

NCUC Comments on the Proposed NCSG Charter

23 July 2009

The Non-Commercial Users Constituency (NCUC) welcomes this opportunity to comment on the various Stakeholder Group (SG) charters that have been put up for consideration and community discussion. Nonetheless, NCUC is compelled to state in the strongest possible terms that **the current ICANN drafted NCSG Charter, as made available for public comment, does not in any way represent the consensus and support of 86 noncommercial organizations and individuals for the original civil society drafted NCSG Charter proposed by NCUC (V-NCUC¹)**. 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.

NCUC's specific comments on the draft NCSG Charter, as currently proposed by the SIC and ICANN Staff (S-NCSG)² follows.

(1) Timing & Lack of Explanation for S-NCSG being a Substantially Different Document from V-NCUC

Despite the requirement in the Board's May resolution³ that an Explanatory Memorandum be posted alongside the revised Charters, none was provided to explain why civil society's charter had been re-written by ICANN and replaced with the governance model noncommercial organizations unanimously said would stifle noncommercial interests in the GNSO. Further, the S-NCSG document was only provided to NCUC during the Sydney meeting (on 22 June 2009), leaving little (if any) time for any meaningful substantive discussion of the changes before our meeting with SIC moments later. While NCUC is grateful to the SIC for meeting with us during the Sydney meeting, the timing of the release of S-NCSG made it practically impossible to discuss fully the scope and implications of S-NCSG and to respond while stunned.

¹ In order to avoid confusion, the original Charter submitted by NCUC in March 2009 will be referred to hereinafter as "V-NCUC" (to use the abbreviation coined by ICANN Senior Policy Director Robert Hoggarth, in his Summary-Analysis of Comments in Public Forum – New GNSO Stakeholder Group Petitions & Charters, posted to the public forum for that comment process on 2 May 2009). The V-NCUC consensus charter submitted by NCUC is available at: <http://gnso.icann.org/en/improvements/nscg-petition-charter.pdf>

² "S-NCSG" the ICANN drafted NCSG charter is available at: <http://gnso.icann.org/en/improvements/nscg-proposed-petition-charter-22jun09.pdf>

³ Board Resolution 2009-05-21-13.

In view of the fact that V-NCUC was supported by 55 non-governmental organizations (NGOs) and civil society groups, and 31 individuals⁴ during the April 2009 Public Comment Period, many NCUC members were upset to find that S-NCSG differs in many significant respects from V-NCUC, in particular it's attempt to impose precisely the constituency based ("silo") governance model that civil society said it did not want. The lack of explanation for these changes, and the late release of S-NCSG, can be interpreted by many, both within and outside the ICANN environment, as a slap in the face of non-commercial users and civil society. This is particularly frustrating, given the fact that, in response to the Board's GNSO Improvements Report and related Resolutions, 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 year⁵.

Moreover, the main grounds of objection to V-NCUC raised by those opposed to it can readily be refuted. Specifically, these grounds were (i) that NCUC was too small and insufficiently diverse, and needed to expand significantly (including representation of individuals and consumers); and (ii) that the V-NCUC model means Council seats would be susceptible to "capture" by a bloc of like-minded members, thus hindering true representation. On the first, we wish to highlight again the demonstrated growth of NCUC over the last year (including, particularly, members who are individuals and pro-consumer organizations), a trend that shows no sign of slowing. NCUC welcomes any other stakeholder group to show members in 45 different countries. On the second, we note that while S-NCSG (the version posted to ICANN's website without Section 5) does not currently specify how Council seats are to be allocated after the two-year transitional period, it does, however, envision a major role for the NCSG Executive Committee (EC) in this matter⁶. S-NCSG thus does nothing to address the potential "capture" problem that all stakeholder groups face⁷.

As such, NCUC calls on the Board to reinstate the consensus charter submitted by NCUC and to provide an immediate public explanation for why V-NCUC was discarded

⁴ This figure does not include the various other individuals who submitted public comments separately in favor of V-NCUC.

⁵ As of 23 July 2009, NCUC has 131 members in 45 countries, representing a broad swath of educational, research, consumer and other non-commercial interests. NCUC's membership currently comprises 71 noncommercial organizations and 60 individuals. This figure represents a 191% increase in membership since 2008 when NCUC's membership was 45.

⁶ See Section 2.1.2.3 and Section 3.2.4, referring to a currently blank Section 5.1 (but outlined in a different document available at: http://www.ipjustice.org/ICANN/NCSG/Council_Seat_Vacancies_Section_%285.0%29_DRAFT-1.pdf).

⁷ See page __, below, for further comments on the role of the EC. In addition, NCUC continues to believe that, with its current growth and the expectation that the Board will approve new Constituencies, the problem of "capture" is an illusory one: see, e.g., the public comments filed by Dr. Milton Mueller in response to the initial draft Charters, dated 14 April 2009 (<http://forum.icann.org/lists/sg-petitions-charters/msg00011.html>).

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.

Our comments on specific portions of S-NCSG follow, below.

(2) The Constituency Model within a Stakeholder Group Framework

The Board's GNSO Improvements Report envisaged a Stakeholder Group (SG) framework for the GNSO Council, within which structure new Constituencies may self-form in a bottom-up process, to be approved by the Board. What was not clear however, was the relationship between the various Constituencies and the SGs. V-NCUC was developed in the context of this uncertainty, and over a period of several months between the latter half of 2008 and February 2009, through multiple discussions both within and outside the existing NCUC, including with members of the At-Large communities, ICANN Board and Staff, and potential new Constituencies.

In discussions with ICANN surrounding the March meeting in Mexico, NCUC specifically asked ICANN if the stakeholder group wide election model it was proposing was inconsistent with the Board Governance Committee's report; and we told the model was not inconsistent.

V-NCUC proposed a light, flexible SG model in which Constituencies (subject to their formation being approved by the Board) could form and dissolve freely, and in which Council seats were voted on by the full SG membership and not tied to particular Constituencies. From S-NCSG, it seems clear that this is not the model that SIC will permit for noncommercial users, although it is permitted for 2 other stakeholder groups (Registries and Registrars).

There is no legitimate reason for ICANN to treat noncommercial users as second-class citizens to those in other SG's and deny noncommercial users representation unless they first decipher the ICANN matrix and decide which constituency best represents them and they manage to successfully go through the process of joining the constituency before they can join the SG. Noncommercial users should have the same voting rights as members of other stakeholder groups and not increased barriers to participation as proposed by ICANN. Different representation rights between stakeholders written into their charters is unfair to noncommercial users.

NCUC 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 divisive⁸, 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

⁸ Given that NCUC currently does and, in the future, NCSG will represent the "full range" of non-commercial users and entities of the Internet, it is extremely likely that such divisiveness will occur.

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.

As such, NCUC calls on the Board to allow noncommercial users to elect their GNSO Council and other representatives on a stakeholder group wide basis and to permit noncommercial users to participate within the NCSG before deciding which constituency to join.

(3) The Possibility of Board Amendments to the NCSG Charter

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.

(4) Election of Councilors

Since the 2008 Report from the Working Group on GNSO Council Restructuring, it has been recognized that NCSG and CSG should have parity in terms of the number of GNSO Council seats in the new bicameral House structure, with the result that noncommercial users will have more than its current 3 Council seats. Noncommercial users having parity with commercial users on the GNSO Council was also recommended by a Board commissioned report from the London School of Economics on GNSO restructuring in 2006⁹. Despite subsequent efforts by some GNSO community members to go back on this consensus, the draft new Bylaws currently before the Board clearly accept this principle of parity between the two SGs in the Non-Contracted Party "User House". Even so, and presumably in response to the perception that in the new structure the CSG will have "lost" three (3) Council seats and the NCSG will have "gained" three (3) seats, the community is now being asked to endorse a transitional arrangement whereby the additional three (3) NCSG seats will be occupied

⁹ 2006 Report from the London School of Economics available at:
<http://www.icann.org/en/announcements/gns0-review-report-sep06.pdf>

temporarily by Board appointees for the first two (2) years of the new structure¹⁰. 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.

NCUC recognizes the fact that new Constituencies are an important means of reflecting diversity. We have stated publicly, many times, that we welcome new voices and participants. As such, and even though NCUC believes that it would have easily found new and diverse representatives to elect to fill the three (3) seats in question (particularly given its unprecedented and recent membership growth), it has expressed to the SIC its willingness to recommend to the Board appropriate appointees to represent noncommercial interests.

Nonetheless, given the high levels of support for V-NCUC and the increased NCUC membership, ***NCUC calls on the Board to acknowledge that increased and new non-commercial voices and participants are emerging in NCUC and thus ICANN.*** This recognition is critical for NCUC and NCSG as the new GNSO structure is implemented, and will go some way towards preventing stalemates, stalling and other wastes of precious volunteer time as each SG transitions into its final state.

(5) The Role of the EC

As mentioned above, S-NCSG seems to leave a great deal of discretion regarding the allocation of Council seats to the EC. In particular, Section 3.2.4 states that, subject to the as-yet-unconfirmed Section 5.1, the EC “may, if it is able to achieve unanimity, *apportion* vacant GNSO Council seats among its Constituency Members in any way that satisfies their needs and interests” (emphasis added). This language is both puzzling and vague, as besides granting discretion to the EC rather than hold a SG-wide election, the word “apportion” implies that in such cases the EC should divide up the vacant seat(s) amongst the-then number of so-called unrepresented Constituencies. For reasons that NCUC and other commentators have pointed out previously, a system which links Council seats to specific Constituencies is likely to be both divisive and unworkable¹¹.

S-NCSG also contains a transitional Appendix (in Section 8) in place of Section 5, to deal with the question of Council seats. While NCUC understands that the SIC and ICANN Staff will work with it to create a workable and fair process to be embodied in the final version of Section 5, NCUC also believes that approving S-NCSG with the blank space currently earmarked for Section 5 but with Sections 3.2.4 and 2.1.2.3 (which also refers to Section 5.1) would be unwise and potentially problematic.

¹⁰ See Section 8.1, S-NCSG.

¹¹ See, e.g. public comments submitted in response to the earlier round of petitions regarding SG charters by Dr Milton Mueller, dated 14 April 2009 (<http://forum.icann.org/lists/sg-petitions-charters/msg00011.html>) and Adam Peake, dated 16 April 2009 (<http://forum.icann.org/lists/sg-petitions-charters/msg00013.html>).

As such, 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.

CONCLUDING REMARKS

At this point, NCUC and the individuals and civil society groups that supported V-NCUC cannot support S-NCSG, drafted by ICANN in defiance to the expressed wishes of noncommercial users.

As ICANN's operations and processes come under increased scrutiny by governments, international organizations and users across the globe, to see if they truly fulfill ICANN's promise of open, accountable, transparent and bottom-up policy development, it is crucial that the Board demonstrate that it is willing and able to address the expressed concerns of non-commercial users.

NCUC and its existing members have fulfilled, and will continue to fulfill, the Board Governance Committee's call to broaden its membership numbers, base and diversity. We undertook the long and difficult process of negotiating and drafting the submitted consensus charter (V-NCUC) with the express commitment, which we acted on, to consult with other members and groups of the ICANN community.

The non-commercial users and interests that we represent, and which we believe the Board will wish to continue to participate actively in the restructured GNSO, are entitled to be listened to about the governance model that best advances noncommercial interests, and certainly not be treated with less deference and respect than other stakeholder groups in the charters. We call on ICANN to re-instate V-NCUC as the starting point for NCSG charter discussions and respect the democratic will of noncommercial users.