



June 8, 2008

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

Re: Department of Commerce Notice of Inquiry on the Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System

Dear Ms. Alexander:

The United States Telecom Association (USTelecom)<sup>1</sup> appreciates the opportunity to submit comments regarding the transition of the Internet Corporation for Assigned Names and Numbers (ICANN) to private sector management.<sup>2</sup> The National Telecommunications and Information Administration (NTIA) seeks comment on a broad range of issues that focuses on the progress of the transition of the technical coordination and management of the Internet's domain name and addressing system (DNS) to the private sector, as well as the model of private sector leadership and bottom-up policy development which ICANN represents.

USTelecom's members are uniquely situated in the ICANN process since they play a central role in providing the infrastructure and network services that make the Internet possible. Based on this unique vantage point, USTelecom strongly supports ICANN's private sector leadership and bottom-up policy development. As its name suggests, the World Wide Web is international in nature, and has become a primary economic driver in today's global economy. The Internet's expansive reach and broad economic impact makes it imperative that ICANN's unique policy setting role as an independent, member-driven entity be fully realized.

In this regard, USTelecom's comments in this proceeding address significant areas of concern regarding ICANN's relationship with all stakeholders (including governments and industry participants) as well as the future structure of the organization. Although NTIA's notice of inquiry focuses on the Joint Project Agreement (JPA) between ICANN and the Department of Commerce, the issues that must be addressed by all ICANN stakeholders are distinct from those contained in the JPA.

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<sup>1</sup> USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

<sup>2</sup> Federal Register Notice, *Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System*, 74 F.R. 18688 (April 24, 2009) (NOI).

USTelecom shares the view that ICANN will – and should – eventually become a fully independent entity. Prior to such independence, however, it is imperative that all stakeholders in this proceeding, including ICANN, look to adopt and fully implement tangible and robust improvements.

## **I. ICANN Fulfills an Important Role in Overseeing Several Internet-related Tasks**

Since its inception in September 1998, ICANN’s mandate has included a commitment to the private sector management of the DNS, coupled with the promotion of the security and stability of the global Internet. ICANN’s tasks include responsibility for various operational and technical matters.

For example, ICANN is responsible for ensuring the stable and secure operation of the Internet's unique identifier systems and encouraging improved transparency, accessibility, efficiency, and timeliness in the consideration and adoption of policies related to technical coordination of the Internet DNS, and funding for ICANN operations. Similarly, ICANN is responsible for ensuring that such policies are responsive to global Internet stakeholders. Finally, in addition to working with the Government Advisory Committee (GAC) members, ICANN is also tasked with maintaining and improving the multi-stakeholder model and the global participation of *all* stakeholders in the ICANN process in order to further the effectiveness of the bottom-up policy development processes.

Through its limited relationship with the Department of Commerce, ICANN has been guided by specific and targeted principles.<sup>3</sup> Since the 1998 Memorandum of Understanding (MOU) between the Department of Commerce and ICANN was signed, there have been several iterations and revisions, with amendments occurring in 1999, 2000, 2001, and 2002.

But over time, these principles remained the cornerstone of ICANN’s formation and have continued to evolve. With an eye towards the eventual full independence of ICANN, the Department of Commerce nevertheless committed that it would not conclude its role in DNS management if doing so would cause instability in the DNS. To address longstanding concerns, in September 2006 the ICANN Board of Directors approved and adopted an “Affirmation of Responsibilities for ICANN’s Private Sector Management” (“ICANN Affirmation of Responsibilities”).<sup>4</sup> The ICANN Affirmation of Responsibilities was a commitment by the ICANN Board of Directors to address shortfalls that had been identified by the Department of Commerce and – more importantly – the stakeholder community.

ICANN’s progress was subsequently reviewed in late 2007 and early 2008. Once again, the Department of Commerce concluded that while some progress had been made, there remained key areas where further work was required to increase institutional confidence in

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<sup>3</sup> In the June 1998 DNS White Paper, the Department of Commerce articulated, based upon public input, four principles that would guide the development of an entity called “NewCo” to be established by the private sector. These principles were: stability; competition; private, bottom-up coordination; and representation.

<sup>4</sup> See ICANN Website, *Affirmation of Responsibilities for ICANN's Private Sector Management* (available at: <http://www.icann.org/en/announcements/responsibilities-affirmation-28sep06.htm>) (visited May 21, 2009).

ICANN. These areas included long-term stability, accountability, responsiveness, continued private sector leadership, stakeholder participation, increased contract enforcement, and enhanced competition.

In this current NTIA proceeding, the ICANN community is asked to assess the status of these key benchmarks in order to gauge ICANN's readiness to become fully independent. Unfortunately, many deficiencies remain and USTelecom believes they must be addressed prior to ICANN transitioning to a post-JPA environment.

## **II. ICANN Suffers From a Number of Inadequacies in Core Areas**

Despite its relatively short history, ICANN has been an important participant in the Internet's transformation into a crucial, global medium. In certain areas, ICANN has performed capably in its role. Yet despite these achievements, there remain several key areas in which ICANN must make important improvements before it is capable of existing as a stand-alone organization. All of these areas were identified by NTIA during its mid-term review as being deficient, and ICANN's present inadequacies in these areas should be cause for concern until such time as they are fully addressed.

### ***A. There is a Consistent Lack of Transparency in ICANN's Decision Making Process***

Among the items contained in the ICANN Affirmation of Responsibilities is a commitment by ICANN to take action on various issues, particularly increased transparency. The NTIA asks in its Notice of Inquiry (NOI) what steps ICANN has taken to meet these responsibilities, and whether such steps have been successful.

To be sure, ICANN has taken steps towards improving transparency in certain areas. For example, in January 2008, ICANN released its "Accountability & Transparency Frameworks and Principles" document (Framework & Principles).<sup>5</sup> Since their release, ICANN has made a noticeable effort to put increased amounts of information on its website and has also been providing staff summary of comments. Although more information is being published to ICANN's website, very little has been done to show how the community's comments are integrated into ICANN's decision making processes. Unfortunately, between adoption of the ICANN Affirmation of Responsibilities in September 2006 and today, very little has been done to establish increased transparency into ICANN's decision-making process.

As one further enhanced step towards transparency, ICANN recently introduced the publication of board meeting minutes. Some have called for ICANN to go further, by releasing

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<sup>5</sup> *ICANN Accountability & Transparency Frameworks & Principles*, January 2008 (available at: <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-10jan08.pdf>) (visited May 28, 2009) (*Framework & Principles*) (In the *Framework & Principles*, ICANN identified three spheres of accountability, including public sphere accountability (e.g., assuring stakeholders that ICANN has behaved responsibly); corporate and legal accountability (i.e., ICANN's obligations through the legal system and under its bylaws); and participating community accountability (i.e., ensuring that ICANN performs functions in line with the wishes and expectations of the ICANN community)) *Framework & Principles*, p. 4.

Board transcripts.<sup>6</sup> But one recent Board Review proposal suggested abandoning the release of Board Minutes, which has been an important step towards increased transparency.<sup>7</sup>

More recently, in February 2009, ICANN released its Draft Implementation Plan for Improving Institutional Confidence (“Draft IIC Plan”).<sup>8</sup> Unfortunately, the Draft IIC Plan provides only high-level concepts and recommendations, while ICANN’s Framework & Principles document confuses transparency with accessibility. For example, ICANN’s Framework & Principles stresses the accessibility of information on its website as evidence of transparency.<sup>9</sup> Accessibility of information, however, should not be confused with transparency into ICANN’s decision-making processes. Even when ICANN attempts to highlight the alleged transparency of its decision making process in the same document, it falls far short.

Only one section of the Framework & Principles addresses ICANN’s decision making process. Specifically, ICANN states that it only has an obligation to make clear “wherever possible” the impact of public comment on decisions, and to “[r]equest explicit discussion” of any summary and analysis “while discussing” the particular topic that is under consideration.<sup>10</sup> A commitment to discuss the impact of public comments on ICANN policy making only “wherever possible” is nothing more than a non-binding promise. Moreover, merely requesting “explicit discussion” does not mean that such a discussion will be made public or even occur. ICANN should make a clear commitment to explain the impact of public comment on decisions.

The ICANN stakeholder community’s frustration with ICANN’s opaque decision-making process is a matter of extensive record.<sup>11</sup> Despite its commitment to transparency in the ICANN Affirmation of Responsibilities, Draft IIC Plan and ICANN’s Framework & Principles, more needs to be done to make ICANN more transparent.

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<sup>6</sup> See e.g., Hearing on, *Oversight of The Internet Corporation For Assigned Names And Numbers*, Statement of Christine N. Jones, General Counsel and Corporate Secretary, The Go Daddy Group, Inc., June 4, 2009 (see e.g., Domain Name Wire, *Congress Beats Up ICANN*, June 4, 2009 (available at: <http://domainnamewire.com/2009/06/04/congress-beats-up-icann-part-3/>) (visited June 8, 2009) (*Go Daddy Testimony*)).

<sup>7</sup> See, Main Report, *Independent Review of the Board of ICANN*, November 2008, p. 8 (available at: <http://www.icann.org/en/reviews/board/report-02nov08-en.pdf>) (visited June 8, 2009).

<sup>8</sup> See, *ICANN Draft Implementation Plan for Improving Institutional Confidence*, February 26, 2009 (*Draft IIC Plan*) (The *Draft IIC Plan* was released by ICANN and is a proposed set of twenty-four recommendations designed to maintain and strengthen ICANN).

<sup>9</sup> *Framework & Principles*, pp. 9-10.

<sup>10</sup> *Framework & Principles*, pp. 26.

<sup>11</sup> See e.g., Comments of the International Chamber of Commerce on Draft IIC Plan, p. 4, (stating that legitimacy derives from “decisions that reflect full and informed public comment.”) (available at <http://forum.icann.org/lists/iic-implementation-plan/pdfCNuDuRsEk1.pdf>) (visited June 8, 2009); Comments of the Coalition for Online Accountability on Draft IIC Plan, p. 1, (stating that “[m]embers of the independent business community who are not in contractual relationships with ICANN simply lack confidence that their voices will be heard and heeded when ICANN comes to make decisions that can profoundly affect their businesses. It has happened on some occasions, but a reliable, consistent mechanism for this input has yet to be found.”) (available at: <http://forum.icann.org/lists/iic-implementation-plan/pdf5TFIFkoJyt.pdf>) (visited June 8, 2009); Comments of Network Solutions on Draft IIC Plan, p. 1, (available at: <http://forum.icann.org/lists/iic-implementation-plan/pdfjSdQNOXdl8.pdf>) (visited June 8, 2009) (*Network Solutions Comments*)).

***B. There are Concerns About ICANN's Ability to Retain its Independence***

USTelecom shares the view ICANN must implement sufficient safeguards in order to protect itself from capture, whether by external or internal sources. This is an area of concern that has been raised by numerous ICANN stakeholders, and even ICANN – to its credit – has acknowledged that it is a real possibility that needs to be addressed.<sup>12</sup>

Yet despite ICANN's cognizance of this issue, it has yet to identify any comprehensive improvements that would protect against this threat. ICANN's Draft IIC Plan for improving institutional confidence lays out proposals to address five key areas, including the need for ICANN to be safeguarded against capture.<sup>13</sup> But ICANN's proposed safeguards against capture are lacking in a number of respects.

For example, ICANN commits in its draft implementation plan to “[m]aintain and strengthen transparency in the constituent parts of ICANN.”<sup>14</sup> Yet as discussed previously, ICANN's problems with transparency have been long-standing and remain unresolved. Other commitments contained in the Draft IIC Plan are either unclear in their impact,<sup>15</sup> or seem to contradict their stated goal.<sup>16</sup>

Many stakeholders maintain that the initiatives identified by ICANN are insufficient. Moreover, even if these commitments are taken at face value, they are in a nascent stage and need time to be fully implemented and allowed to develop. Absent adoption and implementation of fully robust safeguards, ICANN faces substantial risk of external or internal capture. These concerns are quite substantial, considering the statements of some governments or intergovernmental representatives regarding ICANN's role.

For example, some governments continue to call for transition of the Internet governance system to bring it under the control of the international community. Not only would this new international entity control the Internet governance system, but it would also control administration of critical Internet resources. Recently, there have been other calls about the creation of a new multilateral bureaucracy to oversee the Internet.

USTelecom believes that it is imperative for ICANN to become a strong, independent organization. ICANN is certainly making steps towards achieving this independence, but the looming threat of internal or external capture is a very possible prospect for ICANN. USTelecom shares the view that the U.S. Government's limited presence with ICANN under the JPA is what has prevented other governments from asserting their influence over ICANN's

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<sup>12</sup> See ICANN Transition Action Plan, September 2008, pp. 1-2.

<sup>13</sup> *Draft IIC Plan*, p. 3. The remaining four areas identifies include state that ICANN must: 1) be accountable and responsive to its multi-stakeholder communities; 2) meet the needs of the global Internet community of the future; 3) be a financially and operationally secure organization; 4) maintain its focus on ensuring safe and stable operations relating to the unique identifiers of the Internet.

<sup>14</sup> *Draft IIC Plan*, p. 5, Recommendation 1.13.

<sup>15</sup> Disclosure of public statements of interest seems to be of little value since any such disclosure would only be as legitimate as the organization making it.

<sup>16</sup> ICANN's recommendation to “[m]aintain presences” in unidentified jurisdictions (Recommendation 1.10) would seem to *increase* the threat of capture, not decrease such a threat.

processes.<sup>17</sup> Unfortunately, ICANN's nascent proposals offered by ICANN render it extremely susceptible to external or internal capture. ICANN must strengthen its internal controls prior to full independence.

### ***C. There is Insufficient Accountability at ICANN***

USTelecom continues to support the concept of ICANN as a private-sector governing entity that is accountable to the multi-stakeholder global Internet community in carrying out its mission. USTelecom agrees with other stakeholders in this debate that enhanced accountability is a fundamental prerequisite for completing the transition process.<sup>18</sup> However, USTelecom also believes that ICANN must significantly improve its accountability mechanisms in order to fully serve its multi-stakeholder community.

There are a number of areas in which ICANN must make tangible improvements in accountability to its stakeholders. In particular, ICANN has no credible mechanism for the meaningful review of, and action on, public comments submitted to the organization. For this reason, many stakeholders feel like nothing more than passive observers to the ICANN process.

During the Commerce Department's mid-term review last year, one business leader summed it up by stating that "many in the business community feel like we are marginalized, that we are not heard, that our voices aren't heard, that ICANN is solely becoming a trade organization for registries and registrars."<sup>19</sup> The business community's widely held frustration results from the fact that ICANN has no process for evaluating public comments and incorporating them into its subsequent policy recommendations. As the International Trademark Association (INTA) noted during the Commerce Department's mid-term review "What is the point of having a public comment period if the public comments are ignored?"<sup>20</sup>

By way of example, in its January 2008 Framework & Principles, ICANN committed to maximizing the transparency and accountability in the consultation process by both summarizing *and* analyzing comments submitted by stakeholders in ICANN proceedings. Specifically, ICANN made two distinct commitments. First, to "[p]ost a summary of comments at the end of each comment period and in the same place as the comments;" and second, to "[p]ost an analysis of the comments."<sup>21</sup>

But with the exception of only a single proceeding in the thirteen comment cycles that closed in 2009, ICANN has only *summarized* comments and provided *no analysis* whatsoever.<sup>22</sup> In every instance, ICANN links from the main docket page to a website labeled

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<sup>17</sup> See e.g., Comments of NetChoice, p. 3 (available at: [http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment\\_001.pdf](http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_001.pdf)) (visited May 28, 2009).

<sup>18</sup> See e.g., *Network Solutions Comments*, p. 2 (encouraging ICANN to work with the community to recommend a true accountability measure at the organization).

<sup>19</sup> See *Mid-Term Review Transcript*, p. 28.

<sup>20</sup> INTA Mid-Term Review Comments, p. 7 (available at: [http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment\\_079.pdf](http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_079.pdf)) (visited June 8, 2009).

<sup>21</sup> *ICANN Framework & Principles*, p. 26.

<sup>22</sup> See ICANN Public Comment website, (available at: <http://www.icann.org/en/public-comment/>). USTelecom reviewed the archived forums for the year 2009, from January through April.

“Summary/analysis of comments.”<sup>23</sup> Once a user clicks on that link associated with each docket, they will be taken to a webpage often labeled “Summary Analysis,” “Summary/Analysis” and in some instances only labeled “Summary.”<sup>24</sup> But regardless of how that page is labeled, in almost every closed proceeding in 2009, ICANN has never analyzed the comments it receives, despite the promises contained in its Framework & Principles document.<sup>25</sup>

As the Coalition for Online Accountability (COA) stated in its comments to NTIA last year during the mid-term review, “members of the independent business community . . . who are not in contractual relationships with ICANN simply lack confidence that their voices will be heard and heeded when ICANN comes to make decisions that can profoundly affect their businesses. It has happened on some occasions, but a reliable, consistent mechanism for this input has yet to be found.”<sup>26</sup> USTelecom agrees that until such time as robust accountability mechanisms are developed and implemented, ICANN’s role as a private-sector-led entity to manage the DNS will not be realized.

#### ***D. ICANN Lacks Effective Enforcement Mechanisms***

In order for ICANN to retain its independence and continue to function under its private sector model, it is imperative that it have robust enforcement mechanisms in place. Indeed, ICANN itself recognized this when in September 2008 it listed the “[e]nhancement and expansion” of “contractual compliance and enforcement” as one way to strengthen ICANN’s accountability to its community.

Unfortunately, there are a number of areas in which the absence of enforcement actions by ICANN is noticeably apparent. ICANN’s lack of enforcement has long been a source of frustration in the stakeholder community. This frustration remains particularly evident in the registry enforcement area.

Currently, ICANN only employs five individuals devoted to contract enforcement and monitoring,<sup>27</sup> a staffing level that is woefully inadequate considering the extent of enforcement issues facing the organization. ICANN’s enforcement mechanisms have simply gone from non-existent to inadequate.

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<sup>23</sup> See e.g., ICANN Public Comment website (available at: <http://www.icann.org/en/public-comment/>) (visited May 29, 2009).

<sup>24</sup> See e.g., Summary Analysis of Comments In Public Forum - New Consumers Constituency Petition and Charter, (available at: <http://forum.icann.org/lists/gnso-consumers-constituency/msg00007.html>) (visited May 29, 2009) (the ICANN document includes one section labeled “Summary & Analysis”, but that section contains no analysis whatsoever).

<sup>25</sup> The only instance of which USTelecom is aware of ICANN conducting some form of analysis of comments received from the stakeholder community is in its proceeding regarding the introduction of new gTLDs (see e.g., Analysis of Public Comment of the New gTLD Application Guidebook Version 2, May 2009 (available at: <http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>) (visited June 8, 2009).

<sup>26</sup> Coalition for Online Accountability Comments, p. 10, February 14, 2008 (available at: [http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment\\_081.PDF](http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_081.PDF)) (visited June 8, 2009).

<sup>27</sup> ICANN website at <http://www.icann.org/en/compliance/staffing-plan.html>.

This absence in enforcement is apparent in ICANN's termination of only four registrars in the past year for non-compliance with contractual obligations.<sup>28</sup> These sparse enforcement actions are all the more glaring when one considers the concurrent dramatic increase in cybersquatting, phishing attacks and other domain-related crimes.<sup>29</sup> For example, as noted in recent testimony before the U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Communications, Technology and the Internet, ICANN has failed to take any significant action against any accredited registrar for cybersquatting, including those found by federal courts to have violated U.S. laws.<sup>30</sup> Despite the fact that accredited registrars specifically agree in their Registrar Accreditation Agreement to comply with all laws, there has been little if any enforcement by ICANN against registrars who are found to violate specific U.S. laws.

Yet despite these inadequacies, ICANN appears committed to moving ahead with its controversial proposal to drastically increase the number of available gTLDs which would multiply the need for enforcement.<sup>31</sup> If ICANN cannot adequately police and enforce the problems of today, there are strong concerns about its ability to enforce against the larger problems of the future.

It is imperative for ICANN to address its absence of enforcement mechanisms, prior to becoming fully independent. The lack of enforcement mechanisms at ICANN poses serious threats to the stability of the DNS, while at the same time eroding institutional confidence. At a minimum, ICANN must increase enforcement of registrars' non-compliance with contractual agreements. In addition, the ongoing inaccuracies with Whois data remain a major vulnerability in the stability of the DNS.

### **III. ICANN Should Adopt and Implement Critical Improvements Prior to Dissolution of Its Current Relationship with the Department of Commerce**

Despite ICANN's shortcomings in these areas, USTelecom believes that certain improvements to the ICANN process could alleviate many of the problems discussed above. Of course, these are just some of many ideas and proposals that have been discussed with an eye towards improving the ICANN model. USTelecom supports consideration of these and all other legitimate proposals as stakeholders look for ways to address identified shortfalls in the ICANN process. Any proposals that are ultimately adopted should be completely implemented prior to final expiration of the JPA or any successor contract..

#### ***A. ICANN Should Institute APA-Type Mechanisms***

Based on the critical function that ICANN plays in the DNS sphere, it is imperative that a robust administrative framework be established for its unique role. Perhaps the most

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<sup>28</sup> ICANN website at <http://www.icann.org/en/compliance/>.

<sup>29</sup> See e.g., USTelecom Comments on the New gTLDs Program and Process, Dec. 15, 2008, pp. 6 – 7 (*USTelecom gTLD Comments*).

<sup>30</sup> See, Hearing on, *Oversight of The Internet Corporation For Assigned Names And Numbers*, Statement of Sarah Deutsch, Verizon Vice President and Associate General Counsel, p. 4, June 4, 2009 (*Deutsch Testimony*).

<sup>31</sup> *USTelecom gTLD Comments*, pp. 6 – 7.

fundamental change for ICANN would be to implement full Administrative Procedures Act (APA) mechanisms. Such mechanisms would ensure that all of ICANN's stakeholders – ranging from private industry to government entities – gain increased certainty that ICANN's decisions are based on sound analysis.

USTelecom believes that ICANN should establish clear procedural guidelines for decision-making based on well established administrative procedures concepts. At a minimum, such processes should include requirements that ICANN: 1) keep the public informed of their organization, procedures, rules and proposals; 2) provide for public participation in any policy making process; and 3) establish uniform standards for the conduct of formal rulemaking.

Some stakeholders have offered specific proposals for ICANN to consider.<sup>32</sup> These include proposals that ICANN staff publish clear, neutral staff analysis of comments received, the context in which comments were received, the rationale for the original staff recommendation, and how the staff recommendation is informed by the public comments received. USTelecom also supports proposals calling for advanced notices of proposed policy-making activities; establishment of appropriate timeframes for full and comprehensive input from all stakeholders; and publication of draft proposals that provide sufficient time for relevant feedback from the community.<sup>33</sup>

Although ICANN has made strides in some areas (*e.g.*, publishing stakeholder comments), implementation of APA-type systems would ensure broader mechanisms are in place to create greater accountability and transparency. Absent such accountability and transparency, relevant stakeholders will continue to view the ICANN process with distrust and become increasingly disenfranchised. By implementing such mechanisms, ICANN will create an environment where meaningful dialogue with DNS stakeholders will ensure the development of appropriate and proper practices and policies.

### ***B. ICANN Should Improve Accountability to the Stakeholder Community***

Ensuring improved accountability of ICANN to the public and stakeholder community is essential. In conjunction with APA-style mechanisms, improvements to ICANN's accountability measures will provide further legitimacy to ICANN and its policy making process and help to ensure that ICANN remains accountable to *all* members of the Internet community. Such accountability to the stakeholder community can be accomplished through improvements to existing accountability mechanisms and implementation of new ones.

There are certainly many ways for ICANN to improve its accountability to the stakeholder community. For example, some have suggested that ICANN revise the conflict of interest policy for its Board. Currently, there is nothing to prevent members of the ICANN Board that have a conflict of interest to nevertheless participate in Board discussions on the topic

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<sup>32</sup> See *e.g.*, *Network Solutions Comments*, p. 1 (calling on ICANN to “employ methodical decision-making processes subject to meaningful community review.”); AT&T Comments on Draft IIC Plan (May 11, 2009) (available at: <http://forum.icann.org/lists/iic-implementation-plan/msg00006.html>) (visited June 8, 2009).

<sup>33</sup> See *e.g.*, AT&T Comments on Draft IIC Plan, pp. 4-5.

on which they are conflicted. This violates the most basic tenets of fiduciary duties, and must be addressed by ICANN.

In the context of an internal capture scenario, many have expressed concerns about the ability of a simple majority of the ICANN Board to make decisions that are inconsistent with its mission or stakeholder consensus. Such a scenario needs to be addressed by ICANN in a reasonable fashion, such as through implementation of a super-majority vote or other procedural safeguards.

Unfortunately, ICANN's only proposal to date has been to establish "an extraordinary mechanism for the community to remove and replace the Board in special circumstances." As NetChoice has previously observed about this proposal, such a measure "would be too difficult to invoke and would create unacceptable and uncontrollable risks if it were ever actually used."<sup>34</sup> As such, USTelecom believes that ICANN should implement some other less drastic form of Board reform.

In addition, USTelecom is concerned about the need for ICANN to avoid establishing an economic interest for the organization in its DNS policies and related decisions.<sup>35</sup> For example, if the initial round of proposed gTLD applications is successful, ICANN stands to bring in more than \$90 million in fees. In instances such as this, it is imperative that ICANN avoid any policy making decision where it stands to reap a substantial financial benefit.

Finally, ICANN can active steps to improve existing accountability mechanisms. For example, USTelecom supports basic steps that would improve ICANN's Ombudsman services, including greater independence for the Ombudsman and full disclosure of whether Ombudsman recommendations are implemented by the ICANN Board or staff.

### ***C. ICANN Should Establish some Form of Independent Review***

USTelecom supports proposals that would implement some form of independent supervisory review of ICANN's policy making and decision making process. Currently, ICANN has no genuine form of independent review, despite the presence of such mechanisms in other venues. The presence of such review mechanisms offers stakeholders a form of legitimate redress that ensure valid outcomes are attained when procedural or substantive flaws arise in the policy making process. It is imperative that ICANN implement and adopt such mechanisms in order to ensure the integrity of its decision-making process.

ICANN's current review process is woefully inadequate, specifically with respect to its Independent Review Panel and reconsideration process. The flaws inherent in each have been fully analyzed by numerous stakeholders. Susan Crawford, currently the Special Assistant to the President on Science Technology & Innovation and former ICANN Board Member, previously

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<sup>34</sup> See ICANN E-Mail archives (available at: <http://forum.icann.org/lists/iic-implementation-plan/msg00011.html>) (visited May 28, 2009).

<sup>35</sup> See e.g., *Go Daddy Testimony*, p. 9; AT&T Comments on Draft IIC Plan, p. 5.

described ICANN's Independent Review Panel process as "quite circular," and called for establishing some avenue of some avenue of "real appeal of a board decision."<sup>36</sup>

ICANN recently proposed a new Independent Review Tribunal that 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. Unfortunately, ICANN's proposal falls short. In particular, ICANN proposes amending its bylaws in such a way as to enable the Board to completely disregard any recommendation of the Independent Review Tribunal.<sup>37</sup>

In this regard, USTelecom notes the numerous calls for creating a new, truly independent review body that has the authority to review ICANN's policy actions to ensure compliance with implemented administrative procedure guidelines.<sup>38</sup> As is the case with similar types of review boards, any such panel should have the relevant expertise, be fully independent of ICANN and have no past or current conflicts of interest with ICANN. Such a panel should be empowered to reverse ICANN's decisions based on substantive and/or procedural grounds.

#### **IV. ICANN Needs Additional Time to Sufficiently Prepare for a Post-JPA World**

USTelecom strongly supports the model of ICANN as an organization that is accountable to the multi-stakeholder global Internet community through use of a bottom-up, consensus-based process. In addition, USTelecom believes it is imperative for the global Internet community that ICANN eventually transition and fully function as an independent entity that is outside the control of any single government.

The full independence of ICANN will never be realized if it is captured by other entities, whether internally or externally. Absent implementation by ICANN of strong safeguards and well-established procedures, this threat could become all too real.

In light of the many deficiencies that have been identified, and the absence of any substantive reforms by ICANN, USTelecom believes that transition process for ICANN must continue. USTelecom acknowledges that the JPA is a mutual contract between the Department of Commerce and ICANN. We therefore urge ICANN and the Department of Commerce to

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<sup>36</sup> See ICANN Meeting Transcript, *Accountability and Transparency Management Operating Principals Consultations Workshop*, San Juan, Puerto Rico, 27 June 2007, (available at: <http://sanjuan2007.icann.org/files/sanjuan/SanJuan-WorkshopAccountabilityTransparency-27June07.txt>) (visited June 2, 2009).

<sup>37</sup> See, ICANN Report, *Improving Institutional Confidence: The Way Forward*, 31 May 2009, p3 (stating that "A provision should be set forth in the bylaws stating that the Board will follow the recommendations of the panel unless it determines that such recommendations are not in the best interest of the corporation and publishes a report to the community setting forth its reasons.") (available at: <http://www.icann.org/en/jpa/iic/iic-the-way-forward-31may09-en.pdf>) (visited June 8, 2009).

<sup>38</sup> See e.g., *Network Solutions Comments*, p. 2 (calling for the institution of some form of binding independent review at ICANN); *Go Daddy Testimony*, pp. 6 – 7 (calling for some form of a supervisory panel to ensure accountability at ICANN); Comments of NetChoice, May 11, 2009 (calling for additional mechanisms that hold ICANN accountable for its decisions in the development and execution of DNS policies) (available at: <http://forum.icann.org/lists/iic-implementation-plan/msg00011.html>) (visited June 8, 2009).

approach this issue in a pragmatic manner and work towards some type of limited extension beyond the September 30, 2009 expiration date.

**VI. Conclusion**

USTelecom appreciates this opportunity to comment on the ICANN proposals. We understand the complexity of this issue, and would be pleased to work more closely with ICANN and the Department of Commerce to incorporate the proposed remedies. Should you have any questions, please feel free to contact the undersigned.

Sincerely,

A handwritten signature in blue ink that reads "Jonathan Banks". The signature is fluid and cursive, with the first name and last name clearly legible.

Jonathan Banks  
Senior Vice President, Law & Policy

A handwritten signature in black ink that reads "Kevin G. Rupy". The signature is cursive and somewhat stylized, with a prominent flourish at the end.

Kevin G. Rupy  
Director, Policy Development