



The Internet Corporation for Assigned Names and Numbers

Written Testimony of

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on

“Issues concerning the Internet Corporation for Assigned Names and Numbers (ICANN), including the expiration of the Joint Project Agreement between the U.S. Department of Commerce and ICANN at the end of September and the creation of new global top level domains (gTLDs).”

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of the

United States House of Representatives

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Background

The JPA/MOU process has helped to grow ICANN to be a remarkable success story. The unique US Government-ICANN relationship has been, is and will continue to be critically important to ICANN's success.

The original MOU¹ used the word "Test" when it was commenced almost 11 years ago. It was a test of whether a multi-stakeholder private sector lead, California-based not for-profit corporation could perform a narrow but crucial technical function.

After those 11 years, ICANN is a successful US based organization with international support and participation. It has been key to producing a single, interoperable Internet that we, and countless businesses rely on every day. In simple terms "it works".

Accountability

Like other organizations ICANN will - indeed must - continually improve. But unlike many organizations ICANN has continual improvement through review written into its bylaws² and, a community that drives us to improve and that will never allow us to stop striving for the best we can be.

The JPA/MOU process has been a major stabilizer for the organization. It has encouraged worthy, sensible and careful organization building through 7 versions of the MOU and 13 report cards from ICANN over 11 years³.

But one thing the JPA clearly is not and never has been is an oversight mechanism. The Department of Commerce has said that historically and says it again in its latest Notice of Inquiry.

¹ <http://www.icann.org/en/general/icann-mou-25nov98.htm>

² <http://www.icann.org/en/general/bylaws.htm#IV>

³ <http://www.icann.org/en/general/agreements.htm>

Somehow overtime the language of the JPA has become the language of separation: “ICANN is leaving home”; “ICANN is seeking independence”; “ICANN wants to become less accountable”. That language is wrong and has confused the understanding of what the JPA is and what conclusion means.

ICANN is not seeking independence; we have been independent since 1999.

ICANN is not leaving home. The United States will always be our corporate headquarters.

ICANN is not seeking less accountability. We are actively seeking more.

In fact only this week ICANN released materials for community reflection which suggested the ICANN Bylaws should be amended to establish a new Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN Board under three general rubrics – fairness, fidelity to the power, or cogency of decision-making.⁴

The Independent Review Tribunal would consist of a standing panel of internationally recognized relevant technical experts as well as internationally recognized jurists, including persons with senior appellate judge experience. Members would be appointed for either a set period of five years or until they resign.

This proposal would build on the existing accountabilities that operate in the ICANN environment. These were outlined in the document, “Accountability and Transparency Frameworks and Principles published in January 2008”.⁵

Three Spheres of Accountability

ICANN is accountable in at least three ways:

1. ***Public sphere accountability*** that deals with mechanisms for assuring stakeholders that ICANN has behaved responsibly. The mechanisms holding ICANN accountable in the sphere

⁴ <http://www.icann.org/en/announcements/announcement-2-01jun09-en.htm>

⁵ (<http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>)

include:

- 3 public meetings per year – free to all and in a different global location;
- Monthly Board meetings with minutes on website in under 5 days⁶;
- Correspondence inbound and outbound is posted;
- Annual report⁷;
- An independent Ombudsman⁸;
- External independent financial audit;
- Independent review of Structure every three years;
- Transcription of Meeting discussions and posting to website⁹;
- Translation into 5 UN languages for major consultations;
- Mp3's of supporting organization meetings back to 2003;
- Congressional hearings and an Information Disclosure Policy¹⁰.

2. ***Corporate and legal accountability*** covers the obligations that apply to ICANN

through the legal system and under its bylaws. The mechanisms holding ICANN accountable in the sphere include:

⁶ <http://www.icann.org/en/minutes/>

⁷ <http://www.icann.org/en/annualreport/>

⁸ <http://www.icann.org/ombudsman/>

⁹ <http://www.icann.org/en/translations/>

¹⁰ <http://www.icann.org/en/transparency/didp-en.htm>

- By Laws – anyone materially affected by an action of ICANN may request review or reconsideration of that action¹¹;
- ICANN is a Californian Not For Profit (NFP) corporation bound by state laws and federal laws¹²;
- Those laws include laws applicable to contracting, tortious and monopolistic behaviour;
- The Californian Attorney General is the legal overseer of NFP’s like ICANN and can conduct investigations and actions to ensure ICANN can’t stray from its responsibilities;
- All Directors have fiduciary responsibilities;
- All Directors have Duty of prudent investment and loyalty;
- ICANN can have action taken against it in a United States Court.

3. ***Participating community accountability*** that ensures that the Board and Executive perform functions in line with the wishes and expectations of the ICANN community. The mechanisms holding ICANN accountable in the sphere include:

- There 15 voting members on the Board
- 6 elected by Supporting organizations of the community;
- 8 are from a nominating committee (nomcom) plus CEO¹³;
- There is a “bottom up” selection process – nomcom is made up of representatives of the community ;

¹¹ <http://www.icann.org/en/general/bylaws.htm#IV>

¹² <http://www.icann.org/en/general/articles.htm>

¹³ <http://nomcom.icann.org/>

- There is a Government Advisory Committee: over 120 members, United States included¹⁴;
- Plus 6 Liaisons from Technical, Security, Users, Internet Engineering Taskforce;
- ICANN’s Budget, Strategic and Operating Plans are consulted on and scrutinized by community.¹⁵

Enshrining What Works

Whilst the JPA is not an oversight mechanism, what JPA conclusion could and should signal is in fact permanence and entrenchment of the good work done in building this successful model.

As an organization with international stakeholders we know that to extend JPA would be greeted with concern. It galvanizes other governments and government institutions to demand an additional role too. After 11 years of ‘testing’, renewing or extending JPA – the possibility of another “temporary” agreement (the 8th in a row) - causes those with an interest to ‘model shop’ as they wait for some further period for the original model to be confirmed.

It is now time to end the 11 years of temporary MOUs and tentative acceptance of this model. In fact it is a unique time to show that the model within which stakeholders can address issues is the right one – and there are not other models, this is the one and it is designed to continuously improve.

The better route is to enshrine the fundamental principles that have served all stakeholders so well as ICANN’s permanent charter going forward. ICANN will always:

Retain a narrow mission¹⁶;

Remain based in the US;

¹⁴ <http://gac.icann.org/>

¹⁵ <http://www.icann.org/en/planning/>

¹⁶ <http://www.icann.org/en/general/bylaws.htm#l>

Remain a not for profit;

Remain an independent organization;

Remain private sector, multi stakeholder led;

Ensure the role of Governments in the ICANN model through the Governmental Advisory Committee;

Remain committed to continuous improvement.

IANA Contract

The Internet Assigned Numbers Authority (IANA)¹⁷ is what affords ICANN the responsibility for the global coordination of the DNS Root, IP addressing, and other Internet protocol resources. The IANA contract is held by the Department of Commerce.¹⁸

When the JPA concludes in September, the U.S. Government role will and must continue through IANA contract for the organization's own legitimacy and purpose. And being a California-based company ensures ICANN is subject to Congressional oversight and US legal process. Like any contract, ICANN must perform the function with excellence. The United States Government and the Congress will always hold oversight hearings and reach out to the business community, with or without any temporary agreements.

New gTLDs

Generic Top-Level Domains or gTLDs, are that portion of an Internet address that is to the right of the dot, such as dot-com or dot-org.

Currently there are 21 of those gTLDs. ICANN is currently deciding how to lift that artificial limit.

¹⁷ <http://www.iana.org/>

¹⁸ <http://www.icann.org/en/general/bylaws.htm#IV>

There are crucial concerns about trademark and intellectual property protections once the expansion of gTLDs begins. We have heard them and we are acting to fix them. The ICANN Board has invited those who have voiced concern to give us solutions before we open up the application process. Indeed they produced and made public their report¹⁹ only this week and it will be considered at ICANN's next global meeting to be held in Sydney, June 21-26, 2009²⁰.

ICANN will not open up the process until such concerns have been addressed.

The question is often asked why ICANN is expanding the top-level domain space. The answer is: we were asked to by the community and the United States Government. It was a key-stone in the Whitepaper²¹ that established ICANN, has been an objective of each of the temporary agreements, and the JPA, and was the subject of a two-year, intensive, broad-based community driven policy development discussion that could not have taken place anywhere – except at ICANN.

Concerns were raised last year by the United States' Department of Commerce and the US Department of Justice and we have conducted an economic study²² evaluating many of the points raised and have continued the dialogue as part of the implementation process to deal with those concerns.

In addition, competition in the domain space is embedded in our values contained in our bylaws²³.

So in conclusion, it is no surprise that the ICANN model is producing opportunities for choice, commerce and individual expression and doing so while being attendant to our core mission - security.

¹⁹ <http://www.icann.org/en/announcements/announcement-4-29may09-en.htm>

²⁰ <http://syd.icann.org/>

²¹ http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm#N_16_

²² <http://www.icann.org/en/announcements/announcement-04mar09-en.htm>

²³ <http://www.icann.org/en/general/bylaws.htm#l>

The United States Government imbued these values into the ICANN model – along with accountability, freedom, democracy – following the great tradition of pursuit of these in this country – and ICANN is made all the stronger for that.