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To: <DNSTransition@ntia.doc.gov>
Date: Sun, May 31, 2009 1:46 PM
Subject: Comments on Docket No. 090420688-9689-01 (corrected)

These comments are submitted in response to the Notice of Inquiry, "Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System", Docket No. 090420688-9689-01 (74 Federal Register 18688-18690, 29 April 2009).

I am a journalist. In the course of trying to report on ICANN, I have repeatedly been blocked by ICANN's lack of transparency. In trying to hold ICANN accountable to its claimed principles of transparency, I have exhausted all possible efforts to utilize each of ICANN's three claimed accountability mechanisms, without ever actually being afforded the "rights" ICANN claims to provide under those procedures. My engagement with ICANN is documented at:

<http://hasbrouck.org/icann>

I submitted comments explaining the history of my involvement with ICANN in response to both of NTIA's previous inquiries on this issue, in 2006 and 2008:

http://www.ntia.doc.gov/ntiahome/domainname/dnstransition/comments/dnstrans_comment0600.htm

http://www.ntia.doc.gov/ntiahome/domainname/jpacomments2007/jpacomment_122.pdf

I reassert and incorporate by reference those prior comments. My additional comments below are directed specifically to questions 5, 6, and 7 in the notice of inquiry:

Question from NTIA:

"5. The current JPA called for NTIA to conduct a mid-term review. That review revealed that ICANN needed to take further steps to increase institutional confidence related to long-term stability, accountability, responsiveness, continued private sector leadership, stakeholder participation, increased contract compliance, and enhanced competition. What steps has ICANN taken to address the concerns expressed in the mid-term review process? Have these steps been successful? If not, what more could be done to meet the needs of the community served in these areas?"

Answer:

There has been no significant substantive progress on the problems detailed in my previous comments. In some areas, ICANN's practices have gotten substantially worse.

With respect to transparency, ICANN has adopted a transparency "framework" which formalizes ICANN's lack of transparency and its repudiation of the

commitment in ICANN's own corporate Bylaws that, "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." I pointed out the contradictions between this framework and ICANN's commitments in comments to ICANN when the framework was proposed:

http://forum.icann.org/lists/draft-mop-2007/msg_00001.html

<http://forum.icann.org/lists/draft-mop-2007/msg00002.html>

ICANN's Board approved this "transparency framework" even after its incompatibility with ICANN's own Bylaws had thus been brought to ICANN's attention.

In practice, as I have previously reported to NTIA, ICANN has never complied with the section of its Bylaws on transparency, particularly the "maximum extent feasible" clause and its applicability to "constituent bodies" of ICANN. But the adoption of a framework explicitly restricting transparency, on grounds entirely unrelated to "feasibility", is a huge step backwards for ICANN, away from compliance with its Bylaws or commitments to NTIA.

With respect to accountability, ICANN has claimed to have implemented three different "accountability" mechanisms. In fact, as my own experience (the most detailed and systematic attempt to utilize each of these purported mechanisms) has shown, none of the three actually have been implemented or operate in accordance with ICANN's Bylaws.

I explained my experience trying to use each of these three purported mechanisms in my previous comments to ICANN, as cited above. Nothing has changed with respect to any of these three mechanisms:

(1) ICANN still has not properly appointed an Ombudsman. ICANN claimed in a press release in 2004 to have "appointed" an Ombudsman. But ICANN's Bylaws require -- for good reason -- that the Ombudsman be appointed or removed only by the Board of Directors, and that any initial appointment of an Ombudsman be for a 2-year term, subject to renewal by the Board. There is no record in the publicly-disclosed minutes of any ICANN Board meeting of a proposal or decision to appoint or renew the appointment of an Ombudsman, even though I have repeatedly brought the lack of proper appointment of an Ombudsman, and the requirement of the Bylaws for this to be Board decision, to ICANN's attention in formal public comments.

(2) ICANN's Reconsideration Committee never held a public meeting, and has now been dissolved. Its action on one of my requests was explicitly declared to be based on secret communications between the person acting as Ombudsman (without proper appointment, as discussed above) and the Reconsideration Committee related to a separate matter on which I had requested the assistance of the Ombudsman. This was in flagrant violation of the requirement of ICANN's Bylaws that, "The Reconsideration Committee shall act on a Reconsideration Request on the basis of the public written record," and of the "Ombudsman's" purported principles of confidentiality. Despite my complaints bringing this matter to the attention of the full Board, the communications which formed the basis for the Reconsideration

Committees's decision still have not been disclosed to me or placed in the public record. (Nor, of course, could making them public now cure the error of relying upon them at a time when they were not in the public written record.) ICANN's Board has taken no action to sanction either the Reconsideration Committee or the "Ombudsman", to bring them into compliance with ICANN's Bylaws, or to reconsider the improperly based decision on my request.

(3) My request for independent review of ICANN's slack of compliance with its Bylaw on transparency remains pending. So far as I can tell, it has not been acted on in any way by ICANN. ICANN has not considered or adopted independent review procedures or appointed an independent review provider (IRP) in accordance with ICANN's procedural rules for policy development. ICANN has refused to provide me with any contracts it may have with any Independent Review Provider(s).

One commercial entity, ICM Registry, has filed an "independent review" petition with an arbitration body, and ICANN is participating in that arbitration. But ICANN is claiming that the "independent review" is only advisory -- which is correct, and part of why oversight by NTIA is still required -- and that the arbitrators must show "great deference" to ICANN's decisions. More importantly, while ICM Registry has raised both substantive and procedural issues, its fundamental reason for requesting an independent review is the outcome of ICANN's decision-making, not the process. Because its interest as a for-profit corporation is necessarily financial, ICM Registry has commercial reasons to pursue any avenue for potentially changing that outcome, regardless of whether it is in accordance with ICANN's Bylaws.

The decision by ICM Registry to proceed with this process is not binding on me or any of the other individuals and entities who have made requests for independent review (none of the others of whom have chosen to accept it). Most importantly, it is not dispositive of whether ICANN has established a process consistent with its Bylaws -- which it has not. ICANN has admitted that they have never conducted a policy development process to select an IRP or to approve procedures for independent review.

The only mention of a potential IRP in ICANN Board decisions is a resolution authorizing, but not requiring, non-exclusive negotiations with one potential IRP. There is no public record (despite my specific requests) of whether any such negotiations took place or were concluded, much less of any proposal for or approval of an agreement with any IRP(s).

Ironically, ICANN is claiming in the arbitration with ICM Registry that a decision by ICANN's Board authorizing ICANN's staff to enter into negotiations does not imply that the negotiations would be result in a proposal to the Board or that such a proposal would be approved. At the same time, ICANN is claiming that a decision to authorize non-exclusive negotiations within one potential IRP shows that ICANN had complied with its obligation for the Board to "appoint" an IRP and approve its procedures.

In any case, ICANN has, so far as I know, taken no action to fulfill its obligation to refer my request to an independent review panel, or to begin a policy development process, consistent with ICANN's Bylaws, to select

and appoint an IRP and develop and approve procedures for independent review of ICANN actions. ICANN's primary response to my criticism of their lack of transparency and accountability has been a succession of public ad hominem attacks on me by ICANN, rather than any meaningful engagement with the substance of my critique of ICANN's procedures.

ICANN's failure to implement or comply with its own Bylaws on transparency and accountability is apparent with even the most superficial comparison of ICANN's actions in these incidents with the relevant provisions of its Bylaws. I have repeatedly and directly brought these matters to ICANN's attention, including in written comments acknowledged and posted by ICANN on its Web site, and in person before the Board on the one occasion when I was able to afford to attend an ICANN Board meeting. No competent and diligent ICANN staff or Board member could possibly believe the statements that ICANN has repeatedly made, to the public and to NTIA, claiming specifically to have implemented the transparency and each of the three accountability mechanisms required by ICANN's Bylaws. Those claims are false, either knowingly or grossly negligently or incompetently so, and made with the intent to mislead the public and NTIA and to induce NTIA to enter into a contract with ICANN on the basis of fraudulent misrepresentations of material facts about ICANN's actions.

Question from NTIA:

"6. The JPA between the Department of Commerce and ICANN is an agreement by mutual consent to effectuate the transition of the technical coordination and management of the Internet DNS in a manner that ensures the continued stability and security of the Internet DNS. Has sufficient progress been achieved for the transition to take place by September 30, 2009? If not, what should be done? What criteria should be used to make that determination?"

Answer:

No, sufficient progress has not been made to permit such a transition to take place without depriving Internet users of the the due process, transparency, and accountability which are appropriate for the exercise of decision-making authority over the topics encompassed by the current MOU between the NTIA and ICANN.

What should be done? NTIA should investigate and act on this and other whistleblower complaints of breach of contract and fraud in contract procurement by ICANN, terminate NTIA's contract with ICANN, and consider whether to (A) enter into a similar contract with another inter-governmental or non-governmental entity or (B) assume those functions within NTIA.

That decision should be based on criteria of ICANN's actual real-world practices, not merely on ICANN's often-ignored "policies" or its self-serving claims to NTIA (and to others including the public) as to what it has done, which have often been false and misleading to the point of constituting fraud in contract procurement.

Question from NTIA:

"7. Given the upcoming expiration of the JPA, are there sufficient safeguards in place to ensure the continued security and stability of the Internet DNS, private sector leadership, and that all stakeholder interests are adequately taken into account? If yes, what are they? Are these safeguards mature and robust enough to ensure protection of stakeholder interests and the model itself in the future? If no, what additional safeguards should be put in place?"

Answer:

No, there are no meaningful safeguards in place in ICANN's practices to ensure that any stakeholder interests are taken into account. ICANN has not implemented the transparency and accountability practices required by its corporate Bylaws and by its contracts with NTIA, and has ignored, in practice, even those policies that it has adopted. ICANN has not provided, in actual practice, any adequate substitute for the transparency protections of the Freedom of Information Act and the procedural due process protections of the Administrative Procedure Act, which would apply if decisions in this area were being made by NTIA (and which may legally apply to decision-making authority delegated to ICANN by NTIA).

If NTIA continues to delegate any authority to ICANN, all activities in the exercise of that authority by ICANN (or any other entities to whom ICANN sub-delegates decision-making authority, such as sponsors of top-level domains) should explicitly be made subject to the substantive and procedural transparency and due process requirements of FOIA and APA.

To date, I have received no response to my previous comments to NTIA, in which I have reported to NTIA what I believe, from my own observations and experiences in interacting with ICANN, to be material breaches by ICANN of the commitments in ICANN's contract with ICANN and ICANN's own corporate Bylaws, and misstatements by ICANN to NTIA concerning ICANN's practices, made by ICANN in order to secure its contract with NTIA, which rise to the level of fraud in contract procurement.

I again request that NTIA investigate and act on these and any other whistleblower complaints that you have received concerning ICANN's contract procurement and contract performance. It is not in NTIA's discretion to overlook or tolerate breaches of contractual commitments by ICANN, or to ignore whistleblower reports of breach of contract or fraud in contract procurement and/or performance. If NTIA has established some other mechanism or point of contact for oversight of ICANN's contract compliance and performance, please let me know to whom this should be directed.

Please feel free to contact me if you would like any additional information or if I can be of any assistance in your investigation of this complaint.

I will be in Washington, DC, on other business the week of 1-5 June 2009, and would welcome an opportunity to meet with you in person. I would also wish to testify at any public hearing held as part of this inquiry.

Sincerely,

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