

RELINQUISHING IANA WOULD BE A MISTAKE FOR NTIA

In comments to the U.S. Government, ICANN sought to convince the National Telecommunications and Information Administration (NTIA) to relinquish its oversight of the Internet Address and Number Authority (“IANA”) functions. At its heart, ICANN’s presentation is a plea for NTIA to declare the privatization of DNS management finished. For several reasons, ICANN’s plea should be refused.

ICANN notes that “[i]t was anticipated that [it] would perform the IANA functions pursuant to a contract with the DOC on a transitional basis only to ensure the security and stability of the Internet” and it complains that “[a]lmost 11 years later, the White Paper’s stated goal of transitioning the IANA functions to the private sector remains unfulfilled.”¹ It points to the “relatively short transition period”² identified in the White Paper and asserts its understanding that “[o]nce ICANN was firmly established, the DOC would fully transfer the management of these [IANA] functions to the private sector.”³

ICANN omits crucial details from the White Paper, which also stated that “the U.S. Government should end its role in the Internet number and name address system in a manner that ensures the stability of the Internet.”⁴ Because the United States concluded that “it would be irresponsible to withdraw from its existing management role without taking steps to ensure the stability of the Internet during its transition to private sector management,” the government determined to “continue to participate in policy oversight until such time as the new corporation was established and stable.”⁵

ICANN also neglects to mention that other aspects of the White Paper did not work out as planned either. It was also anticipated that “members of the Interim Board would not themselves serve on the Board of Directors of the new corporation for a fixed period thereafter.”⁶ But more than one member of the interim board continued to serve beyond the first election in November 2000.⁷ And it was contemplated that “[m]anagement structures should reflect the functional and geographic diversity of the Internet and its users.”⁸ That goal remains an aspiration some 13 years after ICANN’s incorporation. If these elements of the White Paper were not fulfilled as anticipated, it is difficult to see why the government is bound by a timeline for completing the DNS Project that was conceived when ICANN did not exist.

But the real answer to ICANN’s complaints lies with a series of agreements that ICANN entered with the United States, beginning with the original Memorandum of

¹ ICANN, Request for Comments on the Internet Assigned Numbers Authority Functions 3 (March 25, 2011) (“*ICANN Comments*”) (footnote omitted).

² *Id.*

³ *Id.*

⁴ United States Dep’t of Commerce, Nat’l Telecomm. and Inform. Admin., *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741, 31749 (June 10, 1998) (“*DNS White Paper*”).

⁵ *Id.* at 31743-44.

⁶ *Id.* at 31750.

⁷ See <http://www.icann.org/en/general/board.html>.

⁸ *DNS White Paper* at 31749.

Understanding,⁹ in which the U.S. Department of Commerce recognized ICANN as the organization that would carry out the DNS Project. The U.S. Department of Commerce's general counsel testified before Congress that the MOU "did not confer immediately upon ICANN responsibility for domain name system management... Obviously if the project is not successful, that transition of responsibility will not occur."¹⁰

From the outset of the DNS Project, it was clear that ICANN would have to earn the trust of the community its decisions affect. Only then could the government responsibly "withdraw from its existing management role."¹¹ ICANN's performance under the Affirmation of Commitments suggests that that moment has not yet arrived.

ICANN characterizes the Affirmation of Commitments as a document in which the United States "relinquished its oversight role on the basis that 'a private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users.'"¹² It further describes the Affirmation as "ending the exclusive oversight of ICANN and further institutionalizing ICANN's accountability to the global Internet community."¹³

But the NTIA has said that ICANN is not living up to its obligations under the Affirmation.¹⁴ Assistant Secretary Strickland expected that under the Affirmation "ICANN would make significant improvements in its operations" and yet "[o]ver a year later ... those improvements have yet to be seen."¹⁵

ICANN and the NTIA see the Affirmation from opposite perspectives. ICANN believes that the government "relinquished its oversight role" by entering the Affirmation, and the NTIA believes that ICANN is failing to meet its obligations under it. However one interprets this conflict, it is hardly an auspicious moment for the United States to declare the DNS Project complete. Even if transitioning all of the IANA functions to ICANN were the right thing to do, it is at least prudent to wait to see how ICANN implements the final recommendations of the Accountability and Transparency Review Team. ICANN should be held to its commitments under the Affirmation as minimal standards of conduct for an organization with serious global responsibilities.

Similar reasons counsel against ICANN's proposed "narrowing" of the future IANA framework, by removing from NTIA oversight the port and protocol parameter registry

⁹ Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (Nov. 25, 1998).

¹⁰ Testimony of Andrew J. Pincus, General Counsel, U.S. Dep't of Commerce to House Committee on Commerce, Subcommittee on Oversight and Investigations, *Domain Name System: Is ICANN Out of Control?*, July 22, 1999, at 15 (Serial No. 106-47).

¹¹ *DNS White Paper* at 31743.

¹² *ICANN Comments* at 4 (quoting Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, Sep. 30, 2009).

¹³ *Id.* at 3.

¹⁴ Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, U.S. Dep't of Commerce, to Rod Beckstrom, President and CEO, ICANN, Dec. 2, 2010, at 1 (expressing concern at ICANN's "apparent failure ... to carry out its obligations as specified in the *Affirmation of Commitments* ...").

¹⁵ *ICANN Comments* at 2.

functions, the administration of .arpa, and any new technical functions like RPKI.¹⁶ Only the continued strengthening of ICANN as a multi-stakeholder institution will produce the “global confidence”¹⁷ that ICANN wants to pursue. Until then, reducing the NTIA’s oversight will more likely increase uncertainty over ICANN’s stewardship of the Internet DNS than reassure the Internet community of the Internet’s safety and stability.

ICANN likewise argues that “incorporating the principles of transparency and accountability into the next framework would enhance global confidence in the performance of the IANA functions.”¹⁸ By this, ICANN means to “impose transparency obligations on all parties to the agreement,”¹⁹ permitting ICANN to publish each step of its activities in administering root zone requests and requiring NTIA to do the same.²⁰

This proposal underscores the deep confusion with which ICANN approaches the issue of accountability. It tends to use the words “transparency and accountability” as a pair of vague buzzwords rather than as distinct and separately meaningful concepts. As its proposal illustrates, ICANN tends to treat transparency as a synonym or substitute for accountability. But disclosure isn’t accountability. While ICANN should be applauded for any improvement it makes in transparency, accountability is a separate matter.

Unfortunately, ICANN tends to resist accountability.²¹ In fact, its comments on the IANA functions contract argue against the accountability of a contractual relationship, preferring instead more “flexible” arrangements.²² Such resistance is unsurprising given ICANN’s recent legal position that “the board cannot empower any entity to overturn decisions or actions of the board.”²³ Its unwillingness to accept formal accountability is worrisome. Already it is causing international support for the private sector model of DNS management to erode.²⁴

In light of ICANN’s struggles to perform its commitments under the Affirmation of Commitments and its resistance to formal accountability, NTIA’s continued oversight of the IANA functions is indispensable. ICANN’s pleas to reduce or eliminate the NTIA’s role should be rejected. Internet users are better served by NTIA’s efforts to act as ICANN’s contractual partner than by an arbitrary decision to declare the DNS Project completed.

¹⁶ *Id.*

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 5 (capitalization modified and emphasis omitted).

¹⁹ *Id.*

²⁰ *Id.* at 5-6.

²¹ See R. Shawn Gunnarson, *A Fresh Start for ICANN*, at 13-16 (June 1, 2010); Milton Mueller, Internet Governance Project, *ICANN, Inc.: Accountability and Participation in the Governance of Critical Internet Resources* 3 (Nov. 16, 2009); Thomas M. Lenard & Lawrence J. White, Technology Policy Institute, *ICANN at a Crossroads: A Proposal for Better Governance and Performance* 3 (June 2009).

²² See *ICANN Comments* at 12 (“To assume that a static contract can anticipate the requirements of a future and evolving Internet is unrealistic and will impede rather than improve overall customer satisfaction.”).

²³ ICANN, *Limitations on Third Party Review of Corporate Board Actions under California Law*, Aug. 31, 2010.

²⁴ See Danish Comments to the Accountability and Transparency Review Team, Draft Proposed Recommendations, Nov. 23, 2010, at 2; French Comments to the Draft Proposed Recommendations made by the Accountability and Transparency Review Team (ATRT), Dec. 3, 2010, at 2; Norwegian Comments to the Draft Proposed Recommendations—The Accountability and Transparency Review Team, Nov. 30, 2010, at 2.

When ICANN earns institutional confidence by more reliably matching its actions with its ideals, the NTIA may reasonably consider whether to turn over the IANA functions unconditionally.