18 August 2009

TO: THE ICANN BOARD OF DIRECTORS AND MR. ROD BECKSTROM, ICANN PRESIDENT AND CEO

RE: CALL TO THE ICANN BOARD TO CORRECT PROBLEMS WITH THE NCSG CHARTER, AND TO ADDRESS CONTINUING MISPERCEPTIONS ABOUT NONCOMMERCIAL INVOLVEMENT IN ICANN

This letter comes from nearly 150 individual and organizational members of ICANN's Non-Commercial Users Constituency (NCUC). It is also endorsed by public interest groups outside of NCUC. We are all deeply concerned about the July 30, 2009 ICANN Board decisions regarding the restructuring of the Generic Names Supporting Organization (GNSO). We believe that the Noncommercial Stakeholder Group (NCSG) chartering process has been seriously flawed on both procedural and substantive grounds. We appeal to you to address these problems before permanent damage is done to ICANN's reputation, to the GNSO reform process, and to the interests of noncommercial users of the Internet.

This letter is, first and foremost, an urgent plea to the ICANN Board to grant three specific requests:

1) First, because you have never had the opportunity to get the full story, we are asking for *a direct meeting between the full Board and NCUC representatives at the Seoul ICANN meeting in October*.

2) Second, because of important flaws and the complete lack of community support for the Structural Improvements Committee (SIC) and ICANN staff-revised transitional NCSG charter[1], we ask that you make a public commitment to *completely review the transitional NCSG charter within one year (i.e., by July 30, 2010) in a way that explicitly guarantees that the charter originally proposed by the NCUC[2] and overwhelmingly supported by the noncommercial community will be considered as an alternative.* As part of this review, we commit ourselves to finding opportunities to reconcile the differences between the two models in a way that can gain consensus from the noncommercial community.

3) Third, because of the danger of locking in a suboptimal structure, we ask you *not to approve any new Constituencies under the* SIC and ICANN staff-imposed transitional *NCSG charter* until the ongoing debates over the status of Constituencies and their role in the NCSG is resolved next year. It is necessary to first determine the framework of the stakeholder group in which Constituencies will take their place.

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[1] http://gnso.icann.org/en/improvements/ncsg-proposed-petition-charter-22jun09.pdf

[2] http://gnso.icann.org/en/improvements/ncsg-petition-charter.pdf

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We emphasize that ***this letter does not ask the Board to repeal its decision of 30 July.*** Although many NCUC members initially favored rejecting the SIC/staff imposed charter in its entirety, we decided to work within the confines of the imposed transitional NCSG charter ***provided that the Board agrees to work with the noncommercial community to create a final NCSG charter that meets the needs of both the Board and noncommercial users***.

NCUC did this to demonstrate our support for moving forward with the GNSO restructuring process, including implementing the new SG structure and seating the new, bicameral Council at the October Seoul meeting. Thus, even though we believe it constitutes a grievous mistake, NCUC is willing to work within the confines of the imposed transitional NCSG charter including the Board's appointment of three transitional new NCSG Councilors. Subject to certain conditions, we pledge to work within those parameters for the next year if our requests are granted. We recognize the time constraints you are operating under and, in a spirit of cooperation we are proposing a practical way for you to minimize the damage that will be caused by the mistaken July 30 decision.

Nonetheless, you still need to understand that the Board's adoption of the SIC/ICANN staff NCSG charter has resulted in significant harm to ICANN's credibility among civil society and non-commercial Internet users, who increasingly perceive ICANN's decision-making process to be far from the "bottom-up, consensus-based"[3] platform it is supposed to be.

We hope you are able to respond promptly, publicly and directly to the grounds we set out herein in support of our three requests. This letter is also an open call to the entire ICANN community to recognize that noncommercial representation in ICANN is in fact robust, stronger, more diverse and more representative of noncommercial users of the Internet than recent public statements by the Board, staff, and other GNSO constituencies have alleged.

We address the rationale for each of these requests in the next three sections.

I. A MEETING WITH THE BOARD IN SEOUL IN OCTOBER

It is obvious to anyone who has followed this controversy that there has been a serious breakdown in communication between the Board, ICANN's management and the noncommercial community. It is not important to assign blame for this breakdown; it is most important to recognize that it exists and to address it. We are therefore asking for a direct meeting with the full Board to help overcome this problem. The Board can no longer rely on the intermediation of staff and a few Board members with entrenched positions. We need to have a direct exchange on the fundamental issue of ICANN's governance structure.

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[3] See, e.g. ICANN's GNSO Council Position Notification, 4 August 2009: http://www.icann.org/en/committees/improvements/soi-notification-board-ncsg-appointments-04aug09-en.pdf.

The SIC's abrupt substitution of its own charter for the community-developed one, the Board's July 30 vote ratifying that decision, the ICANN Staff's dismissal of the outpouring of civil society and individual support for the NCUC and its proposals, and the persistent misconception of what the NCUC is and stands for all reveal basic and critical misunderstandings of why and how individuals, non-profit groups and public interest organizations participate in ICANN and other international groupings. This gap can only begin to be bridged through a direct meeting.

We note that the Board and CEO have on numerous occasions in the past met for breakfasts or other focused meetings with other Constituency groupings, notably business interests. We think it is time for the same access to be afforded noncommercial stakeholders.

II. ONE YEAR REVIEW

While we have many procedural issues to raise (and these will be addressed in a separate Ombudsman complaint), the Board needs to understand that our most fundamental and important concerns with the SIC charter are *substantive.* They relate to an important debate over the best way to encourage and organize the participation of noncommercial groups in the GNSO. For more than a year, we have advocated a single layer of Stakeholder Group (SG) organization in which noncommercial organizations and individuals join NCSG directly and vote directly for their representatives on the GNSO Council (subject to geographic diversity requirements). This SG model allows for noncommercial organizations and individuals to be the basic unit of membership in the NCSG. The staff and the SIC, in contrast, have favored Constituencies as the basic unit of organization and would have representatives of Constituencies negotiate over the apportionment of Council seats. Under the staff model, forming a new Constituency becomes a very complex, uncertain, and difficult process, involving numerous reviews, criteria and ultimately complicating the process of Board approval.

The debate over those two options was unfairly and unwisely cut short in May 2009, when staff cancelled its planned June meeting with civil society to negotiate a resolution of the differences over the charter. And then in June, together with SIC, staff disregarded public comment and threw out civil society's charter proposal, offering their own alternative without making any concessions or modifications in line with the views of those questioning staff's Constituency-based model.

Noncommercial users believe that the Constituency-based model imposed on us by the SIC is based on false premises and will not work well. We are convinced that it will cause wasteful, energy-sapping political infighting and competition; that it will raise the barriers to participation by new groups; that it discourages consensus building; and that it will lend itself to capture at the Executive Committee level. We note that the At Large Advisory Committee (ALAC) agreed with the NCUC charter proposal on a critical point. In its only formally

discussed and agreed-upon statement on the NCSG charter, the ALAC statement said that "the de-linking of Council seats from Constituencies is a very good move in the right direction."[4]

Additionally, we note that the Board-approved SG Charters for the Registries and Registrars also agree with the NCUC-proposed model. The RySG and RrSG do not require any Constituencies at all. Instead, self-forming "Interest Groups" are permitted to organize within each SG. This is almost exactly the structure that the NCUC proposed for the new NCSG! Indeed, it is evident that the registries and registrars adopted this concept from our proposal. Was the Board aware of this? On what basis did it discriminate between what it considers the best structure for noncommercial users and for business-supplier interests? While in the short term it may be argued that the members of contracting-party SGs might have more interests and issues in common than commercial or noncommercial users, this will not universally be the case. As the number of registries expands with new gTLDs and they become more geographically and economically diverse, there may be major differences among them. With over 600 registrars and often bitter differences of opinion among them with regard to policy, the Registrar SG is already quite diverse; there is no feasible case for making a qualitative distinction between registrars and the non-contracting parties.

We have already prepared detailed analyses supporting our critique of the Constituency-based model and are happy to prepare additional argumentation going forward. At this juncture our point is a simple one. Given the lack of support for a Constituency-based model by three of the four Stakeholder Groups, and the adoption of a different model by two of them, the Board *must recognize that the relationship between Constituencies and Stakeholder Groups is an open question.* We are, therefore, asking you to *revisit that question with noncommercial users over the next year*. We ask that the Board firmly and explicitly commit itself to a review and revision of the SIC/staff-imposed NCSG charter within the year, and that it explicitly make the role and status of Constituencies a primary issue to consider. In that review, *we ask that the NCUC-proposed model not be arbitrarily thrown out of consideration by the staff, but be placed alongside the SIC model for open comparison and debate*. In a fair and open debate over these alternatives, we think it is very likely that some compromise between the SIC's purported desire to encourage new constituencies and the NCUC-proposed charter could be found within a year.

III. RESOLVE THE CHARTER ISSUE BEFORE APPROVING NEW NCSG CONSTITUENCIES

The July 30 decision noted that the new Constituency petitions for entry into the NCSG were not ready for approval, and called for further negotiations between their advocates and the staff. We believe that it would be unwise to approve any new Constituencies until the NCSG charter is no longer an "interim" charter, particularly given the open question over the nature of

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[4] http://forum.icann.org/lists/sg-petitions-charters/msg00020.html

the final NCSG charter. Therefore we are asking you to defer this issue until the charter issue is resolved a year from now. We wish to emphasize, however, that we remain committed to working with ICANN to continue our outreach to bring in new and diverse noncommercial participants in the GNSO policy development forum over the next year.

There can be no such thing as an "interim" Constituency. Once a Constituency is recognized by the Board, it is incorporated into the bylaws and it gains specific rights and privileges under the charter and bylaws. Moreover, the organizers of the Constituency and its prospective members have to spend a lot of time and effort recruiting people and setting up their own organizational structures. To recognize new Constituencies before finalizing a permanent NCSG charter, therefore, would be to place the organizers of these Constituencies in a difficult and nonviable position. They will not know exactly how they fit into the GNSO organization. Or, worse, *the recognition of these new Constituencies under the interim charter would create pressures to make the "interim" charter a permanent one*. In this case, the Board's decisions about the final NCSG charter would not be driven by getting the organizational issues right, but by prior, uncoordinated decisions regarding Constituencies. We believe it is important to get the foundational organizational issues right.

We wish to make it clear that we strongly support the formation of new Constituencies in the NCSG and the Board's discretion in approving them. Our original charter proposal was designed to make it very easy to form new Constituencies, in contrast to the staff/SIC model, which makes new Constituencies top-heavy, organizationally burdensome and expensive to maintain. Given the known problems with the current petitions to form new Constituencies in the NCSG we ask that the Board defer formal approval of any new NCSG Constituencies for a year.

We also believe it is important for the Board to understand that NCUC's members had planned to "spin-out" into various Constituencies of self-forming interest groups with competing agendas; it does not make logical sense to have both a "Noncommercial Users Constituency" and a "Noncommercial Stakeholders Group" as the terms are synonymous.

IV. MISUNDERSTANDING OVER NON-COMMERCIAL REPRESENTATION AND PARTICIPATION IN ICANN

Finally, we'd like to address, prior to our meeting in Seoul, one of the core problems that seems to hamper resolution of these issues.

The following public statement from ICANN seems to have been the basis for the Board's adoption of a transitional NCSG Charter that inexplicably removes the ability of noncommercial users to democratically elect all of its Councilors to the new Non-Contracting Party House:

"the current non-commercial community participation in the GNSO is ***not yet sufficiently diverse or robust***[5] to select all six of the NCSG's allocated Council seats."[6] (emphasis added)

This view has been repeated publicly several times by a number of Board members, as well as by other ICANN, and GNSO community participants. But these statements are patently inaccurate, and NCUC has provided facts to contradict it numerous times. We reproduce them below:

First, NCUC has been, and still is, currently the most geographically diverse Constituency. According to the 2006 London School of Economics (LSE) GNSO Review[7] -- which is the only systematic and independent study of the GNSO ever conducted -- diversity of membership in NCUC then was already "relatively strong" and "shows quite a close fit to the distribution of global Internet users across at least four out of five [ICANN geographic] regions".

Since then, NCUC has continued to engage in active outreach (without ICANN financial or staff support), resulting in a current NCUC membership today of 142 members including 73 organizations and 69 individuals from 48 countries. Please note that this is a growth of over 215% since the Board Governance Committee (BGC) Working Group (WG) report on GNSO Improvements was released in February 2008. NCUC members come from developed and developing countries, and from outside North America and Europe (from countries and continents such as Africa, Korea, Cambodia, Bangladesh, Australia and China). Unlike the Commercial Constituency, whose website indicates 58% of its members reside in a single country (the USA), or the Commercial Stakeholder Group, whose first 3 GNSO Councilors (50%) will represent the USA, NCUC's membership is, in fact, truly diverse.

Secondly, NCUC is also diverse in terms of representation of those individuals and groups that we have repeatedly been told have been "under-represented" at ICANN, such as consumers, researchers and libraries. Numerous groups that champion consumer causes are NCUC members (e.g. ICT Consumer Association of Kenya, International Parents, Media Access Project, Read Write Web France, Uganda ICT Consumer Protection Association, FreePress, and the Association for Progressive Communications (APC) just to name a few); as are individual bloggers, academics, professors, researchers, schools and libraries (e.g. telecommunications, law

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[5] In this letter, we address primarily the question of diversity, as it has never been made clear to us what being sufficiently "robust" means or entails, given that NCUC has been a long-recognized ICANN Constituency and has continued to grow and attract new members.

[6] Background & Explanation to the Call for Applications for Non-Commercial GNSO Council Seats, 5 August 2009: http://www.icann.org/en/announcements/announcement-05aug09-en.htm.

[7] See http://www.icann.org/en/announcements/gnso-review-report-sep06.pdf.

and technology researchers/educators, Global Voices, Yale Law School Information Society Project, Diplo Foundation, several chapters of the Internet Society, EDUCAUSE, the American Library Association, and Egypt's Library of Alexandria)[8]. In addition, all three of NCUC's current GNSO Councilors are academics and researchers affiliated with universities, think-tanks and research centers.

Thirdly, NCUC leaders have distributed the powers, duties and responsibilities of managing the Constituency much more widely than the commercial Constituencies and ICANN staff have alleged. The 2006 LSE Report documented that NCUC has had the highest number of different people serving on the GNSO Council of any Constituency, while the commercial Constituencies have rotated the same 5 people for a decade. The current NCUC Chair and all 3 of NCUC's GNSO Councilors are serving their first term in office. More than a dozen new leaders from the noncommercial community have found their way to ICANN in recent months and are eager and ready to contribute to policy development. These noncommercial leaders were willing to stand for election for the GNSO Council, had the board allowed democratic representation to noncommercial users.

In view of the above, NCUC calls on the Board and the ICANN community to recognize that NCUC has not just met, but exceeded, the BGC's 2008 call for "the new non-commercial Stakeholders Group [to] go far beyond the membership of the current Non-Commercial Users Constituency [and] 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"[9]. We fully anticipate that the new NCSG will continue to expand and diversify and we are committed to working with the Board to bring new and diverse noncommercial participants into the GNSO policy development process.

CONCLUSION

To conclude, we believe that our three requests are reasonable and not at all burdensome for the Board to grant. We look forward to your response.

Signed,

MEMBERS OF THE NONCOMMERCIAL USERS CONSTITUENCY (NCUC)

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[8] The current NCUC membership roster can be viewed at http://ncdnhc.org/page/membership-roster.

[9] Extract from the Board Governance Committee Working Group Report on GNSO Improvements: http://www.icann.org/en/topics/gnso-improvements/gnso-improvements-report-03feb08.pdf.

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Bibliotheca Alexandrina, The Library of Alexandria, Egypt
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FreePress
Diplo Foundation
AGEIA DENSI (Argentina)
Deep Dish Network
Global Voices
Freedom House
Centre for Internet and Society (India)
Aktion Freiheit statt Angst e.V.
ICT Consumers Association of Kenya
Uganda ICT Consumer Protection Association
Free and Open Source Software Foundation for Africa (FOSSFA)
APWKomitel (Association of Community Internet Center)
Yale Law School Information Society Project
Internet Society Chapter of New York
Alfa-Redi (NGO)
Bangladesh NGO's Network for Radio & Communication (BNNRC)
Read Write Web France
Privacy Activism
The Thing
Information Network for the Third Sector - RITS
Audience Act for Good TV Programs
Boulder Community Network
Estonian Educational and Research Network (EENet)
Fundacion Escuela Latinoamericana de Redes
GLOCOM
IPLeft (Intellectual Property Left)
Internet Association of Korea (IAK)
Jamaica Sustainable Development Network Ltd.
Korean Progressive Network Jinbonet
Labor News Production
Media Access Project
Open Institute of Cambodia
PeaceNet Korea
Philippine Network Foundation, Inc. (PHNET)
Stichting A.G. van Hamel voor keltische Studies
Internet Governance Project
SDNP Bangladesh
Virtueller Ortsverein der SPD (VOV)
Phillipine Sustainable Development Network
GIP Renater
American Civil Liberties Union (ACLU)
Electronic Privacy Information Center (EPIC)

Korea Advanced Institute of Science and Technology
Information and Communications University
EDUCAUSE
Internews International
American Library Association (ALA)
Computer Professionals for Social Responsibility (CPSR)
IP Justice (IPJ)
Association for Progressive Communications (APC)
Advisory Network for African Information Society
Internet Society Chapter of Mauritius
AfriDNS Africa Leadership Forum
Jenne Redean Sans Frontieres - Tunisia
Comitê para Democratização da Informática de Pernambuco
Multilingual Internet Names Consortium
CP80 Foundation
Electronic Frontiers Australia
Africa Leadership Forum
FGV Centro de Tecnologia e Sociedade (CTS) - Brasil
Loyola Law School
Pierce Law School
Canadian Internet Policy and Public Interest Clinic (CIPPIC)
Strathclyde Law School
Church of Reality
Free Software Foundation Europe
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NIC Senegal
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