

October 17, 2011

Re: Not-for-Profit Organization Operational Concerns Constituency (“NPOC”) Request for ICANN Board Assistance for Membership Approval and Recent Elections

Dear Dr. Crocker, Mr. Beckstrom and the ICANN Board of Directors:

The Not-for-Profit Operational Concerns Constituency (NPOC) would like to take this opportunity to raise several concerns related to the operation, governance and leadership of the Generic Names Supporting Organization’s Non-Commercial Stakeholder’s Group (NCSG). Further, we request a special meeting with representatives from the Board and NCSG leadership to discuss the issues raised below during the ICANN Public Meeting in Dakar.

I. The NCSG Executive Committee Should Promptly Approve All NPOC Organizations Pending Membership in NCSG.

As you know, the Board formally recognized the NPOC¹ as an official Constituency within the NCSG on June 24, 2011. As mandated by the Board’s resolution, NPOC submitted information to the NCSG Executive Committee demonstrating that twenty-one (21) new NPOC members “meet all membership requirements as imposed at Section 2.0 of the newly-adopted NCSG Charter, including the requirement at Section 2.3 that all members of the constituency should already either be members of the NCSG or be qualified for membership under the Charter.” Since NCSG did not have a membership form at the time (nor does it now), NPOC provided the NCSG Executive Committee with several spreadsheets that contained information demonstrating that these organizations adhered to the NCSG membership criteria. While a member of the then NCSG Executive Committee objected to the “batched” application approach, the review proceeded.

Before submitting information about each of the NPOC organizations for membership consideration by NCSG, NPOC vetted each organization for compliance with the Board-approved NCSG membership criteria. Specifically, according to Section 2.2.1 of the NCSG charter, the following types of organizations are eligible for membership in the NCSG:

2.2.1. Eligible organizations.

Organizations meeting the following criteria are eligible for membership in the Stakeholder Group:

1. The Organization is incorporated as a noncommercial entity (in countries that have such a provision in their commercial code) or, if unincorporated, or if operating in a country without provisions for noncommercial incorporation, that operates on a not-for-profit basis primarily for noncommercial purposes, and

¹ See: <http://www.icann.org/en/minutes/resolutions-24jun11-en.htm#1.5>

2. Be the exclusive user of at least one domain name. This can be verified by: (1) the member being listing as the registrant and/or administrative contact in the WHOIS data of the domain name; (2) the name resolving to a website controlled by and representing the Member Organization; or (3) other indications that prove to the NCSG-EC that the prospective Member Organization is the primary user of a domain name, and
3. Is engaged in online activities that are primarily noncommercial, including, e.g., advocacy, educational, religious, human rights, charitable, scientific and artistic, and
4. In the case of a membership-based organization, the organization should not only be noncommercial itself, but should have a primarily noncommercial focus, and the membership should also be primarily composed of noncommercial members. (E.g., a chamber of commerce, though it may be a noncommercial organization itself, and might even have some noncommercial members, is primarily composed of commercial organizations and has a commercial focus and would not be eligible for membership.)

As demonstrated by the attached chart, each of the pending NPOC organizations meets the membership criteria listed above.² However, by September 5, 2011, only eight (8) new NPOC organizations were approved by the NCSG despite having no less than three (3) weeks and as many as eight (8) weeks to review these members prior to closing the NCSG active membership list on September 5th for the GNSO Council and NCSG Chair elections. These members were sent a welcome email by the NCSG Chair the evening of August 29, 2011 (although the advice to admit was issued to the NCSG Chair August 23, 2011) and given six (6) days to respond to confirm NCSG membership before the close of the NCSG voting list; three (3) new members met this response time.

Several NPOC members, on the other hand, were denied membership by members of the NCSG Executive Committee based upon an unreasonable interpretation of the NCSG Charter. As you know, the NCSG charter excludes membership to the following entities:

2.2.2. Ineligible organizations.

The membership of the NCSG specifically excludes:

1. Political organizations whose primary purpose is to hold government office and/or elect government officials;
2. Commercial organizations and associations that advocate for the benefit of commercial entities (even if they are non-profit in form);
3. Organizations that are represented in ICANN through another Supporting Organization specified in the ICANN Bylaws or GNSO Stakeholder Group;
4. Organizations that provide services under contract or MoU with ICANN;

² See [Appendix A](#) outlining all NPOC Members.

5. Government organizations or government departments whether local, regional or national; and

6. Intergovernmental organizations whose membership primarily includes nation states.

For example, NPOC was notified that one (1) organization was denied membership in the NCSG because the organization was considered “commercial.” NPOC upholds that none of the members it submitted to NCSG for membership are “commercial organizations and associations that advocate for the benefit of commercial entities.” It appears that some members of the NCSG Executive Council consider the mission-related fundraising, awareness and advertising activities performed by some non-profit organizations/NGOs as somehow transforming these organizations into commercial entities. We vehemently disagree to this unreasonable interpretation of “commercial” and urge the Board to consider the mission and activities of the pending NPOC members as the epitomes for “noncommercial purposes” envisioned for inclusion in the NCSG. Moreover, careful review of the current NCSG membership list will illustrate such standards have not been held to other current NCSG members.

Inexplicably, two (2) NPOC organizations were not approved because members of the NCSG Executive Committee could not locate the name of the organization’s designated representative as an employee on the organization’s website despite the fact that NPOC submitted the Official and Alternative Representatives and their contact information to the NCSG Executive Committee. Nowhere in the Charter does NCSG require that a member’s representatives and its contact information be posted on the organization’s website.

Similarly, five (5) NPOC organizations were unreasonably denied NCSG membership because the applying organization selected its outside counsel as its representative. The NCSG charter does not prohibit an attorney from representing an organization. Indeed, Section 2.2.4.1 provides that the “Official Representative must be formally delegated authority to represent the Member Organization within NCSG proceedings by an authorized officer or official of that Member Organization” with no definition as to what constitutes a formal delegation of authority. Accordingly, there is no reason why an outside counsel submitted as an Official Representative cannot qualify. Moreover, NPOC submits it is very problematic for the NCSG to impose an overly formal restriction on the nature of an organization’s Official Representative, especially considering that some non-profits/NGOs operate with limited resources and staffing and should be afforded the flexibility to designate its Official Representative for its organization.

The NPOC has attempted to engage in meaningful conversations with the NCSG Executive Committee throughout the application process. The NPOC routinely asked about the status of its pending members. After it received the denials noted above, it provided feedback and additional information to NCSG in an attempt to address the concern raised about the NPOC organizations and to provide additional contact information for the NPOC organizations. NPOC then requested NCSG Executive Committee to reconsider its decision to deny these organizations. However, these communications were not fruitful and four (4) NPOC organizations remain rejected by NCSG. Moreover, nine (9) NPOC organizations were denied membership simply because several members of the NCSG Executive Committee did not participate in voting, thus stalling the approval process.

On October 15, 2011, the NPOC resent separate applications for each denied – whether by unreasonable rejection or inaction – organization in a fresh attempt to solicit reexamination. This attempt has been met by members of the NCSG Executive Committee criticizing the method of application by NPOC members, potentially creating new processes and procedures that have not previously been examined by ICANN, and resulting in more uncertainty for NPOC membership within the NCSG.

Consistent with NPOC’s mission to conduct global outreach within the nonprofit/NGO community, on October 15, 2011 NPOC submitted five (5) new organizations to the NCSG Executive Council for consideration as NCSG members. The NPOC is growing and our members deserve to be promptly and fairly reviewed by the NCSG Executive Council so they may meaningfully join the ICANN policy discussion.

For all of these reasons, NPOC requests assistance from the Board regarding review and approval of the pending NPOC members, and putting into place more clearly defined application criteria for future inclusion in NCSG.

II. NPOC Respectfully Requests Intervention by the Board

As detailed above, NPOC members have been unfairly disenfranchised from participation in NCSG and the ICANN community as a whole by members of the NCSG Executive Committee. NCSG members and NCSG leadership have demonstrated the inability and unwillingness to accept new noncommercial perspectives within the NCSG and denied NPOC members membership in the NCSG based upon unreasonable rationale.

After repeated failed attempts to constructively engage with the NCSG regarding NPOC membership in the NCSG, NPOC believes there is no way to adequately resolve this issue with the NCSG and respectfully requests intervention by the Board. As a first step, and because NPOC organizations were unreasonably denied membership in NCSG, NPOC requests that the results of the recent GNSO Council Representative election that began on October 4, 2011 and concluded on October 17, 2011 should be nullified and a new election should be conducted after the pending NPOC members have been approved. Further, we request that the nomination period be reopened so that previously denied members have the opportunity to run for these positions. The thirteen (13) NPOC applicants to the NCSG that were either denied membership outright or through inaction represent 40 votes, or 17.4% of the current NCSG voting populous.

Moreover, the NPOC has serious concerns about the propriety of current NCSG leadership. According to the NCSG charter, the service standards for leadership positions “include impartiality, accountability and avoidance of conflicts of interest. NCSG officers hold a collective trust and are expected to be fair and responsible stewards of the NCSG’s activities. The Chair in particular is expected to look after the general interests of the NCSG and to be responsive to all members and officers in their requests for information.”

NCSG leadership, on the other hand, has demonstrated an inability to put aside differences in policy positions and perspectives when interacting with and making decisions related to NPOC members. For example, NPOC recently became aware of a public document authored by the presumed incoming NCSG Chair Robin Gross that was published during the period that

coincides with her candidacy for NCSG Chair.³ In that document, Ms. Gross discusses her view of ICANN and the role of civil society in ICANN policy development. She also comments that she does not consider the perspectives of the NPOC members as valid within the NCSG. Unfortunately, Ms. Gross's document indicates her personal dislike of NPOC and some of its members and organizational representatives based upon inaccurate facts and conclusions. NPOC refrains from any comments related to the allegations Ms. Gross directs towards specific individuals and organizations, but submits that this document serves as demonstration of Ms. Gross's inability to be impartial and fair to all of its members while holding office as NCSG Chair.

NPOC is thus concerned that NCSG is not applying NCSG's rules in a nondiscriminatory and impartial fashion. Section 1.2 of the NCSG charter provides:

The NCSG is intended to provide a representational vehicle for all noncommercial stakeholders; no noncommercial organization or noncommercial individual should be denied membership and no interest-group, constituency or coalition within it denied the right to participate and associate on the basis of their political views or policy positions, or on the basis of their religious belief (or lack thereof), national origin, gender, sexual orientation, race or ethnicity, provided they promote noncommercial interests.

Further, NPOC has serious doubts that Ms. Gross will be able to fairly represent all non-commercial perspectives – even those that are different from her own policy position, which is central to her role as NCSG chair. ICANN and its community have indicated that the NPOC perspective is important and it is the obligation of the NCSG and its leadership to ensure that NPOC is entitled to fair and impartial treatment within the NCSG community.

Instead, the NCSG Executive Committee created a new standard for approving the pending NPOC members that resulted in several deserving members being withheld their rightful place in the NCSG and the ICANN community as a whole. We also note that it appears during the same time the NCSG Executive Committee was considering NPOC members, two (2) new organizations and one (1) individual was admitted to the NCSG membership without the same level of evaluation imposed upon NPOC applicants.

The NPOC thereby respectfully requests intervention of the Board to ensure NPOC members are fairly considered for membership in the NCSG as mandated by the Board's June 24, 2011 resolution. Thank you for your consideration.

Sincerely,
NPOC Leadership

³ http://www.apc.org/en/system/files/Civil-Society_ICANN.pdf