



Promoting Convenience, Choice, and Commerce on The Net

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January 8, 2008

Suzanne R. Sene
Office of International Affairs
National Telecommunications and Information Administration
1401 Constitution Ave, NW, Room 4701
Washington, DC 20230

Re: Midterm Review of the Joint Project Agreement (Docket No. 071023616-7617-01)

Dear Ms. Sene:

Please accept these comments from NetChoice, a coalition of trade associations and global e-commerce companies, plus over 18,000 small businesses that rely on e-commerce. In Washington, at ICANN, and at the Internet Governance Forum, NetChoice works to promote the growth and viability of global e-commerce.

NetChoice supports the goal of placing Internet management in the hands of a multi-stakeholder, private sector organization that is independent of government control. However, we must first address the threat that national governments could displace the private sector from its historical role as manager of the Internet's domain name system.

ICANN's Goal is to Maintain the Role of the Private Sector

The Federal Register notice for this issue requested comments on the 10 responsibilities listed in the Annex to the joint Project Agreement (JPA). In a later submission we will comment on ICANN's contention that it has "Achieved" all of these responsibilities as sufficient reason for immediate independence.

In this initial comment, we contend that this checklist of responsibilities should not be determinative of whether ICANN is ready to become fully independent. Rather, these responsibilities are expressly there to support the central point of the JPA – a commitment to private sector management of the DNS.

While ICANN's recent annual report¹ focuses on this list of responsibilities, it's essential to remember why these responsibilities are included in the JPA in the first place. The preamble to the JPA recognizes and supports "*private sector leadership in the innovation and investment that has characterized the development and expansion of the Internet around the globe*"².

Indeed it was the private sector who invested a trillion dollars to bring the Internet to a billion people, and it is the private sector that will bring the Internet to the next billion, and to the

¹ ICANN Annual Report, 23-Dec-2007, <http://www.icann.org/announcements/announcement-23dec07.htm>

² Joint Project Agreement, at www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNJPA_09292006.htm

next billion after that. In the section entitled “Agreement Between the Parties”, the JPA reinforces the private sector role:

In recognition of the Parties’ desire to institutionalize the private sector technical coordination and management of the Internet DNS to the private sector, the Parties hereby agree ...

This commitment to private sector management is also stated as the driving purpose for the much-quoted responsibilities that are listed in Annex A:³

AFFIRMATION OF RESPONSIBILITIES for ICANN’s Private Sector Management

ICANN’s shall continue in its commitment to the private sector management of the Internet DNS, by promoting the security and stability of the global Internet, while maintaining, and promoting competition through its multi-stakeholder model.

ICANN hereby affirms and agrees to be guided by the following responsibilities...

It is clear that both the U.S. Government (USG) and ICANN recognize the prime importance of the private sector role in ICANN and DNS management. However, ICANN seems to be missing the forest for the trees. To focus only on the Annex checklist is to lose sight of what the U.S. Government envisioned when it created ICANN to manage the DNS. The JPA mid-term review should be an opportunity to ensure that the private sector maintains its role in managing ICANN and the global DNS – at a time when the private sector’s role is increasingly being threatened.

The Threat to the Private Sector’s Role at ICANN

Private sector management of ICANN and the DNS has been a paragon of success in building an ever-expanding Internet while maintaining security and stability. That model, however, is coming under increasing pressure from a handful of national governments.

A handful of national governments who are vocally critical of the current ICANN model may be motivated by the notion that anything so important as the Internet simply *has* to be managed by governments. But that view misses the fact that investment and innovation by the private sector— not by governments – has made the Internet so successful. And, it misses the fact that sovereign governments already have legal control over conduct and content within their borders, whether on the Internet or in any other medium. That is, nations still make and enforce their own laws governing freedom of expression, fraud, spam, cyber-security, and cyber-crime.

ICANN, on the other hand, is the Internet’s manager—not its Governor. As long as ICANN restricts itself to managing technical aspects of the Internet, it poses no threat to the sovereign powers of national governments. Moreover, an ICANN that stays focused on technical management cannot be used to impose censorship or other regulations on citizens of other nations.

However, countries like China, Russia, Iran, and Syria have been calling for an alternative to the international private sector model embodied in ICANN. Reform proposals offered in the World Summit on the Information Society (WSIS) and Working Group on Internet Governance (WGIG) would have created multi-government organizations to govern the Internet. While those proposals were temporarily shelved to create the Internet Governance Forum (IGF), they were revived by the Russian government at the Nov-2007 IGF meeting in Rio de Janeiro.

³ Annex A to JPA, www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNBoardResolution_09252006.htm

Putting Internet management in the hands of governments would hinder investment and innovation, suppress free expression, and threaten the network's inherently open architecture.

A second misperception that is driving some governments to demand an alternative to ICANN is an overstated fear of USG influence over DNS decisions and policies. For instance, the USG is said to have unduly influenced ICANN's re-designation of registry operators for two country-code top-level domains (ccTLDs), and these instances have assumed mythical proportions among critics of U.S. oversight. But there were valid reasons for ICANN to re-delegate the Iraq and Australia ccTLDs, and the USG long ago stepped back from active oversight of ICANN's operations.

Ironically, it is the *threat* – not the actual *fact* – of US Government oversight that is keeping other governments from displacing private sector interests at ICANN. Without the USG's current oversight role, ICANN could conceivably be "captured" by the governments that are today ICANN's harshest critics. Capture could happen in a variety of ways, including:

- ICANN's Government Advisory Committee (GAC) could insist upon formal voting and veto power over ICANN decisions;
- Government-run operators of country code domains (ccTLDs) could assert their numerical majority to control the Country Code Names Supporting Organization (ccNSO) at ICANN; and
- As ICANN launches new top level domains, some governments will undoubtedly assert control over native language versions of gTLDs such as .com and .org. The governments that operate these registries and related businesses will thereby gain voting power on ICANN's GNSO Council, where most of ICANN's policy work originates.

These are real threats to ICANN's current model of private sector management, which all agree must be preserved and protected. 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.

Private Sector Investors Require Legal Certainty in Contracts

For the private sector to continue its success in building and developing the Internet, it is critical that we can continue to count on the clarity and certainty of contracts.

Presently, operators of Internet infrastructure rely upon contracts with ICANN and other providers that clearly describe responsibilities and restrictions. As contract participants, these operators make significant investments in people, equipment, and commitments to their suppliers and customers. These contracts must therefore be honored by ICANN, without risk of being unilaterally abrogated or modified in response to a change of sentiment among ICANN participants.

Moreover, these contracts must be upheld and interpreted by a reliable and consistent body of law. For the present, U.S. Courts serve as the place to govern contract disputes between operators and ICANN. If an international governance body were to take over ICANN's role as contract partner for Internet operations, the clarity and certainty of these infrastructure contracts would be thrown into doubt.

We encourage the U.S. Government to continue maintaining cooperative agreements to preserve operation of essential domains such as .com, .gov, .net, .edu, and .mil. This "back-stop" protection is justifiable given the degree to which U.S. and commercial interests rely upon a functioning DNS, and should continue even in a post-JPA world.

In planning for the future of ICANN, the question of contract enforcement and legal liability should be a central concern, and not a concession associated with ICANN's desire to move its operations outside the US.

Conclusion

Today, the Internet thrives thanks to private-sector investment and innovation, not command and control by governments. ICANN's bottom-up, private sector-led structure has ensured a secure, stable, open and free Internet; and it must be enshrined and protected for the future. The continuance of a private sector-led ICANN is the real goal of the JPA, and one that cannot be ignored during this midterm review.

This private sector management approach must be retained if we are to bring the Internet to billions more users in the developing world. As a leading ISP executive from Ghana said at the Rio IGF meeting:

On this point, we note that at the time that Africa is starting deployment of its Internet network may in fact not be a good time to talk about any form of change in the governance or administration of the Internet. That might be as though you are pulling the rug from under us.

-- Nii Quaynor, Chairman of NCS, an ISP in Ghana

Like Dr. Quaynor, the private sector is concerned about losing the rug from under us – which could happen if the USG should take its foot off the corner of the rug. We encourage you to use this mid-term review of the JPA to begin a serious inquiry into how we can preserve this successful model of private sector management in a post-JPA world.

Sincerely,

Steve DelBianco
Executive Director
NetChoice Coalition