



The Internet Corporation for Assigned Names and Numbers

8 June 2009

Fiona M. Alexander
Associate Administrator
Office of International Affairs
National Telecommunications and Information Administration (NTIA),
U.S. Department of Commerce
1401 Constitution Avenue N.W., Room 4701
Washington, D.C. 20230

Dear Ms. Alexander,

This letter is the ICANN Board's response to the NTIA's Notice of Inquiry (NOI) regarding the Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System. The Notice of Inquiry seeks comment regarding the upcoming expiration of the Joint Project Agreement (JPA) that ICANN has with the U.S. Department of Commerce, scheduled to expire on September 30, 2009.

Summary of ICANN's Position

The ICANN Board believes:

- The Joint Project Agreement (JPA) and the Memorandum of Understanding (MOU) process that preceded it have helped ICANN to become a successful and stable organization.
- The JPA is not an oversight mechanism.
- That the operation of the Internet Assigned Numbers Authority (IANA) is the mechanism that 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 United States Department of Commerce and ICANN is uniquely positioned to operate that function.
- The IANA contract provides for explicit oversight capacity by Department of Commerce. When the JPA concludes September 30, 2009, that fact will not change.
- ICANN already has a clear set of accountabilities and is actively seeking more.

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- The MOU/JPA process was a test of whether an international, multi-stakeholder, private sector led, independent not-for-profit corporation could perform a narrow but crucial technical function – the coordination of the Internet’s unique identifiers.
- After almost eleven years of testing it has been clearly demonstrated that these fundamentals have been key to ensuring the stable and secure operation of the Internet's unique identifier systems – ICANN’s core mission.
- In simple terms, the ICANN model works.
- ICANN has a responsibility to and draws its legitimacy from a global community recognizing that all stakeholders including government, technical, business, civil society, play an important role in this responsibility.
- ICANN must always work to earn and maintain the trust of the international Internet community.
- Further renewals of the JPA will erode confidence in a model that has worked for eleven years.
- It is time to acknowledge and enshrine what works.
- The report required to be written between ICANN and the Department of Commerce at the conclusion of the JPA should agree the tried and tested fundamentals of the model as being the conditions upon which ICANN will operate and they should be made a permanent and binding set of arrangements in the form of an ongoing charter.

MOU/JPA Process

The JPA/MOU process has been a major stabilizer for the organization. It has encouraged worthy, sensible and careful institutional growth through seven versions of the MOU, during which 13 reports have been sent from ICANN to the U.S. Government over 11 years¹. The National Telecommunications and Information Administration (NTIA) within the Department of Commerce has been the key point of contact and the Administration has employed willing and knowledgeable officials to the task over time.

But the process is not, and has never been, an oversight mechanism. The current NOI makes that plain:

“The MOU does not give the Department of Commerce the ability to exercise oversight in the traditional context of regulation and the Department of Commerce plays no role in the internal governance or day-to-day operations of ICANN.”

¹ <http://www.icann.org/en/general/agreements.htm>

And yet that fact continues to be misunderstood by many.

Discussion about the conclusion of the JPA has somehow been infused with the language of separation; some represent the JPA's conclusion in September as ICANN seeking independence, or the privatization of one of the Internet's core functions.

ICANN is not seeking independence: it has been independent since 1999.

ICANN is not 'cutting ties': the United States will always be our corporate headquarters and to perform the IANA contract ICANN must be a US based corporation.

ICANN is not seeking less accountability but actively seeking more.

The Department of Commerce also recently made it clear that the conclusion of the JPA does not mean an end to relationships but a continuation of them:

"It is important to note however, that regardless of whether the JPA is terminated, modified, or extended, the Department, through NTIA, will continue to be an active participant in ICANN by representing the United States government in ICANN's Governmental Advisory Committee (GAC) and by filing comments, as appropriate, in ICANN's various public consultation processes. In addition, the Department's relationship with ICANN will continue, as ICANN currently performs the Internet Assigned Names Authority (IANA) functions under contract to the Department."²

Why Does ICANN Perform the IANA Contract?

ICANN has performed the responsibilities under the IANA contract since 2000³.

Initially, these interdependent technical functions were performed on behalf of the Government under a contract between the Defense Advanced Research Projects Agency (DARPA) and the University of Southern California (USC), as part of a research project known as the Terranode Network Technology (TNT). As the TNT project neared completion and the DARPA/USC contract neared expiration in 1999, the United States government recognized the need for the continued performance of the IANA functions as vital to the stability and correct functioning of the Internet.

In addition to the accountability afforded through the IANA contract ICANN has a strong set of relationships with the Internet community. Indeed this fact is one of the reasons that the Department of Commerce has contracted ICANN to perform the IANA function.

² Testimony by Ms Fiona Alexander at the United States Sub Committee on Communications and the Internet, 4 June 2009

³ <http://www.icann.org/en/general/iana-contract-09feb00.htm>



The contract states:

“On December 24, 1998, USC entered into a transition agreement with the Internet Corporation for Assigned Names and Numbers (ICANN) under which ICANN secured directly from USC, all necessary resources, including key personnel, intellectual property, and computer facility access critical to the continued performance of the IANA functions. Having assumed these key resources (as well as other responsibilities associated with privatization of the Internet domain name system), ICANN was uniquely positioned to undertake performance of these functions. On February 8, 2000, March 21, 2001, and then on March 13, 2003, the DoC entered into an agreement with ICANN to perform the IANA functions. In connection with its work under these agreements, ICANN has developed and maintained close, constructive working relationships with a variety of interested parties, including Internet standards development organizations and technical bodies.”⁴ (Emphasis added)

In other words, ICANN is uniquely positioned to operate the IANA contract and engage with the global community it serves and has done so successfully since it was awarded the contract. That success is founded in the working relationships it has established as an international, private sector led, not for Profit Corporation.

What Other Accountabilities Apply to ICANN?

ICANN has extensive accountabilities in addition to the IANA contract. Following a two-year public consultation, ending in January 2008, ICANN’s Board officially approved a set of “Accountability and Transparency Frameworks and Principles”.⁵

Those principles highlighted that ICANN is accountable in three ways.

1. **Public sphere accountability** that deals with mechanisms for assuring stakeholders that ICANN has behaved responsibly. Examples include:

- Three public meetings per year where attendance is free⁶
- Agenda and minutes of Board meetings published on the website in less than five days⁷

⁴ <http://www.icann.org/general/iana-contract-14aug06.pdf>

⁵ <http://www.icann.org/en/transparency/>

⁶ <http://public.icann.org/>

⁷ <http://www.icann.org/en/minutes/>

- All inbound and outbound correspondence is published⁸
- An Annual Report that provides an extensive overview of the organization and its work⁹
- An independent Ombudsman¹⁰
- External independent financial audit¹¹
- Independent review of ICANN's Supporting Organizations and Advisory Committees on periodic basis¹²
- Transcriptions of discussions posted online routinely (for example ICANN's recent Mexico City meeting)¹³
- Translation of important documents into Arabic, Chinese, French, Spanish and Russian
- Recordings of Supporting Committee teleconferences posted online routinely since 2003¹⁴
- An Information Disclosure Policy¹⁵
- Newsletters and News Alerts¹⁶

2. **Corporate and legal accountabilities** cover the obligations that apply to ICANN through the legal system and under its bylaws. Those mechanisms include:

- The organization's bylaws, where anyone materially affected by an action of ICANN may request review or reconsideration of that action¹⁷

⁸ <http://www.icann.org/correspondence/>

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

¹⁰ <http://www.icann.org/ombudsman/>

¹¹ <http://www.icann.org/en/financials/fiscal-30jun08.htm>

¹² <http://www.icann.org/en/reviews/>

¹³ <http://mex.icann.org/mex/transcripts>

¹⁴ <http://gnso.icann.org/calendar/>

¹⁵ <http://www.icann.org/en/accountability/frameworks-principles/public-sphere.htm#b>

¹⁶ <http://www.icann.org/en/newsletter/>

¹⁷ <http://www.icann.org/en/general/bylaws.htm#IV>



- State and federal laws bind ICANN as a California not-for-profit corporation
- The California Attorney General is the legal overseer of not for profit organizations like ICANN and can conduct investigations and actions to ensure ICANN can't stray from its responsibilities;
- All Directors are bound by fiduciary responsibilities;
- That ICANN can have action taken against it in a United States Court.
- Other jurisdictional and legal accountabilities are available on the ICANN website¹⁸

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

- The 15 voting members on the Board: six selected from the organization's different supporting organizations; eight through a Nominating Committee process whose members are selected by the community; and the CEO¹⁹
- A Governmental Advisory Committee that includes 83 members, including the United States government, as well as 12 observers²⁰
- Six liaisons to the Board from technical, security, and users groups, and the Internet Engineering Task Force (IETF)
- ICANN's Budget, Strategic and Operating Plans that determine what the organization does, how much it spends and where it spends its money – each of which are put out to public comment and review²¹
- A set of consultation principles and translation principles that ensure equitable and effective participation within ICANN's processes²²
- Policy and outreach to continuously improve reach and engagement with the global Internet community.

¹⁸ <http://www.icann.org/en/accountability/frameworks-principles/legal-corporate.htm#legal>

¹⁹ <http://nomcom.icann.org/>

²⁰ <http://gac.icann.org/>

²¹ <http://www.icann.org/en/planning/>

²² <http://www.icann.org/en/accountability/frameworks-principles/community.htm#d>

What More Can Be Done On Accountability?

ICANN is committed to continuously improve. To ensure that it does so, as part of ICANN's evolution under the JPA/MOU process, ICANN has a requirement for independent review of the organization in its bylaws. ICANN also exists around a community that drives for improvement and never stops striving for the best the organization and model can be.

At the Midterm Review of the JPA in February 2008, ICANN proposed that upon its conclusion the JPA was no longer necessary and should be completed. At a public meeting in Washington D.C. held by the Department of Commerce, and in others' submissions to that review, it was clear that there was an interest in strengthening ICANN's institutional confidence. A global consultation to improve institutional confidence was commenced after being announced by the Chairman, on 28 February 2008.²³

An implementation plan was drafted and revised through three public comment periods and in open meetings in Montevideo, Christchurch, Geneva, Washington, Dakar, Cairo, Paris and Mexico City. The result was published one year to the day that the consultation was first announced at the Midterm review of the JPA on 28 February 2009.

In response to the work performed as a result of the consultation, ICANN has recently released materials for community reflection that suggest the ICANN Bylaws should be amended to establish a new Independent Review Tribunal with powers to review the exercise of decision-making by the ICANN Board under three general rubrics – fairness, fidelity to the power, or cogency of decision-making.²⁴

The Independent Review Tribunal would consist of a standing panel of internationally recognized and relevant technical experts as well as internationally recognized jurists, including persons with senior appellate judge experience.

In addition, a further proposal to enhance accountability that was developed and consulted upon through the Improving Institutional Confidence consultation was that the ICANN Bylaws should be amended to establish a special mechanism for the community to require the Board to re-examine a Board decision. That re-examination would be invoked by a two-thirds majority vote of two-thirds of the Councils of all the Supporting Organizations and two-thirds of members of all the Advisory Committees. For the Governmental Advisory Committee, a consensus statement from all the members present at a physical meeting would suffice for the purpose of this vote.

²³ <http://www.icann.org/en/jpa/chairman-address.html>

²⁴ <http://www.icann.org/en/announcements/announcement-2-01jun09-en.htm>

These proposals could provide additional appeal and review mechanisms for community use. 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”.²⁵

In its usual bottom up model of guidance by the community, the ICANN Board will make a decision as to whether these mechanisms should be further developed and put to the community for consultation.

Enshrining What Works in the JPA Concluding Report

The JPA is not an oversight mechanism, but its conclusion would signal permanence and entrenchment of the principles of the successful model.

Some stakeholders may greet extension of the JPA with concern. This is often (on enquiry) because the JPA is imperfectly understood. However, continuation of the JPA/MOU process beyond the point in which the organization finds additional value serves to galvanize other governments and government institutions to demand an additional role too. After 11 years of ‘testing’, the possibility of another temporary agreement (the 8th) will only encourage others to seek broader alternatives. Those alternatives become more realistic and hence more attractive the longer it takes to confirm the current ICANN model.

It is time to conclude the 11 years of temporary MOUs and tentative acceptance of ICANN’s approach to management of the Internet’s naming and addressing systems. Stakeholders need to be given a clear signal that they should invest in further improvement of the existing model, rather than devise different approaches.

The Department of Commerce and ICANN are in a position to support the fundamental principles that have served stakeholders so well by defining ICANN’s permanent charter going forward. The final report should declare ICANN would permanently:

- Retain a narrow mission
- Remain based in the US and uniquely positioned to operate the IANA contract
- Remain not for profit
- Remain private sector led, multi-stakeholder organization

²⁵ <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>



- Ensure the participation of Governments through the Governmental Advisory Committee
- Remain committed to continuous improvement
- Derive its legitimacy from the support and participation of the global Internet community
- Be accountable to the global Internet community.

ICANN will work to ensure these permanent conditions are clearly outlined in the final report in the form of a permanent charter.

The Importance of Community Feedback

Community feedback is crucial to ICANN. It is the thoughts, input, and participation of a committed, diverse and tireless community that provides ICANN with its unique nature and its legitimacy.

This was an outcome clearly envisioned by the U.S. government:

“The U.S. Government believes that the Internet is a global medium and that its technical management should fully reflect the global diversity of Internet users. We recognize the need for and fully support mechanisms that would ensure international input into the management of the domain name system.”²⁶

And:

“Certain management functions require coordination. In these cases, responsible, private-sector action is preferable to government control. A private coordinating process is likely to be more flexible than government and to move rapidly enough to meet the changing needs of the Internet and of Internet users. The private process should, as far as possible, reflect the bottom-up governance that has characterized development of the Internet to date.”²⁷

ICANN’S Supporting Organizations and Advisory Committees are the embodiment of the international, multi-stakeholder, community-driven model pioneered by ICANN. Responsible for developing ICANN’s policies, the Generic Names Supporting Organization, the Country Code Names Supporting Organization, and the Address Supporting Organization have made significant advances on numerous initiatives to improve the generic and country code top-level domain space as well as Internet Protocol addressing.

²⁶ http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm#N_16

²⁷ http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm#N_16



Their work has benefited from advice of the At-Large Advisory Committee and its global community of individual Internet users, the Security and Stability Advisory Committee comprised of Internet security and stability experts, the Domain Name System Root Server System Advisory Committee comprised of root server experts, as well as the Technical Liaison Group, Internet Engineering Task Force, and the Governmental Advisory Committee.

The ICANN Board will always receive advice from this bottom-up structure. In addition, the ICANN Board will be closely examining all of the comments that are submitted to the NOI. They provide a useful body of advice and commentary on ICANN as an institution, its performance and relationships.

Conclusion

The United States Government has played a key role in helping to build ICANN. The JPA has been a part of that success but it does not provide any additional oversight role to the United States government. The IANA contract does provide the United States Government with specific oversight capacity. But to the extent that there is a perception that the JPA is an additional instrument, that perception is harmful and destabilizing to confidence in the original vision of an Internet that is coordinated not controlled.

The original goal of a private bottom up multi-stakeholder organization to coordinate the Internet's unique identifiers remains as relevant and visionary today as it was when it was when ICANN was established.

In announcing the report that outlined that vision, then President Clinton said:

“The Federal Government should recognize the unique qualities of the Internet including its decentralized nature and its tradition of bottom-up governance”.²⁸

Similarly, ICANN and the United States Government now need to confirm the model that has been built and which is uniquely positioned to perform the IANA contract.

In the Whitepaper on the Management of Internet Names and Addresses itself, the U.S. government said of the organization it set out to build:

²⁸ <http://govinfo.library.unt.edu/npr/library/direct/memos/elec.com.html>



"To the extent that the new corporation is established and operationally stable, September 30, 2000 is intended to be and remains the 'outside' date."²⁹

ICANN is that organization and is operationally stable. It has been for almost all of its existence. Its fundamentals have been tested and have contributed to unparalleled security and growth of the Internet for eleven years.

Now is the time to provide certainty so that we can stop defending the model and work on perfecting it. We should end the temporary and make permanent that which works.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Peter Thrush". The signature is fluid and cursive, with a large, stylized initial "P" and "T".

Peter Dengate Thrush
Chairman of the Board of Directors,
ICANN

²⁹ http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm#N_16