

16 March 2009

To: ICANN Board, Peter Dengate Thrush, Chair

From: Robin Gross, Chair, Noncommercial Users Constituency

Dear Peter:

The NCUC is pleased to submit a proposed charter for the new Noncommercial Stakeholders Group (NCSG). This revised proposal reflects comments received in meetings with the Board Governance Committee, during a “Users’ House” session and a joint ALAC-NCUC session at the 34th ICANN Public Meeting, in Mexico City, and in discussions with ICANN staff as well as among NCUC members.

This cover letter to our proposal provides: (i) an executive summary of its essential elements; (ii) an explanation on how it advances the principles and goals of the GNSO Improvements process through the adoption of innovative approaches to certain problems posed by the formation of stakeholder groups; and finally (iii) a summary of the specific changes made in comparison to our previous version of the NCSG proposal, as submitted to the ICANN Board on February 28, 2009.

1. Essential Elements of the proposal:

1. Noncommercial stakeholders join the NCSG directly, and the NCSG keeps track of membership and administers voting for Council seats by the membership as a whole.
2. The NCSG is administered by an annually elected Chair and a Policy Committee. The Policy Committee is composed of the 6 elected GNSO Councilors and one representative from each Constituency.
3. There are three classes of membership: 1) large organizations (which receive 4 votes), small organizations (which receive 2 votes) and individuals (who receive 1 vote)
4. Constituencies are created as subunits within the NCSG and its formation follows some simple procedures, managed by the Policy Committee, which then submits the petition for formation of a new Constituency to the ICANN Board’s approval.
5. We have de-linked Constituency formation from Council seats so that NCSG participants do not have artificial incentives to fragment into competing groups, ensuring that a voting system, conducted through all members of the SG, will result in a better and diverse representation on the GNSO than any other model that strings the formation of a Constituency to a seat the Council, favoring corporatism over democracy.
6. Constituencies are given special rights to propose Working Groups and assured that their positions are incorporated into any and all public comments submitted by the NCSG into the policy development process.

To protect the voice of minorities in the policy process, we require *all* NCSG representatives on the GNSO Council to vote in favor of the formation of a Working Group if it has the support of 1/3 of the constituencies or 1/5 of the whole membership.

2. How our proposal addresses Principles and Goals of the GNSO Improvements process:

We would like to explain how this proposal advances the principles and goals of the GNSO Improvements process. As you know, the Board has articulated four “vital principles” that are critical to the GNSO revitalization process. They are:

- GNSO policy development activities should become more visible and transparent to a wider range of stakeholders;
- Reforms should enhance the representativeness of the GNSO Council and its constituencies;
- Operational changes should help enhance the GNSO’s ability to reach consensus on policy positions that enjoy wide support in the ICANN community; and
- GNSO stakeholder representation structures need to be flexible and adaptable.

Our proposal meets these goals better than any of the proposed alternatives.

Principle 1: *Visibility and Transparency.*

When noncommercial stakeholders are fragmented into independent constituencies, each with their own mailing list, administrative structure and representatives, it is literally impossible for an ordinary noncommercial organization to keep track of them all. Noncommercial stakeholders in one constituency would have no idea what is happening in other constituencies. Our proposal integrates all policy deliberation and voting into a unified structure. This enhances the visibility and transparency of the SG.

Principle 2: *Representativeness.*

Our proposal enhances representation in several ways. First, by adopting a model of flexible and easy-to-form constituencies as subunits under the NCSG, we allow a far more diverse set of interests and coalitions to form. Most important, through unified voting for GNSO Council seats, our proposal ensures that whoever represents noncommercial stakeholders on the Council has support across all constituencies, not just a bare majority of a small subgroup of the SG.

Principle 3: *Consensus.*

We believe that the old GNSO constituency structure, which assigns a specific number of Council seats to specific constituencies, is inimical to the formation of consensus. That approach encourages small subgroups to break away and form their “own” constituencies in order to gain a guaranteed Council seat. Once a constituency controls specific Council seats/votes, they have little incentive to seek support from other Council members for their views or their representatives. We already have evidence from this; we note that none of the “new constituencies” currently being proposed for the Noncommercial

Stakeholders actually represent newcomers to the ICANN space. All of them are existing members of NCUC or RALOs who wish to gain seats on the Council without having to win an election among a large number of other noncommercial entities and individuals.

Our proposal understands that policy development in the new GNSO will not come from a Council acting as a legislator, but from consensus-based Working Groups. Therefore, we allow relatively small minorities of the NCSG to bind our Council representatives to support the formation of a Working Group. Once a Working Group is formed, its proponents will have to convince many other stakeholders to agree on a common policy. We think there should be a low threshold for the formation of a WG, so that anyone can have a chance to convince the rest of the GNSO of the need for a policy.

Principle 4: *Flexibility and Adaptability.*

The old constituency model is broken. It rigidly assigns Council seats and representation to categories of users that are constantly changing, categories that may overlap in numerous ways. Dividing the world up into mutually exclusive categories known as “constituencies” is always bound to exclude some people who don’t fit the categories, and at the same time over-represent entities who qualify for two or three of the categories. By detaching Constituencies from Council seats, our proposal can make constituencies much more flexible and lightweight. We make constituencies more like intra-Stakeholder Group working groups – easier to form and not mutually exclusive. NCSG members can join multiple constituencies, and constituencies can form and disband more easily without disrupting the entire representational structure of the NCSG. Under the old model, once a constituency is formed, there is a strong danger that it can be captured or controlled by a small group, especially as membership and participation declines. The NCSG charter proposed here solves this problem by situating constituencies in a large NCSG membership that cannot be easily captured, as addressed in the item below.

3. Changes made to the previous (2/28/9) version of the proposal:

Dealing with “Threat” of Capture.

A central concern is the ability of special interests or a discrete group to gain a majority of GNSO Councilor seats in the reformed GNSO. Comments suggested that existing participants within the NCUC might have special advantage, or the proposed structure might be subject to “gaming,” specifically capture of Councilor seats by a simple majority.

To the first point, the current NCUC will dissolve completely when the charter goes into effect. Existing individual and organizational members will be free to form new constituencies and participate in elections according to the charter rules. They are not privileged in any manner, having the same rights as any new members that chose to join the Stakeholder Group. The various interests among NCUC members are extremely diverse, perhaps the most varied of all SG’s, and are difficult to capture by a single

viewpoint, given the breadth of noncommercial interests.

To the second point, the threat of “gaming” exists under any proposed structure. It should be recognized that concerns about some coordinated push to “capture” the Noncommercial Constituency have been made since 1999. However, there is no factual basis to suggest this has occurred. Instead, and as the Board realized in reviewing the BGC recommendations, the issue has always been under-representation of noncommercial interests. It has always been the case for noncommercial interests that there are not enough people willing and able to get deeply involved and do the work required to participate effectively in the GNSO. Despite this ongoing difficulty, NCUC’s membership has increased by more than 40% within the last six months, partially due to the membership being opened for *individuals* to join.

Nonetheless, in response to this perceived threat of capture, **we have extended the minimum voting eligibility period for new Members to 90 days (Section 3.4.3)**. Such an adjustment should allow opportunity for countervailing interests to form, preventing the flooding of new members’ right before an election with the specific purpose of winning it, without any actual engagement of such members in the discussions and activities pertaining to the Stakeholders Group.

The current constituency-based model actually aggravates problems of capture because it potentially institutionalizes special interests. Once a constituency has formed and been allocated seats, there is no reasonable mechanism to remove a constituency’s representatives from the Council, no matter how the broader membership base may change. **We partially address this concern by now requiring final approval of Constituencies by the ICANN Board (Section 2.3.1)**.

Dealing with the demand for diversity in representation on the GNSO Council:

Attempting to categorize individuals and organizations according to constituencies is inimical to growing diverse participation in the stakeholder group. A constituency-based model of allocating seats is neither flexible nor adaptable to a growing noncommercial membership.

In this regard, the discussions in which we engaged during the Mexico meeting featured a wide range of comments on the issue of representation, and providing adequate solutions for a long-term perspective, as well as creating complex voting methods that would end up decreasing the broader representation we seek.

One approach suggested that an *interim* system in which each Constituency would be granted an automatic seat at the GNSO Council could be created as long as no more than six Constituencies exist within the NCSG structure. This suggestion not only fails to provide a long-term solution for the issue, it also creates artificial incentives for the formation of groups that have little concern for the wider range of the membership who

the NCSG Council must serve.

The outcome of an *interim* decision like that would encourage the election of NCSG Councilors who have little or no incentive to reach out to other views and constituencies that naturally constitute the non-commercial interest in ICANN.

The other proposal ties up non-commercial energy and resources with in-fighting between competing constituencies and dispute mechanisms. It presents complex systems for voting and/or for the allocation of members inside the specter of six forced Constituencies. And its voting mechanism seems to create a difficult method for measuring the will of the members that integrate the NCSG.

There have been even some suggestions for fragmented voting. We deem that no other system is simpler and direct than allowing each member to vote and that representation results from the election of the ones to whom the majority of votes has been casted.

In short, the other NCSG proposal allocates GNSO Council seats by constituencies *competing* with one another, while our proposal allocates Council seats via constituencies *cooperating* with one another to find a consensus.

The recently submitted charters of the Registries and Registrars provide for GNSO Councilors to be elected by Stakeholder Group-wide membership rather than individual constituencies. In this matter, each of these charters (ours, the Registries, and the Registrars) seem to present the same solution for the issue of representation.

The reason for this in the non-commercial stakeholder group is simple: There are no concentrated benefits for noncommercial participants to counter their costs of participating in a global policy making institution. A simple solution to this is to lower structural barriers to participation, as the NCSG charter does by providing for direct representation and easy participation within constituencies.

Our proposed NCSG Charter tackles the issue of representation, avoids interim suggestions, and puts forth a system that allows the broadest and most democratic representation of noncommercial interests.

Conclusion

Although it has transformed significantly along the way, our proposal is not new. We have been working on this charter since June of 2008, and have entered into extensive consultations with ICANN staff members, ALAC, At Large representatives, board members, and our own constituency members on its development. We feel that much has been improved to guarantee diversity in representation, to secure a space for minority views to be heard, and to address the concern over capture.

We thank ICANN for allowing us an opportunity to provide this revised proposal that reflects the comments and suggestions received from all interested parties who have joined in the effort to present the best charter possible for the NCSG structure, built upon consensus and the principles that guide the GNSO Improvements process. We stand ready to continue to work with the ICANN community to improve this NCSG proposal even further.

Best regards,

Robin Gross,
Chair, Noncommercial Users Constituency