

# NCUC Statement on GNSO Restructuring and the ICANN Board Governance Committee Report

25 April 2008

## **Rebalancing the Constituencies**

The most critical aspect of any GNSO reform is the reshaping of GNSO constituencies to ensure that everyone who has a stake in ICANN policy is represented and that the votes of the constituencies be structured to represent a fair balance of these interests. To this end, the Board Governance Committee Report recommends more widely interested constituencies and proposes a four constituency model. NCUC, together with the other 3 “user constituencies” in the GNSO and the At-Large Advisory Committee (ALAC) have jointly proposed a more balanced three constituency model for the GNSO consisting of contracting parties, commercial users, and non-commercial users of the Internet. The three constituency model represents the fairest balancing of interests between these various stakeholders and this submission hereby incorporates the Joint Users Group Proposal of 23 April 2008 available online at <http://forum.icann.org/lists/gnso-improvements-report-2008/msg00012.html>.

## **Contract Parties**

The principal difference between the two models is that the four constituency model would give registrars and registries each their own constituency, whereas the three constituency model would collapse them into a single contract parties constituency. This means that under the four constituency model the parties with a contractual relationship to ICANN would have effective veto power, whereas in the three constituency model they would be on equal footing with other interests.

Because ICANN regulates the conduct of the contractual parties, it is important that they not be given a disproportionately large stake in ICANN policies. If the registrars and registries had effective veto power over any GNSO policy, it would mean that ICANN would be effectively captured by the very entities it purports to regulate. This would not only undermine the effectiveness of the GNSO, but also undermine public perception of ICANN and possibly invite governmental action.

More importantly, the GNSO should recognize that the business interests of the contracting parties do not outweigh those of the numerous people and entities who rely on the Internet for business and communication. Although the unique concerns of the contracting parties do warrant them having a direct voice at ICANN, this voice must not be so great as to drown out all other interests.

## **The Working Group Model**

The Board Governance Committee Report suggests making working groups the focal point of the new GNSO structure. It proposes eliminating voting by the GNSO council entirely and empowering working groups directly to create consensus policy. Under this new model, the GNSO council would not vote on any policy, but instead function as an administrator of working groups, with each working group operating on a basis of “forced” consensus.

The primary motivation for this new model is fear of voting. The Board Governance Committee asserts that voting polarizes the GNSO and drives the constituencies to focus on building alliances rather than developing policy. It concludes that the solution to this politicking is to eliminate voting and to force compromise through a consensus based policy development process. This

simplification overlooks both the dangers of consensus as a policy making tool and the benefits of the GNSO Council's current decision making role.

## **Dangers of Consensus**

“It has been said that democracy is the worst form of government, except for all the other forms that have been tried from time to time.” -- Winston Churchill

Even if the Board Governance Committee's fears about voting are accurate, it does not follow that voting must be entirely replaced by consensus. Any danger of politicking inherent in a system of voting is significantly outweighed by the dangers of a consensus system, which is far more open to gaming and strategic manipulation.

In a system of “true” consensus, any one participant in a policy development process can prevent a proposal from going forward. Although this is intended to foster discussion and compromise, it gives rise to a number of problems. Most significantly, anyone who has an interest in the status quo has an absolute ability to preserve it. This creates an excessive obstacle to action in these situations and may guarantee inaction on contentious issues.

Even where there is general agreement that some action should be taken, consensus still gives disproportionate power to the minority. A sufficiently obstinate objector can force the majority to include changes that the majority find objectionable, on the threat of blocking any action at all. While in some cases these compromises may make for better policy, in other cases they will strip the proposal of most of its merit or create unwarranted exemptions. The super-majority vote currently required already promotes compromise, but this current proposal skews the balance too far in the favor of hold outs.

These dangers are only partially ameliorated by using a system of “rough” consensus. Under this model, the chair of a working group has the authority to let a policy go forward notwithstanding the objection of a small minority, but the exact size of that minority is a moving target. This is effectively just a requirement of a supermajority vote with a moving target. The judgment about how large a minority needs to be to have veto power ought to involve a uniform judgment and ought to be made with respect to the balancing of interests in the GNSO, not the proportion in which those interests are represented in an individual working group. To do otherwise would be to encourage abuse of power by chairs and the stacking of working groups by constituencies.

## **Role of the GNSO Council**

The extreme Working Group model also ignores the important functions served by the GNSO council to make policy decisions. As it stands, the GNSO council serves a gate keeping function to ensure that the interests of each constituency are considered and protected during every policy development process. While it is good to encourage interested parties to participate directly in working groups, it would be a mistake to assume that the only people effected will be those that get actively involved. The GNSO constituencies serve the important function of guaranteeing that everyone is fairly represented throughout the policy development process. The vote by the GNSO council is an important step in this process which ensures that an experienced constituency representative familiar with the big picture asserts the interests of their constituency.

Additionally, the vote by the GNSO council represents a careful balancing of interests which are being fine tuned by the current restructuring. The GNSO constituencies represent everyone with an interest in ICANN policies. The distribution of votes among these constituencies is the product of a

Careful balancing of interests intended at developing the best and fairest policies. Entirely eliminating the GNSO Council's vote would remove an important check and the benefit of this balancing.

Finally, the GNSO Council serves as a regular forum for the GNSO constituencies to meet and discuss policy issues. As the same representatives meet to discuss different issues, this provides a focal point for the creation of working relationships between the constituencies, and keeps the channels of communication and compromise open.

### **Institutional Culture**

It should also be remembered that politicking is not necessarily the by-product of a defunct system of policy creation. While a problematic structure can encourage politicking, it can also be a product of institutional culture and, to some degree, a natural by-product of any system of policy development where divergent interests are represented. While it is good for the GNSO to strive for an atmosphere of cooperation and compromise, it would be a mistake to assume that drastic structural change can or should be employed to remove all politicking. At some point cooperation must stem from good will rather than change to the policy development process.