

April 15, 2009

SUBMISSION OF INTELLECTUAL PROPERTY CONSTITUENCY (IPC)

The Intellectual Property Constituency offers these comments on the draft stakeholder group petitions and charters. See <http://www.icann.org/en/public-comment/#sg-petitions>.

This comment focuses on the proposals for the non-commercial stakeholder group. In general, we do not take a position at this time as between the competing non-commercial stakeholder group charter proposals; and specifically, we do not take a position at this time as to whether or not GNSO council representation should be tied to recognized constituencies (e.g., through allocating seats to each constituency). We note that both models are present in the charter proposals for other stakeholder groups.

However, we object to both non-commercial stakeholder group charters insofar as they contemplate the selection by that stakeholder group of six GNSO council members to be seated as part of the new GNSO Council in June 2009 (according to the timetable established by the ICANN Board). This is set forth explicitly in the charter proposal submitted by Robin Gross et al (<http://gns0.icann.org/en/improvements/ncsg-petition-charter.pdf>; see section 3.4); it is implicit in the charter proposal and cover letter submitted by Cheryl Preston (<http://gns0.icann.org/en/improvements/ncsg-charter-proposed-by-cybersafety-redacted.pdf>), which refers repeatedly to seating six council members.

Our objection is based on the fact that the non-commercial stakeholder group fails to meet pre-established objective criteria for diversity and representativeness, as called for in the recommendations of the July 2008 report of the “consensus group” on GNSO restructuring (now referred to as the Working Group on GNSO Council Restructuring), see <http://gns0.icann.org/mailling-lists/archives/council/msg05245.html>, whose recommendations were endorsed by the ICANN Board in August 2008, see <http://gns0.icann.org/en/improvements/structure-en.htm>. As documented in the “background” section of this submission, our constituency has consistently maintained that this condition must be fulfilled before seating the new Council, under which the voting power of commercial interests is significantly reduced, while the voting power of non-commercial interests is significantly inflated. This condition has not been fulfilled and there is no prospect that it will be fulfilled by the time of the June 2009 ICANN meeting, much less far enough in advance of that meeting to allow stakeholder groups to select their new representatives.¹ To seat six representatives of the NCSG on the GNSO Council in June 2009, no matter whether they are chosen by constituencies or otherwise, would be unfair, illegitimate, and contrary to the expressed intent of the Board Governance Committee which created the new GNSO structure.

¹ In this regard, we note that the charter proposal submitted by Gross et al calls for the three NCUC representatives to the current Council, elected in October 2008, to automatically assume three of the six seats claimed by the NCSG. See proposed Art. 3.4.4. At the same time, the proponents of this charter assert that “the current NCUC will dissolve completely when the charter goes into effect.” March 16 cover letter, at 3. <http://gns0.icann.org/en/improvements/executive-summary-ncsg-proposal.pdf>. How an organization that no longer exists can claim the right to choose three members of the GNSO council is nowhere explained.

April 15, 2009

The Board is well aware of the problem. As the Board Governance Committee Working Group, which invented the stakeholder group structure, itself noted:

“We want to emphasize that a new non-commercial Stakeholders Group must go far beyond the membership of the current Non-Commercial Users Constituency (NCUC). We must consider educational, research, and philanthropic organizations, foundations, think tanks, members of academia, individual registrant groups and other noncommercial organizations, as well as individual registrants, as part of a non-commercial registrants Stakeholders Group.”

Both NCSG charter proposals contemplate the selection and seating of six non-commercial representatives to the GNSO Council by a group that still lacks the requisite diversity and representativeness, especially with regard to the categories of non-commercial entities identified by the Board Governance Committee report, such as “educational, research, and philanthropic organizations, foundations, think tanks, members of academia, individual registrant groups and other noncommercial organizations.” It is time for the Board to step up to this problem and provide an alternative mechanism for filling these seats, and to defer the seating of the new Council until this mechanism has been established.

Respectfully submitted,

Steve Metalitz, IPC president

Background

IPC has raised this concern repeatedly, especially after the Board decision in June 2008 to create the working group that ultimately recommended the bicameral structure now embodied in the GNSO restructuring. The statement of our representative to that group, as transmitted to the Board in July 2008, included the following:

“I call the Board’s attention to item 6 in the attached document, concerning the need for all stakeholder groups to fulfill pre-established objective criteria for diversity and representativeness. This is an essential pre-requisite to implementation of any new GNSO council structure. While these criteria should apply to all stakeholder groups, special attention must be paid in this regard to the non-commercial stakeholder group, whose role in the decisionmaking process will become much greater under any of the restructuring plans now under consideration. The conclusion of the Board Governance Committee on this topic is worth re-emphasizing, and I hope the Board will re-affirm it:

We want to emphasize that a new non-commercial Stakeholders Group must go far beyond the membership of the current Non-Commercial Users Constituency (NCUC). We must consider educational, research, and philanthropic organizations, foundations, think tanks, members of academia, individual registrant groups and other non-commercial organizations, as well as individual registrants, as part of a non-commercial registrants Stakeholders Group.

April 15, 2009

In September 2008, our constituency reiterated this point when we responded as follows to questions posed to all constituencies by the ICANN staff. We also warned that a back-up mechanism might be needed if a stakeholder group had failed to achieve the requisite diversity and representativeness:

4) Implementation Plan -- The Board has directed that an implementation plan be submitted for Board approval that creates a transition to the new Council structure. Further input would be appreciated on this point, including on transition timing and whether additional guidance or requirements are needed on the implementation plan. Also, views would be appreciated on what provision should be made to fill seats on the new Council if a Stakeholder Plan is not approved by the Board.

Response: A clear and realistic timeline will be very important. The new council structure should not take effect until all stakeholder groups have been demonstrated to have fulfilled pre-established objective criteria for diversity and representativeness. The timeline must accommodate both the development of these criteria and the efforts of stakeholder groups to fulfill them. A realistic timeline would minimize the likelihood that any back-up mechanism will be needed to populate the Council through some mechanism other than Stakeholder Group selection, in order to represent the denizens of one Stakeholder Group that has not fulfilled the diversity and representativeness criteria.

In response to another query launched by ICANN staff in September 2008, IPC responded as follows regarding the timetable for seating the new GNSO Council:

“Finally, although the IPC faces many challenges in adapting to the new structure, they are dwarfed by the challenge inherent in the formation of the Non-Commercial Interests Stakeholder Group, which must, as the Board Governance Committee itself recognized, reflect a dramatic expansion of the current Non-Commercial Users Constituency, to encompass major educational, research, philanthropic and charitable organizations which have never before participated consistently within ICANN. It is unlikely that this transformation can even meaningfully begin by the end of this year, and it would be irresponsible in the extreme to implement the restructuring before this transformation has actually occurred. The IPC believes that the end of 2009 represents a much more realistic date for completing implementation of the GNSO restructuring, and is prepared to participate in developing a specific plan with timetables and milestones for reaching this goal within that timeframe, or another that can be shown to be more realistic than January 1, 2009.”

It is now evident that the revised timetable of June 2009 for seating the new GNSO Council also cannot be fulfilled, at least without the use of some alternative mechanism for filling the seats allocated to the Noncommercial Stakeholders Group.