



Promoting Convenience, Choice, and Commerce on The Net

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NetChoice Comments submitted to NTIA, regarding:

**Assessment of the Transition
of the Technical Coordination and Management
of the Internet's Domain Name and Addressing System**

[Docket No. 090420688-9689-01]

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Please accept these comments from NetChoice, a coalition of trade associations and global e-commerce companies, plus over 13,000 small businesses that rely on e-commerce. NetChoice works to promote the integrity and availability of the global Internet, and is significantly engaged in internet governance issues. As an ICANN Business Constituency member, NetChoice has attended the last 12 ICANN meetings. NetChoice also has participated in all 3 meetings of the Internet Governance Forum (IGF) and testified before multiple Congressional hearings on ICANN and internet governance.

Our considerable experience indicates that in its zeal to be rid of US government oversight, ICANN may have lost focus on its reason for being – to facilitate Domain Name System (DNS) management that is led by, and accountable to, the private sector.

Should the JPA terminate even if ICANN is not yet fit for transition?

The Notice of Inquiry for this matter neatly summarizes the JPA's purpose:

"The Goal of the JPA process has been to transition the coordination of DNS responsibilities, previously performed by the US government or on behalf of the US government, to the private sector so as to enable industry leadership and bottom-up policy making."¹

For the past year, ICANN leaders have been declaring that transition is a *fait accompli*, and that the JPA will simply expire as scheduled on 30-September-2009. If you accept ICANN's view, there's nothing left but the countdown to October.

But hold the countdown for a moment. ICANN may be the best available entity to accept this transition from the US government, but today ICANN lacks adequate mechanisms to ensure that it will remain accountable to and led by the private sector. Absent those mechanisms, it is not in the interest of private sector stakeholders to effect a full transition of DNS management roles.

¹ NTIA Notice of Inquiry, 24-April-2009,
http://www.ntia.doc.gov/frnotices/2009/FR_ICANNVol.74_No78_Apr242009.pdf

The JPA has protected ICANN from capture by multi-governmental organizations

In our January 2008 comments at the mid-term review of the JPA, we raised concerns over capture of ICANN's role by governmental organizations:

We strongly urge your department to use the remaining half of the JPA term to facilitate serious discussions about how to preserve private sector leadership of ICANN in a post-JPA world.

When the JPA expires in September of 2009, ICANN will need a long-term arrangement that retains the protective effect of the current USG oversight role. In today's environment, a fully independent ICANN would be an easy target for those governments not inclined to defer to private sector management.

-- NetChoice mid-term review of JPA, 8-January-2008²

Over the past year, the threats to private sector leadership at ICANN have become more significant. In our mid-term review, we noted that the United Nations' World Summit on the Information Society (WSIS) included proposals that multi-government organizations should assume ICANN's role. Those proposals were set aside to create the Internet Governance Forum (IGF), but several government participants in IGF have continued to call for a greater governmental role in managing the DNS.

For example, we cited the November 2007 IGF meeting in Brazil, where the Russian government representative called on the UN Secretary-General to create:

*"an ad hoc working group to develop practical steps for transition of the Internet governance system to bring it under the control of the international community, including the administration of critical Internet resources."*³

Russia, along with several other governments, is opposed to the private sector's leading role at ICANN and fearful about the rise of free expression enabled by the Internet's inherently open architecture. Also supporting the Russian demand was a broader group of governments who resent the legacy of US role at ICANN. Executives of ICANN often cite this resentment as reason enough to terminate the JPA, in the naïve belief that its government critics will be satisfied once the JPA goes away.

As for downside risks of JPA termination, ICANN sees nothing to be concerned about. When ICANN President Paul Twomey testified before Congress on 4-June-2009, he summed up ICANN's view about the end of the JPA by saying, "Nothing will change".⁴

However, the end of the JPA will indeed bring changes and challenges, since the JPA will no longer be there to protect ICANN from the threat of capture by governments. As noted in the current NOI, the US government "plays no role in the internal governance or day-to-day operations of ICANN."⁵ Rather, as we said in our JPA mid-term review, it is the *threat* – not the

² NetChoice comments submitted to NTIA on mid-term review of the JPA, 8-Jan-2008, http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_001.pdf

³ Transcript of remarks by Konstantin Novoderezhkin at IGF Meeting, 15-November-2007, at http://www.intgovforum.org/cms/Rio_Meeting/IGF2-EmergingIssues-15NOV07.txt

⁴ U.S. Congressional Hearing, 4-June-2009, http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1642:energy-and-commerce-subcommittee-hearing-on-oversight-of-the-internet-corporation-for-assigned-names-and-numbers-icann&catid=134:subcommittee-on-communications-technology-and-the-internet&Itemid=74

⁵ NTIA Notice of Inquiry, 24-April-2009, http://www.ntia.doc.gov/frnotices/2009/FR_ICANNVol.74_No78_Apr242009.pdf

actual *fact* – of US Government intervention that has kept other governments from displacing private sector leadership at ICANN.

In the year since the mid-term review, there have been new signals that governmental groups want to assume greater power at ICANN once the JPA termination reduces the legacy role of US oversight.

First, the Secretary-General of the United Nations' International Telecommunications Union (ITU) has complained that neither ICANN nor the IGF is sufficiently responsive to his needs.

At the November 2008 ICANN meeting in Cairo, ITU Secretary-General Toure admonished ICANN to work more closely with his organization. Toure was joined by the government representative from Brazil, who insisted on a stronger role for governments and “observance by the board of ICANN of any public policy advice” coming from governments.⁶

Secretary-General Toure addressed the IGF in Hyderabad just a few weeks later. Reprising his lecture to ICANN in Cairo, Toure called the IGF “a waste of time” and urged IGF to commit to a structure where governments – including his very own ITU – have more “muscle”.⁷

The ITU will certainly insist upon new authority as the UN considers whether to renew the IGF next year. But ITU’s model is one where governments alone get to vote on decisions. There is no voting authority given to industry and private sector interests that pay for and operate the vast majority of Internet infrastructure.

The second signal that the JPA is protecting ICANN from government capture came last month from the European Commission.

Viviane Reding, the EU Commissioner for Information Society and Media, called for termination of the JPA and asked who would step into the oversight role vacated by the US government:

“a moment of truth will come on 30 September this year, when the current agreement between ICANN and the US Government expires. This opens the door for the full privatisation of ICANN; and it also raises the question of to whom ICANN should be accountable, as from 1 October.”

-- Commissioner Viviane Reding, 4-May-2009⁸

In her video address, Commissioner Reding answered her own question by proposing to replace the JPA with a “G12 for the Internet” – a new multi-governmental group that would vote on “recommendations to ICANN where appropriate.”

In addition, Reding acknowledged that the JPA’s role in holding ICANN accountable to the Internet community, when she proposed a new accountability tribunal to replace the JPA.

We respectfully disagree with Reding’s vision of a ‘fully privatized and independent ICANN’ if that means it will be beholden to a new multi-governmental entity. The goal for ICANN has always been to move toward private-sector leadership of the Domain Name System, not towards greater control by governments.

⁶ Transcript of ICANN meeting, 6-Nov-2008, <http://cai.icann.org/files/meetings/cairo2008/toure-speech-06nov08.txt>

⁷ Transcript of IGF meeting, opening session, 3-December-2008, <http://www.intgovforum.org/cms/hydera/Opening%20Session.pdf>

⁸ “EU Commissioner Reding calls for full privatisation and full accountability of ICANN as of 1 October”, 4-May-2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/696&format=HTML&aged=0&language=EN&guiLanguage=en>

These overtures by leaders at the ITU and the European Commission serve to confirm the warning given in our JPA mid-term review. More important, it is confirmation that the JPA is seen as an obstacle by governments and multi-governmental organizations that want to displace private sector leadership of DNS management.

When the JPA goes away, ICANN must replace it with new mechanisms to preserve private sector leadership and accountability

The Commerce Department's mid-term review of the JPA concluded that "ICANN needed to take further steps to increase institutional confidence" in terms of accountability and private sector leadership. On the same day that conclusion was published, ICANN's chairman tasked an advisory panel to draft a framework for transition that would increase institutional confidence.

If only for its own survival, ICANN should favor strong and durable mechanisms to preserve private sector leadership and protect against capture by governmental organizations. As noted above, the JPA and its predecessor agreements provided some of these mechanisms over the first decade of ICANN's existence. The JPA will likely expire at some point, so we need to design new mechanisms to replace its beneficial effects.

It was therefore surprising that ICANN's draft report on institutional confidence lacked significant reforms or workable mechanisms to improve accountability and protection from capture.

For instance, only one of its recommendations would hold ICANN's board decisions accountable to external review – "an extraordinary mechanism for the community to remove and replace the Board". At the ICANN meeting in Mexico City this March, NetChoice and others told ICANN leaders that such a mechanism was too difficult to invoke, and would bring unacceptable and uncontrollable risks if it were ever actually used. Our concerns were largely dismissed at the time, reflecting ICANN's preferred method for responding to challenges: *develop a study; solicit public comments; then declare that the challenge has been met.*

The plan for improving institutional confidence should have contemplated mechanisms to hold ICANN accountable for its decisions in the development and execution of DNS policies. We suggested an ad-hoc or standing 'judiciary' that could hear appeals, perhaps through an arbitration process similar to what ICANN has proposed for handling objections to new top-level domain applications. Additionally, ICANN should explore changes to its charter and other foundational documents that could form the basis to evaluate appeals of ICANN decisions.

There has been a surprising degree of agreement on this notion of external accountability. Last month, Commissioner Reding proposed a new international tribunal, where anyone affected by ICANN decisions would have a right to request full judicial review. Most recently, AT&T is circulating a proposal for specific measures that would improve ICANN's independence and accountability, including an independent adjudication panel.⁹

With all this attention to the aspect of accountability, even ICANN had to acknowledge the need for new mechanisms. Last week, ICANN announced it would now consider:

"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."¹⁰

⁹ AT&T Comments on the Draft Implementation Plan for Improving Institutional Confidence, 11-May-2009, <http://forum.icann.org/lists/iic-implementation-plan/pdfpUYuCuWOmU.pdf>

¹⁰ ICANN website announcement, 31-May-2009, <http://www.icann.org/en/jpa/iic/iic-the-way-forward-31may09-en.pdf>

We believe that ICANN's willingness to now consider what it had previously ignored is attributable to the presence of the JPA. Essentially, ICANN seems willing to promise virtually anything that helps to justify termination of the JPA. However, the demise of the JPA significantly reduces the oversight and leverage we believe is necessary to hold ICANN accountable to meet those promises.

The JPA will terminate someday, but an extension could protect ICANN while it develops mechanisms to replace the JPA.

We realize that the Commerce Department cannot unilaterally extend the term of the JPA. Moreover, we understand that the Department has limited leverage to induce ICANN to create mechanisms to replace the JPA. Still, the Department could attempt to persuade ICANN of the benefits of retaining the protective benefits of the JPA while ICANN develops accountability mechanisms and adds measures to prevent external capture.

Given their public statements, it's not likely that ICANN will find this argument persuasive. In that case, we believe the Department and Congress should evaluate this transition in light of the original commitment made back in 1998:

In particular, the Department of Commerce committed that it would not conclude its role in DNS management if doing so would cause instability in the DNS.¹¹

Instability in the DNS would become a significant risk if ICANN itself became unstable. And stability will be impossible to maintain if a prematurely independent ICANN lost the confidence of its private sector stakeholders at the same time that government organizations were asserting more control over ICANN's current roles.

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¹¹ NTIA Notice of Inquiry, 24-April-2009,
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