Analysis of the two NCSG charter proposals

This analysis was drafted by Milton Mueller and reviewed by the NCUC Executive Committee.

The NCSG charter proposal advanced by Cheryl Preston of CP80 (hereafter: the CP80 proposal) is based on a model of carving up the Noncommercial Stakeholder Group (NCSG) into silos known as "Constituencies." Each Constituency would have its own separate communication organs, its own elected officers and its own views of policy. A noncommercial participant in ICANN would have to make a mutually exclusive choice as to which of these groups to join – or else it would have to double or triple the burden of participation by trying to join and keep track of all of them. In this complex, two-tier structure, Constituencies are the basis for electing GNSO Council representatives and an Executive Committee representative. The EC in turn makes other important decisions. The CP80 charter presumes that the 6 Council seats are divided up evenly among the Constituencies.

The NCSG charter proposal put forward by the NCUC (hereafter: the NCUC proposal) is based on a different organizational principle. In the NCUC proposal, most of the important activities take place on a Stakeholder Group-wide basis. Organizations and individuals join the NCSG first; Constituencies are self-formed subgroups of NCSG members. In the NCUC proposal, Constituencies play an important role in formulating and advocating policy positions but they do not hold elections for Council seats. Because of this detachment from Council seats, Constituencies are much easier to form, and there are no inherent limits on their number. The administrative officers of the NCSG, and the GNSO Council representatives, are elected directly by NCSG members. Voting takes place in the NCSG as a whole, it is not fragmented into separate constituency elections. This "integrated Stakeholder Group" model, by the way, is also proposed by the Registry and Registrar Stakeholder Groups.

In what follows, I contrast these two models. I first identify the inherent problems with Constituency-silos and with the highly centralized Executive Committee it creates.

I then examine the criticisms of the NCUC model advanced by the proponents of the CP80 model. In particular, I refute charges that the NCUC proposal allows a simple majority to capture all the power and shuts out minority views from policy voice and Council representation.

Importantly, I speak for many if not most supporters of the NCUC Proposal when I say that the proposed Cyber-safety Constituency (so-called) can easily be accommodated within our proposed NCSG structure. By revealing the flaws in CP80's charter proposal, we are not arguing against recognition of the CSC per se. Rather, we believe that the NCUC's approach to new constituencies is more in line with the GNSO Improvement Report principles of open, consensus-driven policy development.

A. How the Constituency Model Breaks Down

It is apparent from the CP80 proposal that its constituency-silo structure breaks down under numerous circumstances. Most of the problems come from the attempt to hardwire Council seats to Constituency groupings. The proposal also contains small but powerful decision making structures that are easy targets for capture. Here are some plausible scenarios that demonstrate the problems with the CP80 model.

1. Executive Committee Deadlock

In the CP80 proposal, the Executive Committee (EC) is composed of one delegate from each recognized Constituency within the NCSG. This means that whenever there are disagreements between constituencies, EC can easily result in deadlocks. This becomes especially problematical when there are only two Constituencies. Two Constituencies is not a hypothetical or unlikely scenario – if the Board accepts the Cyber-Safety Constituency (CSC), there could for the foreseeable future be only two (rather hostile) noncommercial Constituencies in existence: CSC and NCUC.

If there are only two noncommercial constituencies, then any disagreement between constituency leaders will produce an insoluble deadlock. The NCSG would not even be able to elect a Chair. How is this problem to be resolved? Ironically, if the EC is unable to make a decision, the CP80 charter requires it to "conduct an election." (Section 4.2.4) According to Section 5, this is a Stakeholder Group-wide election. Thus, in many cases the CP80 proposal would be forced to revert back to the integrated voting model proposed by the NCUC!

Another problem is that a deadlocked EC would be unable to elect a Chair. With no Chair there is no one responsible for running the election.

2. Capture of the EC

But suppose that the EC is not deadlocked. The CP80 charter claims that the SG organization is merely a lightweight coordinating layer on top of the Constituencies. In fact, the EC has an extremely powerful and highly political role. It can decide how many seats on the GNSO Council each constituency gets, and can independently appoint individual members to the Council. It can also choose Nominating Committee appointments for the entire NCSG. The small size of the EC, coupled with its important powers, makes it relatively easy for a dominant group to emerge and capture it.
Proof: Let's say there are three Constituencies, and two of them believe basically the same thing and the third represents a viewpoint opposed by the others. Not an unlikely scenario. With a 2/3 majority on the EC, a group of exactly two people could dictate the Chair of the NCSG and strip the other Constituency of one or more of their seats on the Council. It could also eliminate the other Constituency's influence over policy. In the CP80 proposal, EC decisions occur without any direct ratification by constituency members, and there is no possibility of appeal.

3. The Odd Man Out Problem

Another obvious breakdown point for the constituency model occurs when the number of Constituencies is not evenly divisible into 6. For example, if there are 4 or 5 Constituencies and 6 Council seats, the presumption of an even division of Council seats among Constituencies breaks down. In that case, the EC has to allocate what the charter calls an "extra seat." In section 4.2.1 of the CP80 charter, Constituencies can petition for an "extra seat," and 4.2.2 contains a list of very broad, vague and potentially contradictory conditions for making a determination as to who gets the extra seat. But with 4 or 5 constituencies, there could easily be a deadlock. With 4 Constituencies, you could get a tie; with 5 constituencies you could easily get a 3-2 vote that fails to achieve the 2/3 majority required for making the decision. Deadlocks are likely – why would any constituency vote to reduce its share of the total number of seats? This feature of the CP80 proposal locks the NCSG into a perpetual zero-sum game of political infighting. Members of a constituency can gain influence only by reducing the influence of another constituency. Again, these kinds of deadlocks could only be resolved through a SG-wide election. Thus, here again it is likely that the CP80 proposal would be forced to revert to the integrated voting structure that NCUC proposed.

4. The Problem of Shifting Size

Yet another breakdown scenario occurs when the constituencies are not evenly sized. Under the CP80 charter, Constituency A would get three seats on the Council and Constituency B would get three seats. But what if Constituency A succeeds in growing to 100 members and Constituency B shrinks to 20 members? The only remedy the CP80 proposal offers is that EC can decide to apportion an "extra seat" to one constituency, at the expense of other(s), based on a petition. But in the two-Constituency scenario, this requires that the Constituency losing a seat agree to divest itself, which seems unlikely. The charter does not resolve the problem. The list of factors to be used in making these decisions is just that – an open-ended list, not a clearly defined decision rule. For example, one could claim that while Constituency A is bigger than B, it's "history or performance" or its "breadth of interest" represented were insufficient. Moreover, there are many ways in which membership size can be gamed. One constituency might have a nominal membership of 80-100, but only 5 or 6 active participants. In the kind of SG-wide election proposed by NCUC, members who are not active enough to vote have no influence. In the CP80 proposal, one can easily use membership "on paper" to gain votes.

5. The System Self-Destructs

The most obvious breakdown scenario occurs when the number of recognized constituencies exceeds the number of seats on the GNSO Council. This scenario poses deep problems for the Constituency model. The main rationale for the Constituency-silo model is that it guarantees a voice on the Council to each Constituency. But in this scenario, the Constituency model cannot guarantee that. In an earlier draft of the CP80 charter, Cheryl Preston actually proposed that when there are more than 6 Constituencies, all existing Constituencies would be dismantled, and everyone forced into a new organizational structure with six pre-defined categories. The categories proposed, however, were arbitrary and overlapping, and bear no relation to the preferences of NCSG members. Quite apart from that serious problem, a wholesale reorganization of constituencies would be incredibly disruptive. All officers would have to be re-elected,

new charters prepared, etc. It would essentially cripple the NCSG for months. The current CP80 charter proposal has dropped this proposal, but it has not replaced it with anything. We really don't know what would happen under the CP80 proposal if the Board recognized more than 6 NCSG Constituencies. This by itself is a fatal flaw.

6. Geographic diversity cannot be achieved without additional steps
The constituency-silo model proposed by CP80 makes the achievement of geographic diversity more difficult. Each constituency would elect its Council representatives in isolation from the other Constituencies; thus, if there are three constituencies and each one elected two Council members, each constituency could select representatives from only two world regions. It is possible, even likely, that each constituency would elect people from the same two regions. For example, two representatives from North America and Europe could be elected from each Constituency. The only way to overcome this problem is for Constituency election results to be combined or integrated in a way that eliminates candidates from duplicate regions. But in that case, one could end up with an uneven distribution of Council seats across constituencies. Indeed, it is not inconceivable that one Constituency would get 5 seats and the other only 1 in a two-constituency model. The harder CP80 Proposal tries to get away from the integrated NCSG voting model, the more trouble it causes.

Is the NCUC Proposal Fair to Minorities?

The advocates of the CP80 proposal have attempted to discredit the NCUC model by arguing that its integrated voting model concentrates all of the NCSG's power in the hands of a simple majority. In the words of one CP80 member, "Under the NCUC proposal, a 50.1% majority vote of NCSG members will elect the NCSG Chair (who also has tie breaking authority on the Policy Committee) and all six GNSO Councilors."

This claim is false. It is based on a misrepresentation of the NCUC's proposed voting procedure.

In the NCUC proposal, GNSO Council representatives are nominated and elected on an individual basis, and are subject to regional diversity requirements. They are not part of a collective slate that can get a bare majority of the membership as a group and sweep all Council seats. With individualized votes for 6 Council seats distributed across more than 6 candidates, and a requirement that no more than 2 of the 6 be from the same region, it is not only possible, but likely, that candidates with less than majority support would be elected to the Council. Table 1 demonstrates this fact. (The details are appended as Appendix 1) It shows how 48 members, each with 6 votes to assign to 6 different candidates, might distribute their votes. Assuming a field of 11 candidates from the 5 ICANN regions, it shows that two candidates, one with 46% of the vote, the other with only 38%, could be elected to the Council. It is not difficult to come up with many other scenarios in which similar things happen. This example is small for purposes of simplicity. If the field of candidates and number of voting members increases, the likelihood of getting a single group of candidates with exactly the same views on all policy issues across 4 or 5 world regions diminishes to the vanishing point. And that is

the point of this integrated method of voting. It encourages candidates to seek support from the entire stakeholder group – not just from their own regional cohort or ideological faction.

Table 1
Possible vote distribution using integrated NCSG voting

48 members voting: each member casts 6 votes, 1 vote per candidate	Votes received	Votes as % of membership		
Candidate 1, European region	**36**	**75%**	**win**	
Candidate 2, European region	**34**	**71%**	**win**	
Candidate 3, European region	**32**	**67%**	**--**	**eliminated by regional diversity requirement**
Candidate 4, Latin Am./C region	**28**	**58%**	**win**	
Candidate 5, North Am. region	**28**	**58%**	**win**	
Candidate 6, North Am. Region	**26**	**54%**	**--**	**eliminated by regional diversity requirement**
Candidate 7, Latin Am./C region	**24**	**50%**	**--**	**eliminated by regional diversity requirement**
Candidate 8, Asia-Pac. Region	**22**	**46%**	**win**	
Candidate 9, European region	**22**	**46%**	**--**	**eliminated by regional diversity requirement**
Candidate 10, African region	**18**	**38%**	**win**	
Candidate 11, Asia-Pac region	**18**	**38%**	**--**	**tie, but eliminated by regional diversity requirement**

Under this procedure, the only way all NCSG Council members would have homogenous policy views is when the entire membership is completely unified in its views. (And if such agreement exists, what is wrong with reflecting that in the Council representatives?)

Another problem with the CP80 argument against the NCUC proposal is that it concentrates exclusively on GNSO Council seats. Remember that GNSO policy will be made in open Working Groups that require consensus to move proposals to the Council for ratification. The CP80 Proposal says nothing about how the NCSG proposes Working Groups, except vaguely indicating that it would be up to the EC.

Looking beyond Council representation at the broader picture, there are three other ways in which the NCSG charter NCUC proposed respects and empowers noncommercial groups that do not have a majority.

1) The most important thing the GNSO does is charter Working Groups to create consensus policies. Our NCSG proposal sets a low threshold – 20% of the Policy Council or 20% of the membership - for proposals to create working groups. Once a proposal gets that level of support, *all* NCSG Councilors are required to vote for it on the GNSO Council, regardless of their personal preference.
2) By detaching Council seats from constituency formation, we make it much easier to form constituencies. This makes it possible to have more constituencies and

thus more diverse voices and subgroupings within the NCSG. Constituencies receive seats on the Policy Committee, which gives them influence over policy formulation, membership and other important things. The NCSG is required to include the policy positions of each recognized constituency in any comments it makes on policy issues to the GNSO as a whole. This assures that substantial minority voices will be well-represented.

3) Geographic diversity requirements on Council representation make it impossible for a simple majority of the entire membership to control the entire Council. Our team of Council representatives must be globally diverse.

Conclusion

The CP80 proposal was not drafted in a way that optimizes the functioning of the NCSG. Rather, its main purpose seems to have been to ensure that CP80's own Cybersafety Constituency would be guaranteed a Council seat. By focusing on this narrow objective, the CP80 proposal ignores many important priorities and contains many structural flaws.