COMMENTS OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON THE DRAFT REVISION OF THE ICANN BYLAWS

The Intellectual Property Constituency (IPC) of the GNSO appreciates the opportunity to provide comments on the draft revision of the ICANN Bylaw.

A. Section 1.1. – ICANN's Mission

IPC notes the revisions to the Bylaws which implement Recommendation 5 of the Final Proposal of the CCWG-Accountability on Work Stream 1 Recommendations. The Final Proposal suggested a number of changes which were described as "clarifications" to ICANN's Mission Statement. However, while the incisions might be small, the subject of the contemplated surgery is the literal and figurative heart of ICANN – its ability to perform a set of essential functions which are defined by its mandate. In that regard, we commend the drafters of the Bylaws in performing the very delicate task of transposing the CCWG recommendations into the Bylaws through a set of recommendations. We do not agree with or embrace every part of these changes (as described below), but on the whole, the drafters have faithfully implemented the CCWG-Accountability proposals, and in that sense the IPC can support them as a whole – while noting the specific points and concerns below.

- The IPC can support the changes that have been proposed in Section 1.1(c), which now reads:

> "ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority, and nothing in the preceding sentence should be construed to suggest that it does have authority to impose such regulations."

- Importantly, the drafters have defined the verb "regulate" as "impose rules and restrictions on." The second sentence in Section 1.1(c) offers further clarification on the meaning of "regulate" by confirming that nothing in this section implies that ICANN has any governmentally authorized regulatory authority. The Bylaws therefore correctly and carefully clarify that ICANN does not have governmentally authorized regulatory authority to impose rules and restrictions in a unilateral, top-down manner. Furthermore, the IPC notes that the broader framework of Section 1.1 makes it clear that the activities referred to in Section 1.1(c) are not intended to have an impact on ICANN's ability to negotiate, enter into and enforce its agreements with Contracted Parties, such as those agreements are currently configured. While the drafting includes these useful concepts, the IPC wishes to note that the current phrasing of that second sentence is confusing, by referencing the "imposing of *such* regulations," where it is unclear what the word "such" is referring to. The IPC therefore suggests amending the second sentence to read: "For

the avoidance of doubt ICANN does not hold any governmentally authorized regulatory authority."

- The IPC supports amendments to affirm ICANN's ability to enter into and enforce agreements (including public interest commitments) with any party in service of its mission (Section 1.1(d)(iv)). ICANN's ability and responsibility to enforce its agreements is fundamental to the effective execution of the multi-stakeholder model, which is built upon a framework of private contracts as a preferable alternative to government regulation.

- Section 1.1(c) also references Section 1.1(a), which in turn incorporates in the description of ICANN's Mission the policies set forth in Specification's 1 and 4 of the respective existing versions of ICANN's Registry Agreements (RA) and Registrar Accreditation Agreements (RAA). In doing so, the drafters have added a further means of explicitly affirming that the scope of ICANN's Mission encompasses not only the terms and conditions of the RA and RAA, but also the issues, policies, procedures and principles such as the resolution of disputes regarding registration of domain names.

- With regard to the "grandfathering" of existing agreements (section 1.1(d)), IPC commends the drafters for clearly covering all agreements signed by Registrars and Registries regardless of when they are signed, and all renewals and extensions of these agreements – including future agreements which are "based on substantially the same underlying form as" the current Registry Agreements and Registrar Accreditation Agreements. This is consistent with the Final Proposal's position that the language of existing Registry Agreements and Registrar Accreditation Agreements are within the Mission, and that it would be necessary "for the avoidance of uncertainty only" to affirm that in the Bylaws. In doing so, the drafters have ensured that no party may bring a case alleging that any provisions of such agreements are on their face, ultra vires.

- The IPC does note however, that the drafters appear to have exceeded the instructions in the Final Proposal by including in the list of grandfathered agreements (in Section 1.1(d)(ii)(B)-(E)) a range of other contracts and documents which have not yet been concluded. It would be inadvisable and improper to grandfather those agreements and documents, which do not exist in their final form, and which were not the subject of discussion within the CCWG-Accountability. The grandfathering clause was meant to address possibly uncertainty with specific reference to the RA and RAA, and should be limited to doing so.

- The IPC also notes that in Sections 4.3(a)(i) and 4.6(c)(iii) the term "limited technical Mission" is used. As this term is not used other instances of "Mission" in the Bylaws, IPC requests that both uses of this qualifier be deleted as ICANN's Mission is defined in Section 1 with explicit limitations constraining the scope of ICANN's activities. The use of differing terminology here creates confusion, ambiguity and the chance for misinterpretation.

While the IPC has reservations with certain aspects of the changes to ICANN's Mission, the changes as a whole affirm ICANN's ability to negotiate, enter into and enforce agreements in

furtherance of its Mission, and clarify that the terms and conditions of existing agreements are within the scope of its Mission, including as a general matter the types of the issues, policies, procedures and principles set forth in Specifications 1 and 4 to the RA and RAA.

B. Sections 4.2 and 4.3 — Reconsideration and Independent Review

IPC notes that much of the accountability improvements to the ICANN Bylaws have been left to the implementation "Work Stream 2" phase of the intended transition. IPC expects there will be further changes to the Bylaws arising from WS2, and looks forward to actively participating in that work. This work will include, at least, development of CEP Rules, and the referenced, critical work of the IRP Implementation Oversight Team.

The currently proposed amendments in Article IV, to the Reconsideration and Independent Review processes, appear fairly comprehensive but still short of the stated CCWG-Accountability overarching goals to improve these processes and ICANN's transparency with respect to them. IPC provides the following suggestions for improvement.

Sec. 4.2 Reconsideration Requests

4.2(a) Define "long-term paid contractor," especially as to "long-term." Also, Requestors must continue to be able to challenge decisions of ICANN "constituent bodies," as has been held in the *DCA Trust* IRP decision (Final Declaration, ¶¶98-115) with respect to challenge of GAC decisions.

4.2(e)(ii) Define "insufficient or frivolous."

4.2(e))(iii) Define circumstances warranting "urgent consideration."

4.2(f) Define circumstances warranting a finding of "extraordinary costs."

Sec. 4.3 Independent Review

4.3(b)(ii) Include "constituent bodies." This is generally covered by Sec. 4.3(b)(iii)(2) but should also be included here for clarity.

4.3(e)(ii) Define circumstances demonstrating "good faith" participation in the CEP. Add "reasonable" in last clause, so that IRP panel has discretion to disallow unreasonable ICANN legal fees.

4.3(g). Amend "as understood in light of prior IRP Panel decisions decided under the same version of the provision of the Articles of Incorporation and Bylaws at issue" to "as understood in light of prior IRP Panel decisions decided under *any analogous* provision of the Articles of Incorporation and Bylaws at issue." (See, e.g., new Sec. 4.3(i)(i) referring to "prior relevant decisions.") ICANN must not be allowed to disregard the growing body of existing IRP precedent, merely by amending its Bylaws (even immaterially). Also, add "timely" before "filed" in last sentence.

4.3(i)(iii) Define new key term "reasonable business judgment" with reference to applicable law.

4.3(j)(i) In last sentence, amend "training provided by ICANN" to "training developed by the "IRP Implementation Oversight Team" (described in Section 4.3(n)(i)) and paid by ICANN." ICANN cannot be allowed to unilaterally determine the training materials for IRP panelists without community input and development.

4.3(j)(ii)(B) Replace "ICANN" with "IRP Implementation Oversight Team."

4.3(j)(ii)(D) The Board should not have discretion to confirm the panelists that will decide challenges to Board actions, at least not without providing reasoning and subject to defined criteria for refusing to confirm any nominated panelist.

4.3(k)(ii) Consider a "strike" process as used in current IRP proceedings, rather than requiring the party panelists to select the third arbitrator. The "strike" process allows parties to research and strike panelists who are perceived to have any potential bias, or are unduly expensive, etc., which the parties' panelists may not consider important.

4.3(n)(i) Composition of the Oversight Team should be defined, particularly with respect to any participation by ICANN Staff and/or counsel. Moreover, there are existing IRP Rules (including ICDR Rules) that generally have met the criteria of this section, and at minimum should be carefully considered by the Oversight Team with any amendments understood to improve the existing Rules to make ICANN more accountable, rather than replace them wholesale.

4.3(n)(ii) The Board's right to "approval" of the IRP Rules should be circumscribed; they should not be able to pick and choose among the community-proposed Rules nor to amend them without approval of the Oversight Team.

4.3(n)(iv)(D) The Bylaws or IRP Rules should not restrict panel discretion to fashion appropriate discovery in any given case.

4.3(n)(iv)(E) Hearings are permitted at discretion of the panel, per the *DCA Trust* decision. The Bylaws should not restrict panel discretion in this regard.

4.3(n)(iv)(G) Any appeal mechanism would conflict with the core IRP Principles that IRP proceedings be efficient and cost-effective, and that IRP decisions be final – and would materially change the current Bylaws which do not provide any appeal mechanism. The Oversight Team should retain discretion regarding whether to develop any appeal mechanism; it should not be mandated in this version of the Bylaws.

4.3(o)(iv) Amend to read "Require that the ICANN Board take any specified action to remedy its violation of the Articles and/or Bylaws." IRP panels must be able to fashion affirmative relief, rather than merely "recommend" that ICANN address its own failures. The *DCA Trust* panel set out two lengthy, persuasive discussions of this issue (Final Declaration, ¶¶ 118-133, and Final Declaration on IRP Procedure, ¶¶ 96-128), including the fact that ICANN still has not complied with its own Bylaws as to formation of a standing IRP panel, years after adopting the Bylaws and nearly two years after an IRP declaration finding such failure to be a violation of its

Bylaws. ICANN has demonstrated that it cannot be trusted to follow either its own Bylaws or the decisions of IRP panels, and so the new Bylaws must make ICANN more accountable to IRP panel decisions.

4.3(v) Replace "the same version of" with "any analogous provision of." (See, e.g., new Sec. 4.3(i)(i) referring to "prior relevant decisions.") ICANN must not be allowed to disregard the growing body of existing IRP precedent, merely by amending its Bylaws (even immaterially). Also, the Bylaws should require that all parties' briefs and all panel orders and decisions be maintained by ICANN in a searchable format on the Website – many current IRP documents and decisions are not maintained by ICANN in a searchable format.

4.3(w) The Standing Panel may consist of any number greater than 7 panelists, so it may not be practical to have the entire panel hear an appeal *en banc*. It also may not be advisable to have an appeal mechanism, as previously noted. (See also Sec. 4.3 (x) "The IRP is intended as a final, binding arbitration process.") Typically, arbitration processes are not subject to appeal except in very limited circumstances such as conflict of interest.

4.3(x)(iii)(A) ICANN cannot be allowed to "reject compliance with the decision." This is inconsistent with the entire notion of the IRP, as previously noted and exhaustively discussed in the *DCA Trust* panel declarations.

4.3(x)(iv) It is not fair that the Claimant is bound by an IRP decision, but ICANN is not.

4.3(x)(v) Replace "ICANN" with "IRP Implementation Oversight Team." Again, ICANN cannot have complete discretion to develop rules and policies by which its decisions are to be challenged.

C. Review Teams (section 4.6)

IPC remains concerned that the Bylaws should ensure that appropriate participants are selected for review teams, and in particular should guarantee that constituencies or stakeholder groups most directly impacted by the subject matter of particular reviews receive adequate direct representation on those review teams (e.g., representation of the diversity of GNSO interests on the review of gTLD registration directory services [4.6.e] and of gTLD expansions [4.6.d]). This concern could be encompassed within the requirement that teams be "balanced for diversity and skill," though it would be preferable to make this 'most directly impacted" criterion an explicit factor in selection.

Section 4.6(a) directs the development of Operating Standards to guide the selection process. These Standards could provide a path for enshrining this "most directly impacted" criterion in the selection process for review teams. We are disappointed, however, that the selection process laid out in the section 4.6(a) could, under some circumstances, lead to a review team in which there are as few as 3 participants from the GNSO. Such a scenario would make it very difficult to meet the "most directly impacted" criterion with respect to IPC in the two reviews mentioned above.

Section 4.6(a) also vests the selection decision in "the Chairs of the Supporting Organizations and Advisory Committees participating in the applicable review." Under the

current Bylaws, the chair of the GNSO is selected by the GNSO Council and is primarily responsible for GNSO Council activities, which are confined to managing the policy development processes of the GNSO. Giving the GNSO Chair the important new responsibility (in cooperation with a handful of others) to select members of these review teams would be a dramatic expansion of that role, and necessarily requires a complete review of the duties of the GNSO chair and how he or she is chosen and held accountable. Optimally, such a review would be completed before the revised Bylaws enter into force. It would also be preferable for the Bylaws to allow each SO and AC to decide who should participate in the selection process, rather than dictating that the chair of each group do so. This could be accomplished by revising the sentence above to read "the Chairs (or other designees) of the Supporting Organizations and Advisory Committees…."

In general, IPC supports the provisions of this section regarding the timing and frequency of these reviews. We note that under section 4.6.a.v, each review team may recommend amendments to the terms of subsequent reviews on the same topic, which could include timing changes. But we would not at this point support delaying any of these reviews beyond the time frames set forth in the Bylaws.

Specifically, regarding Section 4.6(e)(v) on the timing of the Directory Service Review (currently required under the AoC), IPC does not share the concerns of some regarding the timing reflected in this new bylaw. IPC believes ICANN should begin the Directory Service review as soon as possible. IPC does understand concerns have been expressed that this review may impact policy development currently underway on a next generation registration directory service however we assert that the Directory Service review should occur in parallel with existing PDP work. This not only ensures ICANN meets its requirements to enforce existing consensus policy and contractual obligations, but also gives the newly adopted Bylaws the respect they deserve.

D. Empowered Community (Article 6 and Annex D)

The extensive changes to the Bylaws reflected in Article 6 and Annex D focus attention on the critical role of the "Decisional Participants" in carrying out the functions of the Empowered Community. While some of these roles are quite limited and formalistic, others are extremely substantive and consequential. In this regard, the provision that may at this stage be the most problematic for IPC (as part of the GNSO) is section 6.1(g), which delegates to the "Decisional Participant" entities a wide range of discretion in carrying out these functions, beginning with one job not even listed in section 6.1(g): selecting a person to act on behalf of the entity in the "EC Administration" (see section 6.3.a).

Even a cursory review of Article 11 of the Bylaws, dealing with the GNSO, demonstrates that the current charter and structure of the GNSO is completely unsuited to the new responsibilities that will be thrust upon it under the revised Bylaws. To give just one example, the chair of the GNSO is selected by the GNSO Council and is primarily responsible for GNSO Council activities, which are confined to managing the policy development processes of the GNSO (see Section 11.2.D). Many of the new responsibilities the GNSO will undertake as a Decisional Participant in the Empowered Community have nothing whatever to do with generic names policy development. It is quite unclear that the GNSO Council, as currently authorized by

the Bylaws, is the appropriate venue for choosing the GNSO delegate to the EC Administration, or for making any of the other decisions listed in section 6.1(g); in fact, it is highly questionable whether the GNSO Council currently has the constitutional competence to do so. Similarly, it would be irresponsible (even if constitutional) for the GNSO Council simply to bestow upon its chair the authority inherent in the role of its delegate to the EC Administration, when that chair has been selected by a policy development management body solely to carry out policy development management functions.

In short, GNSO participation in the Empowered Community is entirely dependent on the completion of a process for deciding how (and through whom) that participation will be carried out, and the documentation of that decision through an appropriate amendment to Article 11 and other Bylaws provisions. Optimally, the proposed revisions now before the community would not be brought into force until that process is completed.

The same fundamental mismatch between the structure and charter of the GNSO as set forth in the current Bylaws, and the role it is expected to play in the Empowered Community under the revised Bylaws, may also apply to other SO's and AC's. If so, that is a further reason why a realistic timetable for bringing these revisions into force should be adopted.

E. Article 25: Amendments

IPC supports the decision to treat the Articles of Incorporation as equivalent to a Fundamental Bylaw for the purposes of amendment (see section 25.2.b). Such a basic document should not be subject to amendment solely by the Board, but should require affirmative support from the Empowered Community.

We are troubled by the second sentence of section 25.4, which prohibits the EC, Supporting Organizations, Advisory Committees or anyone else from "directly propos[ing] amendments to these Bylaws." This seems to contradict the preceding section, which contemplates that an amendment may be "the result of a policy development process of a Supporting Organization"; in other words, that it may be "proposed" by an SO. There could also be a variety of other ways in which a proposed amendment would be put forward on which the Board would act. If section 25.4 is intended to mean that the Board acts as a gatekeeper for all proposed amendments, and that no amendment can be adopted without the approval of the Board as specified in Article 25, then it should so state; but the suggestion that only the Board can even propose a Bylaws amendment is objectionable.

Respectfully Submitted,

Intellectual Property Constituency