN needs to focus itself on the essential difference between organizations that have contracts with it and those that do not. Accordingly, Tucows considers that the reform of the DNSO into a GNSO, however useful, does not focus the organization sufficiently into those constituencies that have contracts with ICANN and those that do not.

Tucows thinks that the current proposals for the GNSO, by failing to recognize this distinction, will perpetuate the DNSO's inadequacies into the future. The GNSO may do

an adequate job of policy development, but it will not focus itself or the ICANN Board on the radical difference between those with contracts with the organization, and those without.

Tucows supports the proposal for hiving off the country codes, and for staff assistance to the GNSO, a neutral Chairman, and time limits set by the Board of ICANN for the resolution of disputes. We remain concerned that the too many member constituencies are allowed to play in issues that do not really concern their interests, and that the basic problems of the GNSO are not going to be fixed by the addition of more neutral appointees to its steering committee.

As to the issue of staffing of ICANN's supporting organizations, Tucows sees no particular need for ICANN staff to have a monopoly on serving them. People serving committees, supporting organizations and task forces should be able to be hired from a number of sources. In particular, there is no need to rely upon permanently employed staff when contractors can be hired and fired as the need arises. We think the Committee's proposals over specify the solution on this subject, and should not be followed. We do not want to see the development of a centrally-employed bureaucracy.

Policy Development and Contract Adjudication Processes

In the light of the preceding comments on policy-development structure, Tucows is in particular agreement with the concerns expressed by the Committee that there must be

> *"…clear procedures established by the Board for asking for input when needed, receiving input, evaluating that input, and reporting the results of those efforts to the Board, along with any consensus recommendations that have been produced."*

Nevertheless the emphasis once again is on policy development. Tucows thinks that contract enforcement and adjudication is a key role for ICANN, one in which it has been conspicuously weak.

Consequently, the next iteration of ICANN reform proposals needs to focus as much attention on the particular problems of those organizations that have contracts with ICANN. In Tucows view, there needs to be a separate structure for those with contracts with ICANN. These organizations with contracts should also be a part of the GNSO, because that forum may be the appropriate one for developing policy.

The relations of those organizations with contractual relations to ICANN need to be addressed in a distinct office or internal structure of ICANN. Staff should be assigned to competitive issues.

Thus Tucows is proposing an Office of Competitive Issues or an Office of Contractors' Issues within ICANN. It should be a major division of ICANN staff. Its head should be empowered to bring contractual issues to the attention of the Board, analyze positions and enforce agreements. Bodies with contracts with ICANN, such as the registrars and registries, should have recognized ways of bringing issues to the Board through an ICANN Contractors' Forum if necessary.

We have alluded to the possibility that there might be created ways for disputes about the interpretation of ICANN contracts to be dealt with in the somewhat the same manner as disputes about domain names are heard. We do not have a completed plan. We are trying to push into agenda the notions that

- Contract enforcement and adjudication is half the work of ICANN;
- The organization needs to accommodate this reality distinct from and outside of the policy development process;
- Staff need to be assigned to this;
- Some form of dispute resolution of contract issues needs to be devised.

In short, Tucows thinks that the Committee's proposals for a GNSO do not go far enough to sort out the contractual issues that frustrate registrars and registries, from the policy development issues with which the GNSO might prove effective. ICANN is not devoting sufficient intellectual or monetary resources towards operational issues arising from its contractors. This lack of attention needs to be remedied as soon as possible

Tucows is not in a position to elaborate all the consequences of this proposal in this round of comment. Nevertheless we believe that, to be successful, ICANN reform must focus on how the organization fails to handle competitive issues among its contracting parties well, and propose remedies.

Public Oversight and Participation Mechanisms

The proposals in this section of the committee's report gather three issues, which in our view, could be separated according to the rubric of contractors' issues/non-contractors' issues, or operational and policy issues.

The proposal to establish a process to submit violations of ICANN's by-laws to non-binding arbitration is helpful but beside the point. We think this proposal should be considered in the light of the need to radically upgrade ICANN's approach to operational issues among its contractors, and to devote staff resources to resolving their disputes.

Tucows has no objection to the proposals for an Ombudsman or for a Manager of Public Participation, provided always that it is understood that an Office of Competitive Issues or Office of Operations, however named, be created to deal with operational matters, and that the persistent under-appreciation of operational issues be remedied.

Funding

Tucows has no comments on funding at this time, except to say that registrars and registries must be formally consulted and should have the ability to determine their overall levels of contributions. The contributing organizations must have an appropriate say in the budget process.

Government Participation in ICANN

Tucows has no comments on this topic in this round of commentary.

Utilization of Outside Resources

Tucows agrees that ICANN by-laws should confirm the right and ability of the ICANN Board to refer specific issues to outside experts for advice.

Internal ICANN Structure

The proposals made in this section of the Committee's report call for a separate technical operational section to handle ICANN's technical responsibilities. This is akin to the proposal we have made for a separate focus on contractual matters. Tucows agrees with the requirement for a distinct operational section within ICANN.

This section would not be the same as the Office of Competitive Issues we have proposed above. The proposals are similar insofar as they call for ICANN to place greater emphasis on solving contractual and technical operations issues, and different to the extent that one set of issues is largely contractual in nature, while the others are operational.

Conclusion

In conclusion, Tucows thinks that ICANN's principal defect is in failing to solve business disputes arising from its contractual relations to registrars and registries in the gTLD space, and in failing to recognize the organizational implications of that fact. The proposals for reform dwell at great length on policy formulation, to the detriment of focus on operations, in which we include relations with contractors. The formula for the GNSO persists in the error of not segregating business disputes among ICANN's contractors from policy development in generic top level domains generally. ICANN needs to devote half of its energies to solving practical business problems among its contracting parties. At the moment, both the Lynn proposals and the Committee's further considerations continue the over-emphasis on policy development at the expense of the rights and obligations of contracting parties.

More thought and attention needs to be given to this vital portion of ICANN's activities. The measures for the reform of the DNSO in the GNSO still fail to differentiate contracting parties from those without contracts, and to muddle policy development and business dispute resolution. Finally, the staffing and internal structure of ICANN must devote much more resources and conscious attention to the business issues arising from the domain names market.