Summary and analysis of public comments for:

GNSO STAKEHOLDER GROUP CHARTERS

Comment period: Opened on 30 June 2009 and Closed on 23 July 2009

Summary published: 29 July 2009

Preparation by: Robert Hoggarth, Senior Policy Director

I. BACKGROUND

As part of the comprehensive GNSO Improvements effort, last year the ICANN Board approved the formation of four new GNSO Stakeholder Groups (SGs). After considering proposed SG Charters that were submitted by the community and posted for public comment, the ICANN Board passed a Resolution in May directing its Structural Improvements Committee (SIC) and ICANN Staff to revise the SG Charters to make them consistent with the Board's GNSO Improvements Report (and related Resolutions).

Stakeholder Groups are integral elements of a new, restructured GNSO, and are intended to be lightweight "caucuses" bringing together like-minded international groups (Constituencies) to elect the best representatives to fill the SG's allotted Council seats. Stakeholder Groups ensure that the ratio of Council seats among SGs remains the same while encouraging the formation of new Constituencies and the continued growth and diversification of the GNSO community. The overall GNSO Improvements effort and the role SGs will play in that arena are more fully described in the Stakeholder Group section of the GNSO Improvements Information Web Page.

The SIC provided the community with the revised Charters listed below and discussed these documents during ICANN's recent Sydney meeting. The documents were posted to encourage further public comment from 30 June through 23 July 2009.

- **Commercial SG Charter** [PDF, 29K]
- **Non-Commercial SG Charter** [PDF, 59K]
- **Registrars SG Charter** [PDF, 60K]
- **Registries SG Charter** [PDF, 117K]

Community comment on these SG Charters, including their adherence to existing Bylaws, is an important component of the Board's evaluation and will be used to inform the Board's decisions to approve or, at its option, to recommend any alterations or amendments to the submissions.

II. GENERAL COMMENTS AND CONTRIBUTORS

The forum remained open one day beyond the 23 July deadline. At the time this summary was prepared, a total of 73 community posts were counted in the forum.

Three commenters' text and/or documents (total of 7 posts) were either unreadable or illegible and were subsequently resubmitted in different formats. The Registries Constituency posted a brief request to extend the forum until 23 July. Staff contributed three posts, one proposing new SG Charter elements, a second extending the forum until 23 July (as requested by the Registries Constituency), and a third providing a new document link that was not accessible by some parties. Due to technical and time-zone problems, one additional comment was accepted after the site was closed; thus, the net total of discrete substantive community responses in this forum stands at 66.

The contributors, both individuals and organizations, are listed below in chronological order by posting date (with identifying initials noted in parentheses). The initials will be used in the foregoing narrative to denote specific quoted contributions.

Organizations and Groups:

Group	Rep(s)	Initials
Registries Constituency	David Maher	RyC
ICANN Staff	Rob Hoggarth	STAFF
Association for Progressive Communications (APC)	Willie Currie	APC
IP Justice	Robin Gross	IPJ/RG
Non Commercial Users Constituency (NCUC)	Robin Gross	NCUC
Yale Information Society Project	Dr. Laura DeNardis	YISP
APWKomitel	Rudi Rusdiah	APWK
Internet Governance Project	Hans Klein	IGP
IBDI.org.br	Omar Kaminski	IBDI
AIM - European Brands Association	Philip Sheppard	AIM
Leap of Faith Financial Services Inc.	George Kirikos	LEAP
NATIONAL REPRONTIC	Schombe Baudouin	NR
Freedom to Innovate South Africa	Andrew Rens	FISA
Indian Institute of Mass Communication	Gita Bamezai	IIMC
Internet Society Chapter of Mauritius	Dave Kissoondoyal	ISCM
Public Knowledge	Sherwin Siy	PK
Latin American Networking School	Ermanno Pietrosemoli	LANS
Neustar, Inc.	Jeffrey Newman	NEUS
IDNgTLD Constituency (Proposed)	S. Subbiah	IDNC
Near Media Co-op; Ireland	Jack Byrne	NMC
China Organizational Name Admin Center (CONAC)	Yang Yu, Jin Danlei	CONAC
Internet Governance Project	Brenden Kuerbis	IGP
Dublin Community Television (DCTV)	Seán Ó Siochrú	DCTV
Electronic Frontiers Finland (EFFI)	Tapani Tarvainen	EFFI
Electronic Frontiers Australia	David Cake	EFFA
Open Institute	Norbert Klein	OI
Center for Technology and Society	Carlos Affonso	CTS

At Large Advisory Committee	Cheryl Langdon Orr[1]	ALAC
Internet Society of Australia	Holly Raiche	ISOC-AU

Individuals:

Name	Initials
Milton Mueller	MM
Jeffrey A. Williams	JAW
Pete Ashdown	PA
Ángel Sánchez Seoane	AS
Avri Doria	AD
Rafik Dammak	RD
Isaac Mao	IM
Marco Toledo	MT
Konstantinos Komaitis	KK
Cedric Laurant	CL
Alex Gakuru	AG
Kimberly Heitman	KH
Taran Rampersad	TR
Alexey Ptashniy	AP
Graciela Selaimen	GS
Adrienne Lauby	AL
Hala Essalmawi	HE
Robert Bodle	RB
Scott Sanders	SS
Ginger (Virginia) Paque	GP
Bill Drake	BD
Deirdre Williams	DW
Fouad Bajwa	FB
Bryan Parras	BP
Carlos Afonso	CA
Kathryn Kleiman	KK
Danny Younger	DY
Alexey Mykhaylov	AM
Chun Eung Hwi	CEH
Alan Greenberg	AG

---

[1] The Submission by Cheryl Langdon-Orr specifically noted the following disclaimer, "This comment is intended to ensure that the Board Structural Improvements Committee (SIC) is aware of and takes into account in this current public comment period the previous activities, views and opinions, including Advice to the Board, and ratified Statements of the At-Large Advisory Committee (ALAC) and the At-Large Community with specific reference to the development of the new structure of the GNSO, its Council and the Stakeholder Group model. This is not a formal or ratified statement or comment per se but rather a synopsis of those previously provided in various fora to date." For identification purposes this document uses the "ALAC" initials to refer to the submission.

III. SUMMARY & ANALYSIS

This document is intended to broadly and comprehensively summarize the comments of the various contributors to this forum but not to address every specific argument or position stated by any or all contributors. The Staff recommends that readers interested in specific aspects of any of the summarized comments or the full statements of others refer directly to the originally posted contributions.

Although intended as a public comment forum for all of the SG Charters posted, slightly more than two-thirds of the contributions were directed at the NCSG Charter. These matters are taken up in the sub-section III-A below.

The second most popular topic, accounting for approximately 15% of the comments, was a specific provision in the CSG Charter that was universally seen as problematic. Section III-B addresses comments made about the CSG Charter.

Section III-C covers a number of additional matters that were discussed in the forum.

A. NCSG Charter Discussion

In the forthcoming discussion, two NCSG Charter versions are referenced: (a) the original one submitted by the NCUC on behalf of the civil society community, hereinafter "V-NCSG"; and (b) the version developed by Staff at the direction of the SIC, hereinafter "S-NCSG."

It is important to understand, at the outset, that the two NSCG Charters present substantially different approaches to the organization of the NCSG. The major differences between the two Charters concern: (a) the role of Constituencies as defined within the ICANN Bylaws, (b) the methodology and process for filling the six Council seats assigned to the NCSG by the Board, and (c) how each one purports to attract and retain new entrants to the GNSO.

In the S-NCSG model, membership consists of <u>only</u> Board-approved Constituencies that are formed, organized, and chartered according to the ICANN Bylaws. An Appendix (Section 8.0) was added to specify a transition period (two years) during which three of the GNSO Council seats will be elected by the NCUC while the remaining three Councilors are to be appointed by the Board. The Board's purpose and objective with these additional appointments is to establish vibrant new communities within the GNSO in the hope that they will grow to become formal Constituencies ultimately recognized and chartered within the NCSG. In its NCSG Charter version, the SIC intended to remove all references (formerly Section 5.0) as to how GNSO Council seats are decided among its member Constituencies, post-transition, and invited the new NCSG community to recommend its approach to the Board prior to the end of the transition period. Quoting from the introduction to Section 5.0, "The NCSG should make plans to draft its provisions for filling Council seat vacancies to take effect at the completion of the transition period."

The V-NCSG proposes that all members of the SG - organizations, large and small, as well as individuals - become direct members of the NCSG while "constituencies" are voluntary self-forming (ad hoc) groupings that may be freely formed and dissolved for the purposes

of coalescing and advancing particular policy positions. In this model, constituencies have no electoral or voting functions, per se, within the SG.

The remainder of this section focuses on community comments that addressed several thematic areas including: (1) the perceived failure by ICANN to accept the V-NCSG Charter; (2) the lack of a timely explanation as to why the V-NCSG Charter was found to be unacceptable; (3) disagreements with provisions of the S-NCSG Charter document; (4) concerns about fairness and parity in treatment between the NCSG Charter and the revised charters documents for the Contracted Parties Charters (Registries and Registrars); and (5) requests to restore the V-NCSG Charter version.

1. The perceived failure by ICANN to accept the V-NCSG Charter.

Slightly more than two-thirds of the commenters in the forum expressed concerns ranging from surprise to outrage at the current circumstances, which have led to the apparent rejection of the V-NCSG Charter originally posted for public comment (April 2009).[2]

The dominant themes of these comments are: (a) concerns that, in rejecting the proposed self-governance structure for NCSG, ICANN did not listen to and respect the bottom-up consensus position of non-commercial Internet users; (b) allegations of political unfairness *vis a vis* other GNSO structures; (c) questions concerning ICANN's legitimacy to govern; (d) predictions of unfavorable outcomes for ICANN, both internal and external, if it stays its present course, and (e) disbelief in the credibility of the current comment period.

Almost every one of the comments supporting this position reiterated the following observations presented early in the forum by IPJ/RG, "ICANN Cannot Ignore the Consensus Charter Created by Noncommercial Users in a Bottom-Up Process," and "Civil society's NCSG charter was explicitly supported by over 80 noncommercial organizations and individuals in the April 2009 Public Comment period." CA expressed it this way, "I am, and I am sure nearly all of the NCUC membership is, shocked by the fact that ICANN has ignored the proposal … considering it was prepared as a result of a long period of consultations with many non-profit sectors worldwide." The NCUC added, "Although NCUC recognizes that ICANN Staff and the SIC were directed by the Board to revise most of the submitted Charters, we are dismayed by what appears to be, in this matter, a near-complete disregard for democratic principles and exactly the kind of bottom-up consensus-building explicitly endorsed elsewhere by ICANN."

MM characterized the perceived political context in this observation, "The staff/SIC-prepared NCSG charter is … a disgraceful attempt to manipulate the GNSO politically. The apparent purpose of the staff/SIC decisions about the NCSG charter is to weaken noncommercial stakeholders generally and to punish NCUC specifically, as a way of pandering to the Commercial Stakeholder groups that are upset about the balanced representation the new GNSO is supposed to provide. We have been told directly by Board members that this is the case." JAW added, "ICANN's Bod (sic) and executive staff

---

[2] Based upon the content and context presented, well over half of the responses appeared to be a direct or indirect result of a letter writing campaign initiated by Robin Gross (IPJ/RG) that was attached by at least one contributor (JAW).

knows whom they are suppose to be working for … yet they have decidedly (sic) to only give lip service to the vast number of stockholders in favor of registries, registrars, the IPC, and other IP favored constituencies. They continue to do so and as a result the vast majority stakeholders are either not represented at all within the GNSO or are grossly underrepresented. This is of course not by accident, but by contrived design as repeated … forums … had pointed out time and time again...”

More than a few commenters took this opportunity to call into question ICANN's legitimate right to design a Charter for the NCSG. IPJ/RG phrased it, “ICANN's attempt to impose a top-down governance structure on noncommercial users against our will calls into question ICANN's legitimacy to govern; it undermines confidence in ICANN's commitment to democratic values; and it appears ICANN is unable or unwilling to protect the broader public interest against commercial pressures.” IGP observed, “It is true that ICANN is not bound to recognize any public comments submitted in a proceeding, as is the case in traditional government regulatory institutions (e.g. under the APA in the United States). However, ICANN's power to regulate, in part, stems from the public's willingness to accept it as a legitimate governance institution. It is in ICANN's own interest to honestly support bottom-up processes of decision making, similar to other Internet governance institutions like the Regional Internet Registries and the Internet Engineering Task Force. By blithely ignoring public comment, ICANN imperils its own legitimacy in the eyes of the public and its stakeholders.”

Other contributors expressed fears that ICANN's actions could have a deleterious effect upon future participation among the non-commercial Internet community. BD noted, “…there are many noncommercial actors involved in other Internet governance-related venues that have expressed strong interest in ICANN matters but which have hesitated about committing the energies needed for GNSO work. When they hear that noncommercial interests are being disregarded and that the NCSG could be crippled at birth by a poor institutional design, enticing them into the fold becomes all the more difficult. How could marginalizing noncommercial views be consistent with enhancing noncommercial participation?” FISA added that this top-down approach, “…undermines efforts by a number of organisations in the developing world which have advocated engagement with ICANN in the face of considerable skepticism.” PK added, “These questions are particularly worrisome given the pending renewal of ICANN's Memorandum of Understanding with the National Telecommunications and Information Administration, which hinges not only upon ICANN's transparency and accountability, but also the public perception that ICANN does in fact demonstrate these values.” APC also warned, “This is all the more curious as it is on these issues that ICANN is currently being assessed by the US Department of Commerce in terms of the Inquiry into the upcoming expiry of the Joint Project Agreement [Docket No. 090420688--9689--01].”

Finally, YISP extrapolated a concern about the community feedback being solicited currently, “…allowing a public comment period on the ICANN staff-developed charter is being construed as an attempt to paint a veneer of legitimacy and grassroots participation on a fundamentally non-democratic document. This same type of top-down tactic has appeared many times in the history of the Internet and, with the world watching, has almost always failed.” On the same theme, MM commented on the current process, “Public comment periods are supposed to be about listening and adapting. After not only ignoring

but actively defying the public will in the first round, the idea that ICANN is now asking for public comment on this bastardized product of executive fiat only adds insult to injury. ICANN has made it clear that it does not care what the public says, that it has hidden agendas and is only going through the motions in order to conform to some procedural requirements. Why should noncommercial organizations and individuals produce comments on your draft when it is obvious that such comments make absolutely no difference to what will be done? I comment here simply to expose this process for the farce that it is."

2) The lack of a timely explanation as to why the V-NCSG Charter was found to be unacceptable.

On a related matter, commenters found themselves unable to understand the SIC's rationale and timing in substituting a new Charter document. IPJ/RG noted, "…in June, without any explanation or regard for democratic or bottom-up processes, ICANN staff and Board SIC threw out the consensus charter that civil society developed and replaced it with an entirely different model -- the silo-model that civil society explicitly said would stranglehold noncommercial users in policy development." YISP enjoined the organization, "Provide to the public some explanation of how the civil society charter came to be supplanted and ask those who influenced this decision to come forward and make public their concerns." CTS expressed it this way, "The feeling that a great amount of time was spend to end up with no proper explanation on the reasons why such model (and all its discussed solutions) were simply discarded was never provided in a proper way to all those 80 members of NCUC that subscribed the proposal."

Reflecting upon the amount of volunteer time that appears to have been committed to this process, BD observed, "If the SIC/staff were set on giving us a constituency-centric model no matter what, it would have been nice to have been informed of this much earlier in the process. NCUC spent a good deal of time and effort soliciting inputs and drafting and redrafting its charter proposal in order to address those concerns of which we were made aware, and had we known our preferences would dismissed without any real opportunity for discussion or collaborative adjustment, we might have focused our energies on more productive and rewarding endeavors. Noncommercial stakeholders are spread-thin volunteers, not paid lobbyists, and rendering their time wasted is no way to encourage their deepened engagement in the full range of GNSO activities."

3) Disagreements with provisions of the S-NCSG Charter document.

As stated above, the fundamental difference between the two Charter models relates to the formal hierarchical relationship between Constituencies and SGs. The V-NCSG version denies Constituencies membership in the SG as entities and makes them voluntary and optional structures. Underpinning this issue is the central question about what the definition and meaning of the term "Constituency" should be within a reconstituted GNSO and what roles, rights, and responsibilities should such an entity have within the organization. The S-NCSG follows the Board's direction that the Constituency is the primary organizational unit within SGs and, as such, they are its only legitimate members. Individuals and organizations must join Constituencies in order to participate in the NCSG. A corollary concern deals with each model's ability to attract and retain participants.

Disagreeing with the S-NCSG model's construct and assumptions, EFFA noted that the non-commercial world is not conducive to a rigid Constituency model, "…the NCSG contains a very wide variety of organisations with a wide range of interests within the NGSO policy process. There are not inherent structural lines that form natural constituencies." APC recognized the Board's right to approve different NCSG Constituencies; but added, "we think that the Board should practice forbearance in this regard. The organisation of civil society groups in arenas like the World Summit on the Information Society has generally recognised that it is better to allow civil society groupings to organise themselves rather than have this over-determined by an executive structure from the top. ICANN's bylaws have identified a broad constituency -- non-commercial stakeholders. To go beyond this -- to slice and dice sub-constituencies from this general category -- seems to us to go too far in trying to organise civil society from the top and undermines the notion of subsidiarity, which … 'is an organizing principle that matters ought to be handled by the smallest, lowest or least centralized competent authority' and is a key principle underpinning the European Union." Applying this principle to the two Charter proposals, APC argued, "The NCUC's NCSG Charter captures the notion of subsidiarity in its procedures for forming the membership of the Non-commercial Stakeholders Group. Membership, constituency formation and representation in the NCSG would take place at the lowest level and not at the highest level of decision-making. … This is eminently democratic and bottom-up."

One of three dissenters to the majority position, DY countered, "For over a decade, we have seen interactions within the ICANN world between and amongst the constituencies that have led to joint action, to artfully crafted compromises, to universally adopted policy formulations etc., yet now the NCUC would have you believe that 'the constituency-based model will not work'." ISOC-AU expressed surprise at the contention concerning this version, "I am surprised at some of the negative responses to the NCSG Charter. As it states in the beginning, the Charter's mission is to be open to a range of non-commercial users, including consumer groups, academia, etc. While I understand concerns that the NCUC has [about] seats - this is to allow new constituencies to join Council on their merits, with an emphasis on ensuring more diversity on the Council, and it is only a transitional arrangement. … In the interest of a more open and diverse GNSO Council, we support the new Charter..."

Although the election/apportionment of Council seats (original Section 5.0) was removed from the NCSG Charter version published by the SIC, there remains confusion about its provisions. IPJ/RG expressed, "…to have any chance of influencing ICANN policy it can only happen when we join together and are able to work cooperatively toward our shared objectives. This can be accomplished by stakeholder group wide elections, which encourage candidates to reach beyond their own constituency for support. But the charter drafted by ICANN to keep noncommercial users accountable only to their own focused constituency, rather than the entire stakeholder group, will render all noncommercial interests dead on arrival in the new GNSO." In a subsequent post, the NCUC appeared to recognize that such procedures were not being mandated to the NCSG community; "NCUC calls on the Board to require the SIC and ICANN Staff to work with NCUC to come up with satisfactory language to address the issue of Council elections and seat allocations after the two-year transitional period."

Several commenters believe that the Constituency model, as proposed by the SIC and Board, is inappropriate for non-commercial Internet users and will result in disharmony and stalemate. PK observed, "This proposal … creates a system likely to result in NCSG stasis and deadlock." KK suggested that, "Rejecting our proposal will result in transmogrifying a constituency, currently operating under democratic and just procedures, into a body, where lobbying will proliferate. The way you have envisioned NCUC, we will have to spend all our efforts in political manoeuvring (sic) rather than in tackling contentious and fundamental issues that are of great concern to all of us." The NUC said it "believes that ICANN's proposed constituency model is flawed for at least three (3) reasons: (i) it creates potential 'bloat' and tensions within what is intended to be a light SG framework; (ii) it fosters a tendency for members to cluster around particular, potentially divisive , issues; and (iii) it requires potential new members to decide whether there is an existing Constituency they wish to join or (a more intimidating proposition) try to figure out ICANN's complexities so as form a new, approved Constituency prior to getting involved with ICANN. It seems to us that these problems, especially the last, would tend to both diminish the effectiveness of ICANN's bottom-up consensus-building process and, perhaps more importantly, discourage new participants in ICANN."

Some contributors were not pleased about the Board's temporary appointments as a solution for the NCSG. NCUC observed, "The board taking away elected representation from noncommercial users and replacing it with 'appointments', up for political lobbying by commercial parties is inappropriate, undemocratic, and undermines ICANN's efforts to obtain legitimacy in the governance business." On a related point, CTS said, "The transitional solution is no solution at all. It means just the opposite: that for two more years the uncertainty on fundamental rules that command the organization of the most diverse of all former constituencies still lingers on. Once again, that is certainly a not attractive way to invite more people into the daily ICANN debates."

CTS observed that the section relating to principles is weaker in the S-NCSG version, "…it is important to highlight how better the V-NCSG dealt with the 'principles' clause, stating principles crucial for the future works of the NCSG such as Nondiscriminatory and impartial application of rules; Transparency; service standards for elected officers; Equality of participation; and the encouragement of consensus. Only some of those principles are provided in a very concise way in the S-NCSG´s principles clause, which reserve much of its space to ensure that the members of the NCSG will behave nicely and with courtesy. As much as to declare that to 'listening attentively' and to treat others with 'courtesy and civility' is important, the lack of a more substantive approach on the fundamental principles of whole SG is certainly another disadvantage of the S-NCSG."

With respect to how the two models proposed to attract and retain new participants, the NCUC observed that, "NCUC has dramatically increased its outreach efforts (with no staff support) and increased its membership, both individual and nonprofit organizations, by over 191% in the last year." Notwithstanding those statistical representations, AG countered, "I further note that the changes to the NCSG charter proposed by the SIC explicitly remove the major two problems that I saw in the NCUC proposal, specifically the potential difficulty in making the NCSG attractive to new players, and the potential for capture of the NCSG Council seats by suitably motivated individuals."

Finally, although the majority of comments were strongly in support of returning to the original NCUC Charter version, ALAC favored the SIC's NCSG Charter that, "best meets the aims of the new GNSO Model and the Boards criteria, which we support, and believe is (with the additional version changes as at July 19th) being essentially met." Continuing in this vein, ALAC noted, "Maturity and development of the new design GNSO and specifically the parity and viability of the User House will benefit greatly with the 'fresh start' this Charter in our opinion provides and it should be noted that in it we can see that the opinions and views brought forward in our processes, activities and meetings on the matter have been recognised, heard and considered."

MM took issue with the ALAC synopsis statement asserting, "What you have here are basically two people expressing their personal opinions. It is unfortunate that neither of them made any effort to coordinate with either NCUC nor any effort to reach out to the wider community of noncommercial organizations, nor even to coordinate with ALAC itself. But I know why - if they had done so, they would have found that their opinions cannot even fly in ALAC." Continuing in this vein, MM added that those comments, "…reinforce the validity of the accusations of insider deals and favoritism that are being leveled by the bulk of the community's comments. It appears from this exchange that [they] had a few private negotiations with staff - a privilege that clearly was not afforded the broader community of noncommercial participants - and that this small and unrepresentative group finds the staff/SIC imposed charter satisfactory. OK, that's fine, but no one else does."

4) Concerns about fairness and parity in treatment between the NCSG Charter and the charter documents for the Contracted Parties Charters (Registries and Registrars).

Several contributors noted that there is a discontinuity between provisions that were disapproved for the NCSG that were allowed for the Registries and Registrars SGs. AD stated, "I note with interest that the Contracted House SGs are proposing the effective abolition of constituencies within their respective Stakeholder Group charters. While I have never been, and still am not, in favor of abolishing constituencies, I note that a similar proposal from the NCSG has been denied and been the target of a re-write of its charter by the Policy Staff. Of course I cannot know the intentions of the Structural Improvements Committee, and the Board, with regard to approving the implicit abolition of constituencies within Contracted Parties Stakeholder Groups. I do believe, however, that the original NCSG proposal, sans board approved constituencies, should get the same consideration that the SGs of the Contracted Parties House get on this issue." AD continued, "In support of this, I can only argue that parity is supposed to be a key principle among the Stakeholder groups and between the Houses. Any top-down Board or Policy Staff decision (sic) that unbalances that parity runs counter to the principles of the GNSO restructuring effort and must be avoided."

IGP also noted this differential treatment, "The original NCSG charter proposed by NCUC recognized this, and sought to avoid it entirely by creating a simplified NCSG structure where Constituencies can freely form as desired thereby protecting minority viewpoints,

but its Councillors are selected directly by the entire Membership. Unsurprisingly, this simpler, more efficient structural form, first promoted by the NCUC, has been adopted by the Registry and Registrar stakeholder group charter proposals. However, only in the case of the revised Noncommercial Stakeholder Group charter proposal did the ICANN policy staff/SIC remove it in its entirety without explanation."

Somewhat related to the previous discussion, the NCUC expressed concern about another provision that is handled differently between the SGs, "In Section 6, S-NCSG provides that the Board may modify the Charter or add provisions to it if, inter alia, 'where it believes that changes and/or additions are in the interests of improving fairness, openness, transparency, or accountability within the GNSO's processes and structures; or where it comes to believe that changes shall produce desirable benefits to the ICANN stakeholder community'. This language is extremely broad and does not reflect the existence of actual 'bottom-up' processes as ICANN claims. Furthermore this provision does not exist in any of the other proposed SG Charters. It was imposed upon noncommercial users singularly, without any prior discussion or notification, and without any explanation for its inclusion. As such, NCUC calls on the Board to remove this provision giving top-down control over noncommercial users to the Board, or, failing that, to insert an equivalent provision in the other SG Charters."

5) Requests to restore the V-NCSG Charter version.

Many commenters asked the full Board and SIC to reconsider the decisions to date and restore the V-NCSG Charter version. RD typified this view, "To insure legitimacy and in order to respect its own values, ICANN has to withdraw the altered by staff document and [return] back to the original document." The NCUC also urged the Board "to reinstate the consensus charter submitted by NCUC and to provide an immediate public explanation for why V-NCUC was discarded and S-NCSG proposed, particularly in light of the demonstrated overwhelmingly strong bottom-up consensus support for V-NCUC and opposition against the model proposed in S-NCSG." MM said, "…the so-called 'NCSG charter' up for comment now has no legitimacy and should be rejected completely. ICANN should allow the noncommercial entities themselves to work out an acceptable draft on their own."

Two commenters did not concur with the majority view. ALAC said, "At each of the User House Meetings since Cairo the ALAC has advised a lack of support and various concerns about the NCUC developed NCSG Charter version." DY expressed it more colorfully, "So, what we're dealing with here is a very clever path put forth by an NCUC management … their goal is simple – to capture the Non-Commercial Stakeholder's Group with a particularly odious Charter so that they won't have to share or play nice with other non-commercial entities (especially with those who in their Chicken Little world are regarded as "pro-censorship" foes), and to accomplish their goals they seek to portray the ICANN Staff as an evil conniving fox ready to gobble up the innocents."

B. Commercial SG Charter

The commercial entities of the Business, Intellectual Property, and Internet Services Provider Constituencies submitted a Transitional Charter in which, for the next full year,

the three existing Constituencies have proposed to continue largely *status quo* while they work toward developing a comprehensive new CSG Charter. Notwithstanding the transitional nature of the Charter, nearly 15% of the respondents to the forum noticed a clause (Section 4.2) that they considered to be problematic and strongly urged that it be stricken even from a transitional document.

For ease of reference, the clause is reproduced below:

> "4.2. Membership shall also be open to any additional constituency recognised by ICANN's Board under its by-laws, provided that such constituency, as determined by the unanimous consent of the signatories to this charter, is representative of commercial user interests which for the purposes of definition are distinct from and exclude registry and prospective registry, registrar, re-seller or other domain name supplier interests."

Nine commenters[3] agreed, substantively, with AD's observation, "To allow the incumbent constituencies the right of prior approval of new constituencies is a severe hindrance to the goal of outreach central to the BCG report as approved by the Board and is contrary to the spirit of the entire restructuring exercise. It also usurps the power of the board in the expressing the decision on whether a new constituency in the Non Contracted Parties house is to be approved. The way it is written any of the current CSG constituencies can black ball any new constituency - this is contrary to the spirit of bottom up organization. The clause in the CSG charter should be changed to be equivalent to the statement in the NCSG charter." IDNC, a current new Constituency applicant, added, "The restriction 'prospective registry, registrar, re-seller or domain name supplier interests' would preclude many members of the proposed IDNgTLDC group that have patiently participated (with little organized voice) while ICANN has delayed IDN by 11 years and presumably another 11 years more." AG explained further, "The proposed CSG charter, coupled with the Constituency charters within the SG, could effectively block the GNSO participation of many commercial players who do not fit into the Contracted Parties House. Moreover, there is the potential for excluding small (and possibly unincorporated) commercial entrepreneurs from participation in the CSG." The NCUC's comment itemized the multiple problems it perceives are created by this language:

> "Provision 4.2 of the proposed CSG (drafted by existing commercial constituencies) is untenable for the following reasons:
>
> (i) it goes against the Board's express desire to encourage the formation of new constituencies and increase the growth and diversification of the overall GNSO community, including forging a 'stronger partnership between the international business community and ICANN';
>
> (ii) it arrogates to the CSG the constituency approval function more properly exercised by the Board of Directors (particularly for a nonprofit organization with heightened obligations to not be driven by commercial interests);
>
> (iii) in light of recent discussions within the GNSO Council and the community as to who and what would constitute a 'commercial' interest and/or user , the

---

[3] Supported by IPJ, IDNC, LEAP, CONAC, AP, AD, AM, NCUC and AG.

requirement of unanimous consent from all existing commercial constituencies is extremely likely to mean that no new constituency will be formed within the CSG for as long as its transitional status exists.

(iv) it treats commercial stakeholders different from noncommercial stakeholders, with the board controlling noncommercial users, while giving commercial users a VETO over the board's decisions."

LEAP supported removal of Section 4.2 and also noted a concern with Section 1.3.3, "…that 'behavioural expectations', contains the clauses 'adhering to ICANN Bylaws/Policies; supporting the bottom-up consensus model;' which might cause a conflict of interest between members of constituencies, as they'd need to put ICANN's interests ahead of their own organizational interests. This would mean, for example, that they couldn't advocate certain positions to NTIA/DOC. That's fine for Board members, but not for constituency members."

On yet another issue, the NCUC noted, "The CSG Charter contemplates the selection of two (2) representatives from each of the Recognized Constituencies, for a total of six (6) representatives, which NCUC assumes will serve as the transitional CSG's Councilors to the Non-Contracting Party House. There is no provision for transitioning these six (6) representatives to the Final CSG Charter, for limiting or staggering their service terms, or for including representatives of new constituencies that may form during the transition period. Given that the timetable for fully implementing a restructured GNSO has been rescheduled in certain respects, and may possibly be again, NCUC believes that the lack of detail in the CSG Charter dealing with issues of representation must be addressed before it is approved and adopted."

In a concluding commentary, the NCUC noted, "The difference in treatment between the CSG and the NCSG as can be clearly seen in the proposed charters is staggering, and points to ICANN's deference to insider-lobbying by large companies in formulating policy."

C. Other Assorted Comments Discussed.

<u>SG Elements</u>

STAFF submitted a document to the forum containing suggested additional Stakeholder Group charter elements that "Staff suggests the Board should incorporate into the four final GNSO SG Charters. The brief document sets forth several concepts and ideas previously expressed by Staff in prior correspondence and a number of informal discussions the Staff has conducted with GNSO constituency leaders and members at various points over the past several months."

Concerned about implications of privacy, AIM commented, "I would suggest that any obligation for the processing of personal data and transfer of such data to ICANN staff not be included as part of any Charter. This would seem to raise data privacy issues."

AD expressed a concern about the nature of Staff's input and its relative weight in comparison with other general public comments during this period. AD said, "I understand that by submitting the comments in the way they did, the ICANN Policy Staff is making a differentiation between the private reports and advice they give the Board and the Structural Improvements committee, and public comment. In this case, this is not advice from ICANN, so much as the public viewpoint of the ICANN Policy Staff on a structural issue under consideration. I.e. this comment is just one among the several public comments and will be treated as such in any reporting to the Board or to the Structural Improvements Committee."

Concerned about the level of monitoring and oversight implied in the Staff document, especially as it might be applied to a SG member's activity, AD explained, "While it is certainly important to know whether someone has fulfilled the membership requirements, the idea of monitoring members for relative activity rates seems extremely subjective and necessarily arbitrary. A question 'participates in an active way' brings up is, who would be responsible for such monitoring and such determinations: Would monitoring volunteer effort becomes an ICANN Policy Staff activity; something they would report to the Board in their confidential communiques? Or would the GNSO need to set up a constituency member-activity monitoring constituency activity?"

In a final comment about how these additional SG elements might overlay upon the GNSO, its bicameral voting apparatus, SGs, and Constituencies, AD wondered, "…are we bureaucratizing the GNSO structure even further then we need to? Yes, some structure and some guidelines are necessary, but at some point too much structure and too much formalization may swamp volunteers' efforts to actually have time and energy for the Policy work. As the GNSO comes out of the long slog of restructuring and 'improvement' I sincerely hope they will be allowed to start using their energy largely for the necessary policy work that is within their scope of responsibility."

NomCom Appointees

Recognizing that there are variations between the contracted and non-contracted parties SG Charters, especially as it relates to Constituencies, AD observed, "If the Board is making a decision to abolish the requirement for a constituency substructure to the Stakeholder Groupings, such as seems possible in the Contracted Parties House, then it seems that they must at the same time decide on how the seats in the nominating committee will be assigned and whether the methods proposed by the SGs are fair and equivalent." AG concurred and noted, "The GNSO currently nominates 7 voting members of the Nominating Committee (2 from the Business Constituency and 1 from each other Constituency). There has been little attention paid to how the new Stakeholder Groups and their Constituencies/Interest Groups will select Nominating Committee Delegates, or for that matter, even how many such delegates there will be." Staff notes that Article VII, Section 2 of the Bylaws addresses GNSO appointments to the Nominating Committee, which is currently being reviewed by the SIC for possible amendment before the restructuring is completed.

IV. NEXT STEPS

The ICANN Board is likely to consider all the relevant community input and move forward with guidance regarding all the SG Charters as soon as practicably possible. Any decisions with respect to the approval of the existing SG Charters will likely take place in the context of the GNSO Improvements implementation processes.