Response to: DEPARTMENT OF COMMERCE, National Telecommunications and Information Administration [Docket No. 090420688–9689–01] Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System

I am writing to address several of the issues under consideration. The specific issues of concern in this note involve the question of <u>termination of the JPA</u>, <u>ICANN as a private sector led organization</u>, and the <u>accountability framework</u>. I am writing as an individual US citizen who is involved in ICANN as a volunteer and who has been a Nominating Committee appointed member of ICANN's Generic Names Support Organization Council since July 2005.

I thank the NTIA for this opportunity to comment.

Termination of the JPA

It is my belief that the MOU and the JPA that followed it have achieved their purpose in that they have enabled ICANN to develop into an organization that has the administrative and operational capability necessary to manage the DNS and the IP address space. To a large degree, while discussions can be had on specific details, all of the basic requirements of the JPA have been met. While further development of ICANN is still necessary, including along the lines I discuss later in this note, continuing the JPA as a bilateral agreement between ICANN and the United States Department of Commerce would not be helpful in achieving the improvements that are still necessary. In the last section of this note, I will propose a mechanism that could be used to provide a transition from an ICANN tethered to the United States Department of Commerce to a free standing international organization.

Is Private Sector led still the correct formulation?

By and large, the term Private Sector only includes the for-profit business sector of the economy. While the private sector, as so defined, remains an important stakeholder within ICANN, it is no longer the only, or even, the major stakeholder. Within the ICANN structure, it has been recognized that there are non-commercial stakeholders as well as other international non-governmental and civil society stakeholders. Since WGIG and WSIS there has also been recognition of the role of governments, including the United States, as stakeholders. Finally, one can also see an acceptance of private-public partnerships, such as those sometimes seen in ccTLDs, as having a valid stakeholder role.

For ICANN to be truly representative of the full range of stakeholders, it needs to be a fully multistakeholder organization. The ICANN leadership has recognized this since WSIS brought the importance of multistakeholder process to the world's attention and has shown that ICANN meets many of the criteria for multistakeholder governance and is, in some cases, an exemplar of that model. Multistakeholder leadership is, to some degree, also recognized in the makeup of the Board of Directors. Due to the uneven application of these multistakeholder principles and the private sector orientation of ICANN, however, this has not gone far enough. Bringing ICANN the rest of the way to being an International Multistakeholder Organization needs to become the continuing goal.

Accountability Structures

Since it does not have members or shareholders, ICANN and its Board of Directors, needs to be accountable to its stakeholders. While some degree of accountability is available through the election of some Directors by the supporting Organizations and the appointment of the others by the Nominating Committee, this is inadequate, especially since there is no established means of recall and there are no methods for checks and balances. There have been proposals, since rejected, for the ability of the Supporting Organizations and Advisory Committees to dismiss the entire Board of Directors in the case of non-confidence. I believe this would have been an ineffective safeguard as the threshold would have been too high and the result too unstable. There is currently a proposal for a Tribunal, but this proposal is weak in that is not binding on the Board. There has also been a proposal for an

international governmental body for ICANN oversight, which is also inadequate as it only includes a single type of stakeholder – a number of selected governments.

I believe that the proposal for the Tribunal provides a reasonable starting place, but it must be for an international and multistakeholder tribunal that under defined circumstances has the responsibility to compel the Board reconsider its decisions before implementation. In proposing the creation of such a tribunal, however, I start from two fundamental propositions, which I consider axiomatic regarding ICANN. First, I believe it is fundamental that the control of ICANN must spring from its stakeholders and cannot be imposed from outside the organization. I also believe that it is fundamental that ICANN policy development needs to remain a bottom-up process. I also consider it critical that a tribunal be fully independent of both ICANN staff and of its Board of Directors, this includes being independent of a Board selection process. I also believe that since this role is a multistakeholder role it is broader then a function that could be filled by an ombudsman – it does not, however, obviate ICANN's need for a truly independent ombudsman function to deal with operational appeals.

Further, this tribunal should not be chartered to provide active oversight of the operations of ICANN, but rather should be constrained to addressing appeals against ICANN for failure to adhere to its defined mission, core values and defined processes. In addressing appeals its focus should be on the by-laws and derivative operational rules and procedures, and not on the operational or technical content of decisions.

Next steps after the JPA

The United States Department of Commerce, NTIA, should convene an International Multistakeholder Group to review ICANN's corporate structures and by-laws and recommend those changes required to complete its evolution into an international organization under multistakeholder control. This International Multistakeholder Group should be restricted to reviewing proposals for establishing the Tribunal and for modifying the corporate structure and by-laws to allow this tribunal to have binding authority over process appeals. Its charter should not include a review the internal structures of ICANN.

In order to initiate such an International Multistakeholder Group, the Department of Commerce could ask each of the 3 ICANN Supporting Organizations and both the Government and At-Large Advisory Committees to each appoint 5 members, one from each of the ICANN geographic regions. This group could be chartered to review the issues that arise from this proposal and to come to agreement with ICANN, through its Board of Directors, on the required changes. ICANN could be expected to adhere to its internal governance procedures in this process including requirements for public comment. The US Department of Commerce NTIA, as the convener of this group should hold the chair position for the group. This group could also provide an interim appeals mechanism, though it would be non-binding as long as the by-laws had not been changed.

I believe the work and success of the WGIG process in WSIS and of the IGF provide indications that such a mechanism can be successful and can provide a model that can be built upon for a critical Internet governance entity such as ICANN. I strongly believe that providing such a transition mechanism would enable ICANN, which is already a successful organization, to be accepted as the legitimate international multistakeholder organization responsible for stewardship of the critical Internet resources: domain names and IP addresses.

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