

NCUC Comments on the Proposed CSG 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. NCUC also appreciates the fact that ICANN Staff have attempted to set some uniform standards of transparency, openness, fairness and courtesy (among others) across all SGs. Nevertheless, NCUC has grave concerns regarding the adoption of the Commercial Stakeholders Group (CSG) Charter as it currently stands. These concerns are as follows:

(1) Approval of New Constituencies

The Charter potentially, and possibly effectively, limits membership of the new CSG to its existing Recognized Constituencies, since it subjects examination of whether any new constituency sufficiently represents “commercial user interests” to the “unanimous consent” of the existing Recognized Constituencies¹.

"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." (italics added).

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”²;

(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); and

(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 user³, the requirement of unanimous consent from all existing commercial constituencies is extremely likely to

¹ Section 4.2 of the proposed CSG Charter available at: <http://gns0.icann.org/en/improvements/csg-proposed-petition-charter-22jun09.pdf>

² See p. 32, Board Governance Committee Working Group (BGC WG) Report on GNSO Improvements.

³ E.g. the question of which of the two SGs in the Non-Contracting Party House new groups such as the proposed new IDNgTLD constituency should belong 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.

It is no answer to say that the CSG Charter is merely "transitional", as the Charter's own silence regarding how new constituencies can be formed within the final CSG means that the GNSO community is left in a state of uncertainty – to await the CSG's undefined "consensus process"⁴ regarding what is intended to be a significant feature in the restructured GNSO. This uncertainty is further aggravated by the explicit acknowledgment that how new constituencies are to be created is something that the CSG will determine only after its transitional Charter is approved⁵

NCUC believes that the CSG Charter, even as a transitional document, should be amended to reflect that decisions as to the formation of new constituencies should be made by the Board and not the Recognized Constituencies or any other person or group within the CSG.

(2) Election of Representatives/Councilors

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.

(3) General Comments

As mentioned above, the draft transitional CSG Charter is extremely brief and gives no guidance as to how the Recognized Constituencies intend to operate within the restructured GNSO. NCUC invites the Board, ICANN Staff, the CSG and other members of the community to compare the brevity and generality of the CSG Charter to that being proposed by the Board and ICANN Staff for the new Non-Commercial Stakeholders Group (NCSG), the other SG making up the Non-Contracting Party House. Although that Charter, too, is termed a transitional document, it is far more controlling and detailed, e.g. in describing the processes and voting procedures within an Executive Committee (EC). The difference in treatment between the CSG

⁴ Section 8.2.

⁵ Section 9.

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.

To the extent that both proposed CSG and NCSG Charters (as put up for public comment) are intended to be transitional in nature, and since both the CSG and NCSG will comprise the Non-Contracting Party House, NCUC believes that both Charters ought to reflect a similar level of detail, particularly as regards operational details relating to the existence, creation and representation of new Constituencies⁶.

NCUC has been engaged in recent and extensive discussions with the Board's Structural Improvements Committee (SIC) regarding substantive changes to the NCSG Charter originally proposed by NCUC, which changes (as reflected in the ICANN Staff's current draft available for public comment) resulted in part from feedback provided by other GNSO Constituencies. We request that the Board, ICANN Staff and the GNSO Community ensure that the CSG Charter be subject to similar scrutiny and input.

⁶ See, e.g. Board Resolution #7(b) from its May 2009 meeting, calling for the SIC and ICANN Staff to revise "most" Charters to "ensure equitable participation and representation by new constituencies". To the extent that the SIC and ICANN Staff have attempted to revise the original proposed NCSG Charter to do so, NCUC believes that a similar exercise should be undertaken with respect to the CSG Charter.