

**RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-18**

18 OCTOBER 2015

The Requester, Ron Andruff (Mr. Andruff), seeks reconsideration of the Board Governance Committee's (BGC) decision to not recommend Mr. Andruff for the position of the 2016 Nominating Committee (NomCom) Chair and the ICANN's Board's appointment of Stéphane Van Gelder as the 2016 NomCom Chair.

I. Brief Summary.

Mr. Andruff is the 2015 NomCom Chair-Elect.¹ Mr. Andruff was one of several candidates who submitted an Expression of Interest (EOI) for the 2016 NomCom Chair and Chair-Elect. Per ICANN's Bylaws, the BGC recommends, and the Board approves, the NomCom Chair and Chair Elect.² After a careful evaluation process, which included review of the candidates' EOI statements, two rounds of interviews, and consideration of the 360-degree review of the 2015 NomCom Leadership (360-Degree Review), the BGC recommended to the Board that Stéphane Van Gelder and Hans Petter Holen be appointed as the 2016 NomCom Chair and Chair-Elect, respectively. On 28 September 2015, the Board appointed Stéphane Van Gelder as the 2016 NomCom Chair and Hans Petter Holen as the 2016 NomCom Chair-Elect.³

Mr. Andruff suggests that the BGC did not make the Board aware of the following material facts, and therefore the Board did not consider them, prior to the Board's appointment

¹ See Resolution 2014.10.11.01, available at <https://www.icann.org/resources/board-material/resolutions-2014-10-11-en#1.a>.

² See Bylaws, Article VII, §§ 2.1 and 2.2, available at <https://www.icann.org/resources/pages/governance/bylaws-en/#VII> and BGC Charter, available at <https://www.icann.org/resources/pages/charter-06-2012-02-25-en>

³ See Resolution 2015.09.28.25, available at <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#2.g>.

of the 2016 NomCom Chair and Chair-Elect: (1) an insufficient number of BGC members were present for Mr. Andruff's interviews; (2) Mr. Andruff's 360-Degree Review rating "cannot justify the 2015 Chair-Elect being passed over as 2016 NomCom Chair"; (3) "lack of cultural sensitivity" is subjective and there is no evidence supporting the notion that Mr. Andruff lacks such "cultural sensitivity"; (4) the 360-Degree Review cannot adequately provide a true and full representation of the capabilities of an individual to serve as a Chair-Elect; and (5) the "negative comments" written in Mr. Andruff's 360-Degree Review emanated from individuals with a "suspect agenda".⁴ Mr. Andruff further suggests that the Board was prevented from considering the foregoing material facts because the BGC did not inform him of its recommendation until the day of the Board meeting, thus depriving him of any reasonable opportunity to prepare a detailed response.

Mr. Andruff's claims do not support reconsideration. As set forth in the Rationale for Resolution 2015.09.28.25, "[t]he BGC received and reviewed several EOIs, oversaw a 360-degree evaluation of the 2015 NomCom leadership and conducted interviews with candidates before making its recommendations."⁵ Mr. Andruff had the opportunity to provide the BGC with information relating to his qualifications in his EOI and during the two telephone interviews with the BGC. Mr. Andruff also had the opportunity to respond to any concerns raised in his 360-Degree Review during his second interview with the BGC. With respect to Mr. Andruff's arguments regarding the numbers of BGC members that were present for Mr. Andruff's interviews and that he was deprived of the opportunity to respond to the BGC's recommendation

⁴ Request, § 8, Pgs. 4-5.

⁵ Resolution 2015.09.28.25, available at <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#2.g>.

to the Board, for the reasons set forth below, Mr. Andruff has not stated a basis for reconsideration.

The BGC therefore recommends that Request 15-18 be denied. Further, the BGC recommends that Mr. Andruff be afforded the opportunity to be heard by the Board consistent with Article IV, Section 2.12 of the ICANN Bylaws before the Board makes its final determination.

II. Facts.

A. Background Facts.

ICANN's Bylaws require the Board to appoint the NomCom Chair and Chair Elect.⁶ The Board has delegated to the BGC the responsibility for recommending candidates for the NomCom Chair and Chair Elect for Board approval.⁷

On 4 June 2015, the BGC published a call for expressions of interest (EOI) for the 2016 NomCom Chair and Chair-Elect, seeking EOIs by 30 June 2015.⁸ The call for EOIs was later extended through 20 July 2015.⁹

On 25 June 2015, Mr. Andruff submitted his EOI for the 2016 NomCom Chair.

During the week of 17 August 2015, the BGC interviewed candidates who submitted EOI statements for the 2016 NomCom Chair and Chair-Elect positions, including Mr. Andruff.

At its 3 September 2015 meeting, following the first round of interviews, the BGC discussed the candidates for 2016 NomCom Chair and Chair-Elect.¹⁰ On 10 September 2015, the BGC conducted a second round of interviews of selected candidates.

⁶ See Bylaws, Article VII, §§ 2.1 and 2.2, available at <https://www.icann.org/resources/pages/governance/bylaws-en/#VII>.

⁷ See BGC Charter, Art. I, § I, available at <https://www.icann.org/resources/pages/charter-06-2012-02-25-en>.

⁸ See <https://www.icann.org/news/announcement-2-2015-06-04-en>.

⁹ See <https://www.icann.org/news/announcement-2015-07-01-en>.

On 27 September 2015, the BGC met and approved its recommendation to the Board that Stéphane Van Gelder and Hans Petter Holen be appointed as the 2016 NomCom Chair-Elect, respectively.¹¹ On 28 September 2015, the Board appointed Stéphane Van Gelder as the 2016 NomCom Chair and Hans Petter Holen as the NomCom Chair-Elect.¹²

On 11 October 2015, Mr. Andruff filed Reconsideration Request 15-18 seeking reconsideration of the BGC’s decision to not recommend Mr. Andruff for the position of the 2016 NomCom Chair and the ICANN Board’s appointment of Stéphane Van Gelder as the 2016 NomCom Chair.

B. Relief Requested.

Mr. Andruff asks that ICANN “release the current (and formerly 2015) NomCom Chair from duty and reinstate [Mr. Andruff] to 2016 NomCom Chair.”¹³

III. The Relevant Standards for Evaluating Reconsideration Requests and the NomCom Chair and Chair-Elect Selection Process.

A. The Relevant Standards for Evaluating Reconsideration Requests

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁴ Mr. Andruff challenges a Board action. With respect to Board action, to state a reconsideration request one must show that the Board acted without

¹⁰ See BGC Agenda, 3 September 2015, available at <https://www.icann.org/resources/board-material/agenda-bgc-2015-09-27-en>; see also, Minutes of the 3 September 2015 BGC Meeting, available at <https://www.icann.org/resources/board-material/minutes-bgc-2015-09-03-en>.

¹¹ See Agenda of 27 September 2015 BGC Meeting, available at <https://www.icann.org/resources/board-material/agenda-bgc-2015-09-27-en>; see also, Minutes of 27 September 2015, available at <https://www.icann.org/resources/board-material/minutes-bgc-2015-09-27-en>.

¹² See Resolution 2015.09.28.25, available at <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#2.g>.

¹³ Request, § 9, Pg. 5.

¹⁴ Article IV, § 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

material information or pursuant to false or inaccurate information.¹⁵ Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

B. The NomCom Chair and Chair-Elect Selection Process

The NomCom is composed of, among others, a non-voting Chair and non-voting Chair-Elect. Both are appointed by the ICANN Board.¹⁶ The Bylaws further provide that

[i]t is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.¹⁷

The NomCom Chair is responsible for organizing and leading the NomCom in its activities to select certain ICANN Board members and individuals who will serve in key leadership positions within ICANN's supporting organizations (SOs) and advisory committees (ACs) in accordance with ICANN's Bylaws. As set forth in the Call for EOI for the 2016 NomCom Chair and Chair-Elect, the NomCom Chair must possess the following skills and experience: (i) adequate time available to undertake the role; (ii) excellent communication and negotiation skills to manage a committee of 20-21 members; (iii) a clear understanding of the duties and responsibilities of each position for which the NomCom is selecting candidates; (iv) experience on or with a Board of Directors of organizations with similar scale, scope and diversity as ICANN; (v) strong organization and leadership skills; (vi) ability to remain unbiased;

¹⁵ *Id.*

¹⁶ Bylaws, Art. VII, §§ 2.1 and 2.2.

¹⁷ *Id.* at Art. VII, § 3.4.

(vii) no conflicts of interest; and (viii) a thorough understanding of, and satisfy, all criteria set forth in ICANN's Bylaws relating to the NomCom.¹⁸ Further,

[w]hile it is anticipated that the 2015 NomCom Chair Elect will become the 2016 NomCom Chair, in support of continuous improvement in its accountability and transparency, the NomCom will evaluate the performance of the current NomCom leadership, and the results of that evaluation will be available to the Board Governance Committee before it makes a recommendation to the full Board on 2016 NomCom leadership. These 360 degree reviews will be conducted by an independent third party provider and will consist of interviewing other NomCom leadership, NomCom members, and designated NomCom staff. The BGC will utilize the outcomes of these reviews in their processes leading up to the Board's formal appointment of the 2016 NomCom Chair and Chair-Elect.¹⁹

IV. Analysis and Rationale.

A. Mr. Andruff Has Not Demonstrated A Basis For Reconsideration Of The BGC's Decision To Not Recommend Him To Serve As The 2016 NomCom Chair.

Mr. Andruff challenges the BGC's consideration of his candidacy to serve as the 2016 NomCom Chair. As a preliminary matter, Mr. Andruff suggests that the BGC is "meddling in the affairs of the supposedly independent Nominating Committee."²⁰ As noted above, however, ICANN's Bylaws require the Board to appoint the NomCom Chair and Chair Elect²¹, and the Board has delegated to the BGC the responsibility for recommending candidates for these positions for Board approval.²² As such, the actions of the BGC challenged here are part of its mandate as set forth in the BGC's Charter, which was approved by the Board on 13 October 2012.²³ If Mr. Andruff is challenging the Board's delegation to the BGC of the authority to

¹⁸ Call for EOI for 2016 NomCom Chair and Chair-Elect, available at <https://www.icann.org/news/announcement-2-2015-06-04-en>.

¹⁹ *Id.*

²⁰ Request, § 7, Pg. 4.

²¹ See Bylaws, Article VII, §§ 2.1 and 2.2, available at <https://www.icann.org/resources/pages/governance/bylaws-en/#VII>.

²² See BGC Charter, Art. I, § I, available at <https://www.icann.org/resources/pages/charter-06-2012-02-25-en>.

²³ See *id.*

recommend the NomCom Chair and Chair Elect for Board approval, the time to do so has passed.

Mr. Andruff suggests that the BGC “chose to overlook [his] exemplary record of sixteen years of service, sound leadership at ICANN, and solid overall marks in [his] 360 Review” and focused instead “on a subset of mean-spirited and targeted attacks on [Mr. Andruff’s] reputation by a few individuals.”²⁴ In support of his view, Mr. Andruff notes that while 86 percent of the NomCom members participated in the written portion of the 360-Degree Review, only 57 percent of the NomCom members participated in the telephone interview portion of the 360-Degree Review. Mr. Andruff posits that “with such a small sampling for the telephone interviews it takes but a few people to disproportionately skew the results.”²⁵

Mr. Andruff has not shown that either the BGC or the Board overlooked his years of service or the positive aspects of the 360-Degree Review. Rather, Mr. Andruff’s EOI statement details his skills, experience, and contribution to the ICANN community, and the BGC specifically considered this information.²⁶ Additionally, Mr. Andruff had the opportunity to, and did, provide the BGC with information relating to his qualifications in both telephone interviews with the BGC, as well as address any concerns that he may have with his 360-Degree Review, and point out the positive aspects of his 360-Degree Review, during his second telephone interview with the BGC. Finally, it is unclear how the number of NomCom members that participated in the telephonic versus the written 360-Degree Review supports reconsideration as the results of both are clear in the report, and there is no indication as to who participated in each portion.

²⁴ Request, § 3, Pg. 1.

²⁵ *Id.* at § 3, Pg. 2.

²⁶ Resolution 2015.09.28.25, available at <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#2.g>

Mr. Andruff further challenges the BGC's recommendation on the basis that there were an insufficient number of BGC members present for his interviews.²⁷ This is not a proper basis for reconsideration. There is no requirement mandating a minimum number of BGC members that must be present for the interviews, as there is no requirement that the BGC interview the candidates. Moreover, three of the four voting BGC members that had not recused themselves (those recused did so because they are eligible to be selected by the 2016 NomCom) participated during the first interview, and all four participated during the second interview. Further, all four voting BGC members who did not recuse themselves were present during the BGC meeting in which the BGC made its recommendation for the 2016 NomCom Leadership slate, and all voting Board members, except the three who recused themselves, participated in the Board decision on this matter.²⁸ Additionally, the same or a similar number of BGC members were present at the interviews of the other candidates. It should further be noted that the number of BGC members present at the interviews is not inconsistent with interviews conducted for the NomCom leadership positions in past years. In all events, the number of BGC members who participated in Mr. Andruff's interviews does not speak to whether the Board acted without material information, or pursuant to false or inaccurate information, and therefore reconsideration is not appropriate on this basis.

Mr. Andruff also states that because he was not informed of the BGC's recommendation until 28 September 2015, just before the Board made its decision, he was deprived of due process because he did not have the opportunity to develop a detailed response for the Board's

²⁷ See Request at § 3, Pg. 2.

²⁸ See Agenda of 27 September 2015 BGC Meeting, available at <https://www.icann.org/resources/board-material/agenda-bgc-2015-09-27-en>; see also, Minutes of 27 September 2015, available at <https://www.icann.org/resources/board-material/minutes-bgc-2015-09-27-en>.

consideration. Mr. Andruff states that this seems “procedurally unfair.”²⁹ As noted above, the BGC finalized its recommendation of the 2016 NomCom Leadership slate on 27 September 2015.³⁰ On that same evening, the BGC Chair asked Mr. Andruff via email to speak with him and another BGC member the following morning. With respect to Mr. Andruff’s argument regarding lack of due process and procedural unfairness, there is no requirement that the BGC afford Mr. Andruff the opportunity to respond to the BGC’s recommendation before the Board considers the recommendation. Furthermore, even if there was such a process, this is not a proper basis for reconsideration of Board action. Specifically, Mr. Andruff has not demonstrated that the Board failed to consider material information, or considered false or misleading information, in approving the 2016 NomCom Leadership.

B. Mr. Andruff Has Not Demonstrated A Basis For Reconsideration Of The Board’s Appointment Of The 2016 NomCom Chair.

Mr. Andruff challenges the Board’s appointment of the 2016 NomCom Chair on the basis that Board was unaware of the following material facts prior to voting on the 2016 NomCom Chair, because the BGC failed to so inform the Board: (1) an insufficient number of BGC members were present for Mr. Andruff’s interviews; (2) Mr. Andruff’s overall 360-Degree Review rating “cannot justify the 2015 Chair-Elect being passed over as 2016 NomCom Chair”; (3) “lack of cultural sensitivity” is subjective and there is no evidence supporting the notion that Mr. Andruff lacks such “cultural sensitivity”; (4) the 2015 NomCom Leadership 360-Degree Review cannot adequately provide a true and full representation of the capabilities of an individual to serve as a Chair-Elect; and (5) the “negative comments” written in Mr. Andruff’s

²⁹ Request, §3, Pg. 2.

³⁰ See Agenda of 27 September 2015 BGC Meeting, available at <https://www.icann.org/resources/board-material/agenda-bgc-2015-09-27-en>.

2015 NomCom Leadership 360-Degree Review emanated from individuals with a suspect agenda.³¹

Mr. Andruff has not shown: (1) that the cited information would have been material to the Board's decision; (2) that the Board did not consider the information; or (iii) that the Board acted on false or inaccurate information. Instead, most if not all of the bases for reconsideration (as stated in the preceding paragraph) appear to be Mr. Andruff's opinion, and opinions do not serve as a basis for reconsideration because they are not material facts that were not considered, or false or inaccurate facts that were considered.

As discussed in the foregoing section, which addresses all five points, and as stated in the Rationale for Resolution 2015.09.28.12, "the BGC received and reviewed several EOIs, oversaw a 360-degree evaluation of the 2015 NomCom leadership and conducted interviews with candidates before making its recommendations. The Board then considered and agree[d] with the BGC's recommendation for the 2016 NomCom Chair and 2016 NomCom Chair-Elect."³²

Moreover, as the Board noted that Mr. Andruff had the opportunity to provide the BGC with information that may be material to his candidacy such as his qualification, as well as address any concerns that Mr. Andruff may have with his 360-Degree Review, through his EOI Statement and during the telephone interviews with the BGC. Accordingly, no reconsideration is warranted.

V. Recommendation.

For the reasons set forth above, the BGC concludes that Mr. Andruff has not stated proper grounds for reconsideration, and therefore recommends that Request 15-18 be denied.

³¹ See Request, § 8, Pgs. 4-5.

³² See Resolution 2015.09.28.25, available at <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#2.g>.

That said, the BGC does want to take this opportunity to note its appreciation for Mr. Andruff's contribution, commitment, and dedication to the ICANN community and encourages Mr.

Andruff to continue his involvement with ICANN. Further, although not required, the BGC recommends that Mr. Andruff be afforded the opportunity to be heard by the Board pursuant to Article IV, Section 2.12 of the ICANN Bylaws before the Board makes its final determination.