

GNSO Review Working Party Draft Statement on Westlake Governance's Final GNSO Review Report

Prepared by Chuck Gomes, 17 Sep 15

To: ICANN Board Organizational Effectiveness Committee (OEC)

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In advance of OEC consideration of the Final GNSO Review prepared by Westlake Governance, the GNSO Review Working Party submits the following comments.

Overall we believe that the Review contains some useful recommendations that could contribute to ongoing GNSO improvement and we as a team are committed to contribute to the work that will need to be done going forward to provide additional detail and to assist in implementation. But there is one recommendation that we want to specifically comment on:

Recommendation 23: In order to support ICANN's multi-stakeholder model, all Cs should have seats on the GNSO Council, allocated equally (as far as numerically practicable) by their SGs.

While all of the other recommendations were discussed with the Working Party, the first time that the Working Party saw Recommendation 23 was in the Final Report. In a Working Party Call held on Wednesday, September 16, Westlake called attention to this new recommendation and noted that the rationale was contained on pages 91-94.

Specific Concerns about Recommendation 23

1. As acknowledged by Westlake in their rationale, the recommendation focuses only on the present state of the Council and would not work if any Stakeholder Group ever has more than six Constituencies in the case of the Non-Contracted Party House, or more than three in the Contracted Party House, which does not have constituencies at present.
2. Recommending that "all Cs should have seats on the GNSO Council, allocated equally (as far as numerically practicable)" seems to assume that all Constituencies are equal with respect to mission clarity, member engagement, and contributions to GNSO work. What evidence is there for this? What does 'allocated equally' mean?
3. If this recommendation is implemented it could incent groups to form Constituencies simply in order to get seats on the Council, financial and staff support, and related benefits. Using the Registries Stakeholder Group as an example, additional seats on the Council could be gained by dividing the RySG into more than three Constituencies. That in turn could require a structural change in the Council, which was out of scope for the GNSO Review.
4. Westlake makes the following conclusions in its rationale that are questionable:
 - a. The first sentence of the second full paragraph on page 92 says, "If a Constituency is not represented at the GNSO Council, its input can be marginalized, and its members effectively disenfranchised."

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- i. Westlake assumes that direct representation on the Council is required for a Constituency to maximize its effectiveness.

a) There is no empirical evidence that having direct representation on the Council necessarily increases a constituency's mission clarity, membership, or contributions to GNSO work.

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b) Moving across the board to a constituency rather than stakeholder group model for the election of Councilors would undermine the rationale for doing policy work and agreeing positions at the stakeholder group level. So, for example, the NCSG would likely operate more like the CSG, with each constituency being responsible for fully participating in all processes and crafting its own positions on all issues rather than benefitting from the efforts of its stakeholder group partners. This would be illuminating, but whether it would really increase effectiveness is rather uncertain.

c) Westlake's recommendation would do much to strengthen the construction of tribal silos, perhaps now with moats surrounding them. In NCSG's case, members who are in both constituencies or neither might feel compelled to "choose sides," and the current low-level differences would probably become reified as the high-level tensions Westlake purports to detect and remediate.

d) Moreover, the assumed linkage between constituency representation and effectiveness definitely does not apply with regard to the GNSO's primary function of policy development because participation in working groups is open to all regardless of seats on the Council.

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e) Representation on the Council could impact a Constituency's influence when the Council takes a vote but votes only occur in situations like the following:

- 1) Confirming that a Policy WG has appropriately followed the PDP and WG Guidelines and sending WG recommendations to the Board.
- 2) Election of Council officers.
- 3) Approving motions for miscellaneous Council actions in fulfilling the Council's role as the manager of the policy development process.

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- ii. Westlake also assumes that absence of direct representation on the Council disenfranchises a Constituency.

a) As stated above, a Constituency's ability to participate in policy development is not impacted at all by whether a Constituency has a representative on the Council or not. For example, NCUC does not have representatives on the Council; consistent with the Board's mandate, NCSG Councilors are elected by the entire stakeholder group, and NCSG members from any, multiple or no constituencies can stand and win

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election by articulating a clear vision and demonstrating engagement. Nevertheless, NCUC members participate extensively in policy development and other ICANN work.

- b) It is feasible that a Constituency would believe it has less influence if it doesn't have a seat on the Council and there have been groups that held this view, but that could be remedied by modifications to a Stakeholder Group's procedures to ensure that all of its Constituencies and/or members are properly represented by its Councilors when the Council votes on a matter.
- b. The first sentence of the last paragraph on page 93 says: "Under this model, no Constituency's nominees could hold a majority of that SG's Council positions, even if they won all the remaining elected positions."
- i. Westlake appears to be assuming here that GNSO Councilors have the freedom to vote according to their own personal wishes or the direction of his/her own Constituency. This may be true for some SGs but it definitely is not true of all SGs.
 - ii. For SGs that direct their Councilors regarding how to vote, individual Councilors would have to vote according to the SG directions regardless of what their personal or Constituency position was. So it wouldn't matter whether a Constituency had one vote or a majority of votes on the Council.
- c. The top paragraph on page 94 says: "We have been advised that, when the current structure was developed, there were concerns that to allow an automatic allocation of Council seats to Constituencies might lead to a rush of Constituency applicants. Clearly, this has not occurred."
- i. Westlake is correct that this has not occurred, but the reason it has not happened could very well be because 'automatic allocation of Council seats to Constituencies' was not done.
 - ii. Westlake's point here is not clear. They are recommending 'automatic allocation of Council seats to Constituencies' and thereby risking a rush of Constituency applicants. (See item 4 above.)

Working Party Conclusion and Recommendation

The Working Party believes that Recommendation 23 should not be approved at this time. The Review Team was unaware that Westlake would add this last minute and literally divisive recommendation without providing us a chance to comment. If the Recommendation is to be considered, the GNSO community should first be given the opportunity to conduct its own internal assessment and, if there are some problems that need to be solved, develop possible solutions for them.

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