IPC Comment on Draft ICANN FY17 Operating Plan & Budget and Five-Year Operating Plan Update

1. Introduction and General Observations

The Intellectual Property Constituency (IPC) of the GNSO is pleased to submit comments on the Draft ICANN FY Operating Plan & Budget and Five-Year Operating Plan Update. We note the challenges of translating the complexity of ICANN's budget into readable form and commend ICANN in its attempts to provide transparency as to the process. That said, the length and depth of the budget documents can make them difficult to read and interpret. We also note that ICANN provides open meetings to discuss the budget process. However, the final result should be readable regardless of whether the reader has attended special training. The IPC recommends providing a high level snap shot (no more than a few pages) with overarching themes highlighting increases and decreases in revenue and expenditures. This condensed version should be something that is easily digestible with references to where the community can find more information on specific line items.

We also observe that the boundaries between the operating plan and the budget are often blurred; we have had questions arise from one that were answered in the other and vice versa. We recommend that when future versions of the budget and operating plan are drafted more attention is paid to separating the functions of the documents to provide more clarity.

We are pleased to see ICANN's commitment to creating a budget without resorting to withdrawals from reserves to cover predictable expenses. We note that in FY15 and FY16, the IANA Transition, Public Responsibility and IT were funded out of the reserves.[1] Enough planning has been done around IANA that ICANN should be able to predict costs and balance those costs with revenue rather than reserves.

We have concerns about the plans for contract compliance which will we discuss in greater detail below but we want to emphasize that ICANN's efforts should be focused on addressing complex contractual compliance interpretation issues and working with the ICANN stakeholders to define meaningful metrics. The current rote, mechanized approach to compliance does not serve the community well on the negotiation or enforcement side.

2. Specific Comments on the FY17 Operating Plan & Budget

The IPC submits the following comments and questions regarding the FY17 Operating Plan & Budget. These comments and questions are listed in order of the corresponding Item number.

2.1. Item 3.1, Page 10 --- Resource Utilization

The document calls for a rapid increase in ICANN staffing (increased average headcount of 49.8 FTEs, $9 million increase in personnel expenses --- 16-17% in one year). The last time ICANN staffing underwent such rapid expansion, many of the new staff had little familiarity with ICANN methods of operation and history, and some unnecessary friction resulted. What steps does ICANN plan to avoid a repetition? If training is required, what costs will be incurred by such training? Although about half of the staffing

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[1] The IANA Transition was announced in the 3rd Quarter of FY14. While this may have been an unpredicted expense for FY15, by FY16 this expense should have been accounted for in the budget without the need to resort to reserves.

increase is attributable to GDD/DNS/IANA/Ops, plus IT and Cybersecurity, we still find such training to be necessary.

2.2. Item 3.2, Page 14 – Legacy gTLD vs. New gTLD Fees Disparities

Fixed and transactional registry fees from new gTLDs, projected at $36 million, appear disproportionately high compared to the $48.2 million budgeted from the far larger legacy gTLDs. While fixed fees might be too high in general for new gTLD registry operators, we are particularly concerned that they are improperly allocated without regard to vastly different TLD business models.

More specifically, it seems fundamentally unfair to apply a fixed registry fee of $6,250 USD per quarter for all TLDs below a 50,000 transactions threshold, when closed and predominantly defensive .Brand TLDs account for roughly one-third of all new gTLD applications. Put another way, it would appear that .Brand TLDs are being disproportionately relied upon for ICANN revenue, even though they represent a tiny proportion of second-level domain names under management. For example, .Brand TLD registry operators, such as Apple Inc. or Yahoo! Inc. have activated only a mandatory minimum number of second-level domain names, yet they pay ICANN precisely the same fixed quarterly fees as certain open TLD registry operators, such as Vox Populi, which currently has over seven-thousand domain names under management.[2] It is the latter category of TLD registry operators that are more likely to be controversial and thus ultimately more costly to ICANN in terms of political, administrative, compliance and legal resources.[3]

Accordingly, changes in the fixed registry fee structure for new gTLDs, specifically lowering fixed fees for closed .Brand TLD registry operators, may be necessary as ICANN evaluates its Draft ICANN FY17 budget. See also discussion of "risk" amounts attributable to new gTLD fees in paragraph [3.3] below.

2.3. Item 4.1, Page 22 – Costs of Transition and Accountability Enhancements

While it is understandable that ICANN could not, at the time of publication of this document, confidently project the costs that would be incurred for all these activities, the $6-9 million "placeholder" figure is significant and should be reflected in the operating budget. It amounts to an increase of 5-7% in the overall baseline budget presented in item 3.1, and exceeds the amount of the budgeted excess of revenue over expenses. What is the timetable for arriving at a more precise figure? Will the budgeted excess simply be eliminated, or will cuts have to be made elsewhere in the budget to accommodate this additional expense?

2.4. Item 5.1, page 29-30 --- New gTLD Program

The reserve for "risks" -- estimated at the time of applications to constitute about one-third of the application fee -- seems likely to prove excessive. "Actual risk costs" of the program to date are stated as $5.0M in the Feb. 2016 estimate; and although "future risk cost through the end of the program cannot be estimated," a projection of $8.8M through FY 16 appears in the "multi-year view" chart. The same chart projects "net remaining funds" of $89.3M as of Feb. 2016. Is it ICANN's expectation that "future risk costs" for the remainder of the program will be an order of magnitude (10x) greater than they have been to date? If not, how will ICANN allocate the significant excess funds that appear likely to remain at the end of the program?

2.5. Item 7.5, Strategic Goal 1.3, page 40 --- "quality of service index"

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[2] *See* nTLD Stats, *.SUCKS* (last visited April 25, 2016).

[3] *See, e.g.* Domain Incite, *ICANN Reports .SUCKS to the FTC Over "Predatory" Pricing* (April 9, 2015); Domain Incite, *.SUCKS Sends in the Lawyers in "Gag Order" Fight* (January 23, 2016).

Quantifying ICANN's success in making its policy development processes "more accountable, inclusive, efficient, effective and responsive" will be very difficult. IPC suggests based on recent experience that "# of public comments submitted in ICANN public forums" could be a questionable metric in this context. In the comment forum on the draft report of the PPSAI Working Group, by some counts over 11,000 comments were submitted, but the vast majority of them simply parroted one or two talking points that reflected ignorance or misunderstanding of the proposal that was submitted for comment. Based on the uniform response, it is highly unlikely that more than a fraction of these commenters read any part of the Working Group's initial report; it is far more likely that these comments are reactions to the way third party websites described the report, which bears little relationship to the report itself. This should not be considered an indicator of a healthy and robust policy development process, but more accurately the opposite. IPC urges ICANN to proceed with great caution in developing this metric.

2.6. Item 7.8, Strategic Goal 2.2, and Item 7.9, Goal 2.3, pages 44-48 – Whois portfolios

These two sections provide exactly the same description for two separate portfolios relating to Whois (portfolios 2.2.1 and 2.3.1). How does ICANN differentiate between the two? And how does ICANN expect to materially advance the ambitious goals stated (identically) for each portfolio with a total commitment of 1.6 FTEs and a personnel expense of $500,000?

2.7. Item 7.16, Goal 4.2, page 55 --- "trust agreements"

What are the "trust agreements" whose numbers ICANN will seek to increase? How do they differ from whatever was the previous wording (see list of wording changes under item 4.2 in revised 5-yr op plan, page 15)?

2.8. Item 7.18, Goal 4.4, page 57-8 – Contract Compliance

IPC commends the decision to move contract compliance under this strategic goal "so there is separation from GDD" (see 5-yr op plan, page 14, under item 2.3). We agree that a sound, credible, independent contract compliance program is a critical "mechanism to increase trust within the ecosystem rooted in the public interest," and without it, such trust is unlikely to develop. We note, however, that more than 90% of the personnel, and 85% of the overall resources dedicated to compliance, are devoted to "day to day activities" under Portfolio 4.4.1. The objectives of "addressing contractual compliance interpretation issues, working with the ICANN stakeholders to define relevant metrics … development of an analytic and nuanced approach to complex contractual compliance issues, and cooperation and coordination on consumer safeguards that are beyond the scope of pure contract compliance" should be given much greater priority. We question whether the assignment of 2 FTEs and total expenditure of $800K is sufficient, since satisfactory resolution of these issues will be critical to achievement of the stated "increased trust" goal, and to "generate institutional confidence in ICANN." We also encourage ICANN compliance to take steps to increase the transparency of their compliance activities, and to be provided adequate resources for keeping complainants better informed of the status of their complaints and the reasons for actions taken.

2.9. Item 7.22, Goal 5.3, page 63-64--- "development and public responsibility"

The document is quite opaque in explaining what activities will be undertaken in furtherance of this goal. The four separate portfolios are described in almost identical verbiage with the substitution of one noun (tools, programs, collaborations) or phrase (new program development – is this not a subset of "programs"?). ICANN should more clearly explain what it plans to do in this area, which will occupy 8 FTEs and consume $3.6 million in total resources -- by way of comparison, this is 57% of what ICANN

proposes to allocate to <u>all</u> the policy development and related activities of all the Supporting Organizations and Advisory Committees under goal 1.3.

3. **Specific Comments on The 5 Year Operating Plan Update**

The IPC submits the following comments on the update to the 5 year operating plan.

3.1. Goal 1.3, page 21-22 –permanent staff support for non-contracted party constituencies

The IPC is extremely pleased with the quality of staff secretariat support currently being provided, and would like to see this made a permanent feature of the ICANN operating plan and, if possible, at a higher quantitative level of support. We do not agree that "more experience is needed to confirm the value of a permanent resource," and ask that ICANN explain in detail what stands in the way of making this part of the 5-year operating plan beginning with FY 17.

3.2. Goals 2.2 and 2.3, pages 25-28 – "identifier technologies health index" and "domain name marketplace health index."

We are not clear what these indices describe or how they differ. Clarity is important if we are to comment in a meaningful way.

3.3. Page 24 – "legitimacy survey"

The IPC has asked about this initiative in previous years. On page 24, under goal 2.1, it is stated that it was moved to Goal 2.3, but there is no reference to it there (pages 27-28). How does ICANN explain this discrepancy?

3.4. Goal 3.3, page 33 – ICANN Technical University

In its response to clarifying questions from the GNSO, ICANN staff has explained that "*ICANN Technical University is intended to provide a mechanism for staff and the community to better understand the technologies related to the unique identifiers ICANN helps coordinate. Examples of work done within the ICANN Technical University project would be the "How It Works" tutorials offered at the Buenos Aires, Dublin, and Marrakech meetings. It is a project within the Office of the Chief Technology Officer*." What other courses or services are provided? We are also curious to whether has ICANN considered how the launch of a program likely to be abbreviated as "ITU" will impact policy development on protection of IGO acronyms?

3.5. Goal 5.1, page 43 – Global Public Interest Framework

This is an ambitious goal, with the daunting objective of being able to measure, by the end of FY17, the percentage of ICANN decision making that includes a rationale that makes a public interest assessment against a common consensus-based definition and understanding that as of today, sixteen months before that target date, does not exist. How does ICANN expect to achieve this through the efforts of 0.1 FTE and a total resource allocation of less than $100K (per FY 17 Op Plan & Budget, page 60)? The debate about what is in the "public interest" as it relates to ICANN's remit rages on. The IPC has particular concerns that innovation and the protection of rights that give incentives for innovation have not been included as criteria for defining the public interest. There is much more work to do in this area and the resource allocation and timeline do not reflect that reality.

Along with our specific comments on the Budget, Operating and Strategic plans, we respectfully submit a budget request under Principal 22 of the SO-AC Additional Budget Request guidelines.

4. Budget Request for Additional Travel Support

The IPC wishes to take this opportunity to request additional ICANN public meeting travel support slots in accordance with Principle 22 of the SO-AC Additional Budget Requests (vFY17-2015).[4] As part of the FY17 budget process, the IPC requests a limited expansion of the ICANN Travel Guidelines to enable it to send its entire executive team to all ICANN public meetings and to expand IPC membership participation to handle an increasing community workload. The IPC respectfully requests the addition of three (3) travel slots.

4.1. Current Travel Funding

The IPC is currently allocated a total of five (5) travel slots for the seven (7) members of its leadership to attend ICANN public meetings.[5] The existing travel slots are devoted to the constituency's two (2) elected GNSO Council representatives and only three (3) of its five (5) leaders. This relatively small number of supported meeting participants reduces the effectiveness of the IPC, as the entire leadership team is unable to regularly meet face-to-face, which is particularly important in coordinating the IPC's participation in ICANN.

4.2. Justification for Additional Travel Slot 1

We respectfully request one (1) additional slot to ensure all four (4) elected IPC officers are able to attend ICANN public meetings. The IPC has had four officers since 2005 (prior to that time, the IPC had five officers). For the last two years (FY15 and FY16) the IPC sought to expand this resource by one additional slot to ensure that all officers were supported. Unfortunately, those requests were not resourced through the Community Special Request budget program.[6]

4.3. Justification for Additional Travel Slot 2

The designation of the Participation Coordinator as a member of the leadership team in 2016 creates the need for funding of a second additional travel slot. The Participation Coordinator is important to ensuring effective participation of the IPC, as their role is to recruit members for various working groups and other activities and to coordinate member participation in ICANN's multi-stakeholder model. Therefore, it is necessary for the Participation Coordinator to be at every ICANN meeting in order to fully perform their tasks and in turn maximize the work of all IPC members.

4.4. Justification for Additional Travel Slot 3

The IPC seeks a third travel slot to support IPC members serving as Chairs on Working Groups and other ICANN entities and who are not eligible for other funding. Alternatively, this slot could be used to fund travelers from regions that are historically under-represented at ICANN meetings. ICANN's community workload appears to be on a growth path without an end. For example, this year alone, the ICANN community is embarking on the RPM review, the CCT Review, the New gTLD Subsequent Procedures

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[4] See https://community.icann.org/pages/viewpage.action?pageId=56987383&preview=/56987383/56987385/Principles%20of%20SO-AC%20Additional%20Budget%20Requests%20(vFY17-2015).pdf) .

[5] IPC Leadership consists of four (4) elected officers (President, Vice President, Secretary and Treasurer), two (2) elected GNSO Councilors, and one (1) appointed Participation Coordinator.

[6] Now that the special budget request program is no longer open to requests for expanded public meeting travel support (see Principle 22 - Community Special Budget Request Principles (vFY17-2015), the IPC is making the request though this broader FY17 budget proceeding.

PDP, and the PDP on a Next-Generation gTLD Registration Directory Service (RDS) to Replace Whois. All these critical matters will require substantial additional community meeting attendance and input. To ensure robust participation in and input into these processes, the IPC requests full travel support for an additional community participant to each ICANN public meeting in FY 2017.

These requested travel slot increases would resource the IPC with eight (8) supported travelers per public meeting (seven leaders and one additional traveler), rather than the current count of five (5).

4.5. Background: History of the IPC's Participation in ICANN

IPC officers and members are largely volunteers whose travel expenses are not typically reimbursed by their employers, and thus rely on a combination of ICANN Travel Support, internal IPC funds and self-funding to attend ICANN public meetings. This is especially relevant for IPC members attending from outreach regions. The additional travel slots will increase the IPC's ability to contribute to ICANN's mission in FY17.

Since 1999, the IPC has been highly engaged in ICANN's multi-stakeholder community, with members participating in numerous areas within ICANN. Given the increased profile of ICANN activities and the importance of ICANN public meetings within the ICANN new meeting strategy, it is critical that all IPC leaders have the opportunity to participate in person and maintain the high level of participation that has become expected of the IPC. An expanded community presence at public meetings (including face-to-face meetings of the IPC leadership team) will substantially enhance these contributions.

While we understand that ICANN has faced additional expenditures over the past two years, we also understand that, given this time of transition and enhanced accountability, face-to-face participation is even more critical to the success of the multi-stakeholder model. The IPC believes that this requested incremental increase in travel support will enhance the ability of our members to participate in future public meetings and enhance our effectiveness overall. IPC leadership would be delighted to discuss this expansion in greater detail with senior staff leaders and Board members.

5. Conclusion

The IPC has been a very active participant in ICANN's policy making and governance. We take our role as a stakeholder organization seriously and welcome the opportunity to provide comments on critical ICANN operating procedures including the budget, operating and strategic plans. We are pleased that ICANN continues to strive for transparency, accountability and openness in the multi-stakeholder community. The budget is complex and we provide our comments and questions to aid in ICANN's continuous improvement. We hope that the staff and board will consider our concerns and provide clarity to open questions as we finalize the budget and ops plan. We also look forward to your kind reply regarding our budget request.

Respectfully Submitted,

Intellectual Property Constituency