



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

JUN 27 2016

The Honorable Marco Rubio
United States Senate
Washington, DC 20510

Dear Senator Rubio:

I am writing in response to your May 24, 2016, letter regarding the transition of the U.S. Government's stewardship of key Internet domain name functions. We at the National Telecommunications and Information Administration (NTIA) join you in commending the multistakeholder community for their efforts. I also agree with you that meeting the needs and expectations of the customers and partners of the Internet Assigned Numbers Authority (IANA) functions and bolstering the multistakeholder model are key elements of the transition. With these and the other criteria established in 2014 in mind, NTIA on June 9, 2016 found that the IANA Stewardship Transition proposal developed by the global multistakeholder community met our criteria.

Our assessment is an important and necessary milestone to completing the long-promised privatization of the Internet's domain name system, but there is still work to be done. As you note, one of the key remaining tasks is to complete testing of the one operational change required by the transition, that is, the direct transmittal of root zone updates from ICANN to Verisign.

I agree with you that successful testing of this change is required before the transition can occur. The Internet Corporation for Assigned Names and Numbers (ICANN) and Verisign are already undergoing 90 days of real-time testing, including comparative data analysis against existing systems. Specifically, ICANN and Verisign are testing the ability to transmit root zone change requests directly from ICANN to Verisign in a manner that maintains the integrity of the root zone file. This testing began on April 6 and is scheduled to be completed by July 5. To date, no discrepancy between the production root zone file and the test file has occurred.

Other items related to preparing for the transition, specifically ICANN's work on legal agreements necessary to establish accountability and operational performance requirements, have either already been negotiated or are very close to being finalized. NTIA has asked ICANN for an implementation planning status report by August 12, 2016, to gauge whether all the transition-related work will be completed prior to the September 30, 2016 expiration of the IANA functions contract. If ICANN cannot complete these tasks by September 30, NTIA, in consultation with ICANN and stakeholders, will determine the appropriate contract extension.

Your letter raises a number of other questions and suggestions to which I would like to respond. Some of the suggestions appear to be based on a misunderstanding of the transition proposal. If, after reviewing our response, you would like to discuss these matters more fully, we are of course available to meet with you and your staff members.

IANN Governance Structure and Accountability

Contrary to the suggestion in your letter, the transition proposal would not “create a radically different governance structure for ICANN.” In fact, ICANN’s day-to-day operations would continue relatively unchanged post-transition. ICANN’s fundamental structure, built on the existing supporting organizations and advisory committees, would remain in place. For example, among other things, the structure of ICANN’s Board of Directors and the method for selecting Board members remain unchanged.

What the plan does establish is the enumeration of seven community powers that the existing supporting organizations and advisory committees, joining together, can exercise in the event the Board does not follow the consensus will of the stakeholder community. The plan relies on California not-for-profit law to create an avenue for the stakeholder community ultimately to seek court enforcement, but only after a series of escalations during which the Board and the community would have every opportunity to resolve their differences through discussion and negotiation.

Given that ICANN’s day-to-day operations do not change under the plan, and the extensive work by the multistakeholder community to develop the plan over the past two years, delaying the transition for parallel testing of ICANN’s governance model is unnecessary. The mechanisms and bodies which are the basis for the proposed accountability enhancements have been tested for years in the Internet community. The multistakeholder community has already subjected its plan to a rigorous set of stress tests to analyze how the plan would operate in response to scenarios involving financial crisis or insolvency, legal actions, or failures of the ICANN Board or staff to meet operational expectations and failures of accountability.¹ These accountability enhancements act as a safeguard and tools of last resort. As such, there is no expectation that the community will need to exercise these powers in the next several years; indeed, the hope is that they are never exercised. Accordingly, these powers are not conducive to the notion of real-life “testing” in the near future, if ever.

In addition, the accountability reforms are grounded in good governance practices already in use across corporate, non-profit, and multistakeholder entities. As evaluated by two of the nation’s leading corporate governance experts, Professor John Coffee and Professor Dana Brakman Reiser, along with the Berkman Center for Internet and Society at Harvard University, the individual components of the accountability enhancements are well-tested and well-understood.² These reforms have been tested for many years against many challenges and in many environments; they do not require a “probationary” period.

Use of the term “parallel testing” may also reflect some confusion about NTIA’s current role with respect to the accountability of ICANN. The contract between NTIA and ICANN only designates ICANN to perform the technical IANA functions. It does not grant NTIA any authority over ICANN’s day-to-day operations or the organization’s accountability to the stakeholder community. The proposal contains a series of enhancements to ICANN’s accountability that go beyond the role that NTIA or the U.S. Government has today. For

¹ See Annex 15 to the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations at: <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>.

² See Corporate Governance Report at: https://www.ntia.doc.gov/files/ntia/publications/attachment_6_corporate_governance_report.pdf.

example, the U.S. Government has no ability to reject an ICANN budget or remove an ICANN board member – two of the new enumerated community powers. In other words, NTIA does not manage any existing accountability system that would remain in place while the expanded accountability provisions are tested in parallel.

NTIA has always viewed the issue of ICANN’s accountability as an ongoing process of continual improvement. This idea is reflected in the Affirmation of Commitments between ICANN and NTIA, signed in 2009,³ that obligated ICANN to conduct periodic reviews of its accountability and transparency. The community has now codified in the ICANN bylaws this requirement to conduct regular reviews.

This principle of continual improvement puts into context the planned work defined as Work Stream 2. These issues are not directly pertinent to the transition of our stewardship of the IANA functions. Delaying the transition would not contribute to the community’s consideration of these issues. ICANN and the multistakeholder community will always be looking to improve and evolve the organization’s accountability. This is a core characteristic of the multistakeholder model – the flexibility to adapt to changing conditions and needs.

We also want to allay your concern that including a commitment to human rights in the ICANN bylaws could “encourage” the organization to go beyond its constituency. The plan makes it clear that whatever the commitment to internationally recognized human rights, it will be constrained by the mission and core values set forth in the ICANN bylaws. Elaborating on the commitment through Work Stream 2 will not lead to an expansion of ICANN’s mission or scope.

The Role of Governments

The transition proposal does not expand the role of governments vis-à-vis other ICANN stakeholders. The bylaws retain the prohibition on government officials serving as voting board members. In addition, we agree with you that governments’ role should remain advisory. In fact, under the transition plan, governments remain advisory through the Governmental Advisory Committee (GAC) to provide input to the Board in the normal course of business. And, as is currently the case, the Board will be able to reject GAC advice. Today, the Board does give special consideration to consensus GAC advice. The proposal codifies this current practice through a bylaw change that limits this Board deference to consensus advice defined in the bylaws as advice to which no one formally objects.

The GAC has the potential to participate in the Empowered Community at a level commensurate with other stakeholders; however, the GAC cannot unilaterally exercise the community powers. Moreover, the bylaws expressly prohibit the GAC from participating in the community powers when the issue in contention is a Board action on GAC advice.

The GAC has not yet decided whether it will participate in any exercise of community powers. The current position of the U.S. Government, shared by many other nations, is that we do not support having the GAC exercise any of the community powers. To do so risks converting the GAC’s role from that of an expert body providing public policy advice to the

³ See Affirmation of Commitments by the United States Department of Commerce and ICANN at: https://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf.

Board into an operational role for which the GAC is not organized and at which the GAC likely could not be effective. Accordingly, absent a unique and extreme set of facts, the U.S. Government presumptively will oppose any invitation to the GAC to join other parts of the ICANN multistakeholder community to exercise any of the community powers.

Accordingly, while I understand your concerns about change, we see no tangible benefit to extending the contract for the reasons stated above. On the other hand, the potential for serious consequences from extending the contract beyond the time necessary for ICANN to complete its work is very real, including implications for ICANN, the multistakeholder model, and the credibility of the United States in the global community.

Failing to follow through on the transition or unilaterally extending the contract will only embolden the authoritarian regimes that routinely advocate for government-led or intergovernmental management of the Internet via the United Nations. Former Homeland Security Secretary Michael Chertoff and retired Vice Chairman of the Joint Chiefs of Staff James Cartwright recently noted the risks that would come with rejecting or delaying the transition, saying as follows:

To reject or even delay the transition would be a gift to those governments threatened by a free and open Internet. The multistakeholder model is exactly what has allowed policy to keep pace with the Internet's rapid growth. The proposal includes all voices and is built on a foundation of transparency and accountability. It is a quintessentially American policy. When our values of freedom and democracy spread around the world and are shared by others, we are more secure at home and the world is more stable. We support this stewardship transition, as it will pave the way for American values and the free and open Internet around the world.⁴

Additionally, the Global Commission on Internet Governance, comprised of leading experts around the world, called upon the U.S. Government to adopt the proposal and to meet the September 2016 target date for the transition of the IANA functions. In the words of the Global Commission: "Failure to do so will send the wrong message to the international community, increase distrust, and will likely encourage some governments to pursue their own national or even regional Internets."⁵

The global Internet community, comprised of businesses, technical experts, and public interest groups, support this transition and want to see the United States follow through on its long-standing, well-considered commitment to privatize the domain name system.⁶

⁴ See article by Michael Chertoff and James Cartwright on "How to Keep the Internet Free and Open" at: <http://www.politico.com/agenda/story/2016/06/keep-internet-free-and-open-icann-000140>.

⁵ See statement by the Global Commission on Internet Governance at: <http://www.broadcastingcable.com/news/washington/ntia-praised-domain-name-sign/157184>.

⁶ For example, the Internet Association, Computer & Communications Industry Association and Internet Infrastructure Coalition stated, "The internet economy applauds NTIA for its deliberative and thorough work reviewing the ICANN transition proposals to ensure its principles for a successful transition are met. Our organizations agree that the proposals to transition ICANN from U.S. Government stewardship to a bottom-up, multistakeholder model satisfy NTIA principles and provide the internet with the best path forward for self-governance. It is important that Congress not artificially slow down the transition beyond the September 30 expiration of the current IANA contract." See NTIA Blog "What They are Saying: Reaction to NTIA's Assessment of the IANA Stewardship Transition Proposal" at: <https://www.ntia.doc.gov/blog/2016/what-they-re-saying-reaction-ntia-s-assessment-iana-stewardship-transition-proposal>.

I hope this response resolves your concerns. As I mentioned above, NTIA is available to discuss these issues and our assessment report. Please feel free to contact me or my Director of Congressional Affairs Jim Wasilewski at 202-482-1830 with any questions.

Sincerely,

A handwritten signature in blue ink that reads "Lawrence E. Strickling". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Lawrence E. Strickling