COMMENTS OF AT&T INC.

AT&T appreciates the opportunity to respond to NTIA's Notice of Inquiry (NOI) regarding the upcoming expiration of the Joint Project Agreement (JPA) between the Internet Corporation for Assigned Names and Numbers (ICANN) and the U.S. Department of Commerce (DOC).[1]

INTRODUCTION

AT&T has participated in ICANN from its inception and has been a staunch supporter of maintaining the unique model of ICANN as an independent, private-sector organization that represents the diverse interests of the Internet community. The future success of ICANN is extremely important to AT&T because it affects our network, our business and our customers. As a global IP network and Internet provider, AT&T has a direct interest in and significant concerns about the predictability, resiliency, security and stability of the domain name and addressing system (DNS), the Internet as it is affected by the DNS, and ICANN itself. And like most companies of all sizes, AT&T relies heavily on the Internet to operate our global business

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[1]   74 Fed. Reg. 18,688 (April 24, 2009)

and serve our customers. Moreover, a significant and growing part of AT&T's business involves using the DNS to deliver Internet services to millions of customers around the globe. In short, AT&T represents a wide range of stakeholder interests and the success of our business is closely tied to the core functions performed by ICANN.

In 1998, diverse members of the DNS stakeholder community from around the world came together to support the creation of ICANN, based on a shared vision of private sector leadership to facilitate bottom-up decision-making by that community. AT&T supported this model in 1998, and continues to support it today. While ICANN has undeniably accomplished a great deal in ten years, there is broad agreement today – including among its staunchest supporters – that ICANN has not yet matured into the trustworthy steward of the Internet's unique identifiers described in the DOC's June 1998 DNS White Paper.[2] ICANN has resisted taking the steps necessary to become fully accountable to the global Internet community and to individuals and entities affected by its actions, and this failure creates a risk of capture from both external and internal sources. Nonetheless, it is also undeniably true that the ICANN stakeholder community stands ready to work constructively with ICANN to develop and implement accountability mechanisms as part of its organizational structure that are needed to ensure ICANN's future independence and success.

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[2]   Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998) ("White Paper").

DISCUSSION

I.   AT&T Fully Supports the Unique ICANN Model

The NOI asks whether the White Paper commitment to transitioning responsibility for DNS management to the private sector continues to be the best model for international DNS management in support of innovation.[3] AT&T's answer is a decided yes: private sector led, consensus driven, non-regulatory coordination has served the Internet and the global Internet community very well in general, and in the DNS context in particular. Increased globalization makes focused, non-regulatory, and consensus-driven governance mechanisms like ICANN more important than ever to bridge the gaps between sovereign national law on the one hand, and the immensely diverse and inherently "virtual" nature of participants in the global Internet community on the other hand. The community consensus that change is needed does not mean that the "model" is broken. Rather, it means that stakeholders like AT&T have, over time, developed a better understanding of the implications of both the model and the mechanisms needed to sustain and support it.

It should come as no surprise that the model requires further development and enhancements. ICANN was a new and unique idea in 1998, and it remains a unique enterprise today. It is, by design, not a government or an intergovernmental body. It is neither a private foundation nor a for-profit corporate entity answerable, in either case, under traditional fiduciary concepts to a specific set of "owners." If in 1998 there was understandable reticence to acknowledge the experimental nature of ICANN, it is imperative in 2009 to acknowledge that ICANN is a unique kind of organization, accept that familiar benchmarks do not apply to this new model, and work to identify and implement workable standards.

It is tempting, but unsustainable over the long run, to view ICANN as a familiar corporate entity. Nothing demonstrates the inadequacy of that approach better than the many Board-commissioned reviews undertaken in recent years by consultants attempting to apply one ill-suited institutional model after another to validate ICANN's processes. Consider, for

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[3]   NOI, 74 Fed. Reg. at 18,689.

example, the institutions used by the One World Trust to evaluate ICANN's transparency and accountability mechanisms, which included:

- The *International Labour Organisation* (ILO), a UN agency that develops recommendations for minimum labor standards including freedom of association, the right to organize, collective bargaining, abolition of forced labor, equality of opportunity and treatment and other work-related standards;

- The *Global Environment Facility* (GEF), a private equity group that invests in clean technology;

- The *Food and Agriculture Organisation* (FAO), a UN agency designed to serve as a "neutral forum where all nations meet as equals to negotiate agreements and debate policy" relating to food and agriculture;

- The *World Health Organisation* (WHO), another UN agency "responsible for providing leadership on global health matters," with respect to health research, standards setting, policy options, technical support; and monitoring and assessing health trends;

- The *Global Alliance for Vaccines and Immunisation* (GAVI), an organization that coordinates public and private resources in a global effort to create greater access to the benefits of immunization; and

- The *Global Fund To Fight AIDS, Tuberculosis and Malaria* (Global Fund), a public/private partnership "dedicated to attracting and disbursing additional resources to prevent and treat HIV/AIDS, tuberculosis and malaria" that "works in close collaboration with other bilateral and multilateral organizations to supplement existing efforts dealing with the three diseases."

Each and every one of these organizations performs important work on a global basis – but that is where the similarity with ICANN ends. These bodies "develop" and "recommend" standards for consideration by sovereign national governments. They "debate" policies that may be adopted by sovereign national governments, and invest or coordinate investments in important global causes. Each and every one is funded on a fully voluntary basis, whether by participating governments or private donors. None of these organizations preclude the development of alternative mechanisms to support similar activity, and neither the failure to participate in, nor adverse decisions by, any of these entities affects one's presence on or ability to communicate through a global communications network. Some of these organizations may reasonably claim that courts should defer to management acting in good faith, and others may enjoy and even deserve immunity under local law. The essential fact that distinguishes them from ICANN

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remains: each of these organizations is effectively accountable to private or national contributors who remain free at all times to withhold funds or direct funds to other organizations they deem to be more effective.

ICANN is fundamentally different from these and similar entities. ICANN is supported by user fees rather than voluntary contributions. ICANN's projected revenue, which exceeds US $60 million for the year ending June 30, 2009, is derived entirely from fees paid by domain name registrants and collected by ICANN contracted parties. Neither the contracted parties nor the registrants themselves are free to withhold funding if they disapprove of ICANN's methods or policies. In other words, to have visibility on the global Internet via a presence on the World Wide Web, stakeholders must pay ICANN user fees.[4] ICANN is, in the end, a non-governmental alternative mechanism for managing a set of unique indicators that require central management and coordination. It is most closely akin to, but not precisely like, private sector standards bodies. The concept of "bottom-up decision making" by affected stakeholders in this regard helps ICANN stay on task, but it must be accompanied by meaningful accountability.

II.   ICANN 3.0 and its Core Principles

The NOI also asks whether the four core principles articulated in the White Paper should continue to guide ICANN's management of the DNS, and whether they have been successfully integrated into ICANN's existing processes and structure.[5] AT&T believes the four principles remain essential and relevant, but suggests that clarification and refinement of the principles is needed to guide the development of ICANN in a post-JPA environment (ICANN 3.0).

The White Paper process produced global agreement that ICANN's purpose, first and foremost, should be to preserve the stability and security of the DNS, relying, wherever possible, on market mechanisms to do so. The White Paper proposed that where market mechanisms

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[4]   AT&T is not suggesting that user fees are an inappropriate mechanism for funding ICANN; we simply note that there is a difference between voluntary contributions and user fees.

[5]   NOI, 74 Fed. Reg. at 18,689.

proved inadequate to preserve stability and security, ICANN should look to private-sector leadership from around the world to produce consensus based on bottom-up decision making processes. This vision for ICANN remains vibrant, and the principles on which that vision rested – rendered in short-hand as "stability," "competition," "private bottom-up coordination," and "representation" - remain sound. Over time, however, the original meaning of these principles has been obscured. It is worth pausing to remind ourselves what those White Paper principles stood for in 1998:

- **Stability**. In the White Paper, the term "stability" was used in two ways. First, it meant that the transition from USG control should not create any risk to the stable operation of the Internet and the DNS. Second, it meant that security and stability should be the first *priority* and *fundamental focus* of the new management and coordination system.[6] AT&T continues to support this principle, but believes that ICANN's attention has not consistently focused on its fundamental mission to safeguard, as its first and foremost priority, the Internet's unique identifiers.

- **Competition.** The White Paper noted that the success of the Internet was attributable in great measure to its decentralized nature, which encourages innovation and maximizes individual freedom.[7] Accordingly, the "competition principle" directed ICANN to defer wherever possible to market mechanisms that support competition and consumer choice. AT&T continues to support this principle, but is concerned that ICANN has sometimes misconstrued its obligations under the competition principle to mean that ICANN itself is responsible for creating "competition" or new "market mechanisms" at all levels of the DNS. For example, the competition principle does not justify the introduction of large numbers of new generic Top Level Domains (TLDs) without careful analysis of existing data about the costs and benefits associated with the introduction of new gTLDs to date and resolution of other overarching concerns, including widely held concerns about brandholder protection, security and stability, and potential fraud and abuse.

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[6]   DNS White Paper, 63 Fed. Reg. at 31749 ("During the transition and thereafter, the stability of the Internet should be the first priority of any DNS management system. Security and reliability of the DNS are important aspects of stability, and as a new DNS management system is introduces, a comprehensive security strategy should be developed.")

[7]   Id. ("The Internet succeeds in great measure because it is a decentralized system that encourages innovation and maximizes individual freedom. Where possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction.")

In summary, the competition principle requires ICANN to manage the DNS in a responsible and accountable manner that preserves the Internet ecosystem as a stable and secure environment in which users benefit from competition, innovation and new value propositions.

- **Private, Bottom-Up, and Globally Representative Coordination.** The White Paper envisioned a non-regulatory management system that produced equitable, widely accepted policies that emerged from and were developed by globally representative stakeholders. ICANN's role was to facilitate private, bottom-up coordination and to implement policies produced through this bottom-up process for the benefit of the Internet community as a whole, without imposing unjustified or disproportionate costs on individual stakeholders.

AT&T continues to support the four core principles as originally conceived in the White Paper and described above. AT&T believes, however, that insufficient consideration has been given to the concepts of accountability and stewardship, which are inherent and essential components underlying these principles. Notably, ICANN's unfinished development work lies precisely in these areas. These concepts, as described below – either put forward as "new" principles or affirmed as essential elements of the founding principles - deserve ICANN's full attention and must be achieved if ICANN is to achieve the globally agreed vision of the White Paper.

- **Stewardship**. ICANN must serve the multistakeholder community as the trusted steward of the DNS and the unique indicators. ICANN must accept and respect its role and responsibility for this space. ICANN is not simply another participant in the DNS market – its job is to manage and coordinate the unique DNS space that must be for the good of all Internet users. In this role, ICANN must avoid use of those unique identifiers as a source of revenue to support activities beyond its core mission. ICANN must avoid taking a financial interest in its policy and other management decisions, and focus on its core functions and certain activities related to those functions, as defined by its mission.

- **Accountability**. ICANN must commit irrevocably to being accountable both to the global community *as a whole* as well as to the individual stakeholders and stakeholder groups it affects. Accepting responsibility for its actions and embracing meaningful, affordable and independent appeal mechanisms will ensure that it remains accountable to all those affected by its actions and policies.

In summary then, our vision for ICANN 3.0 remains true to the four core principles of stability, competition, private, bottom-up coordination, and representation as originally agreed through the White Paper process. It is time for ICANN to take the final, critical steps required to

become the trustworthy and accountable private steward of the Internet domain name space. As discussed further below, ICANN should focus on:

- Memorializing its mission to serve of the steward of the Internet's unique identifiers;

- Focusing with renewed energy on that primary mission, and fulfilling its coordination role at all times in a manner that preserves the Internet ecosystem as an environment in which *others* may innovate, communicate, and create value;

- Nurturing consensus through predictable, transparent, and reliable bottom-up, non-regulatory policy development; and

- Acceding to a truly independent accountability mechanism.

III.   Completing the Development and Implementation of the ICANN Model

The mid-term review of the JPA in 2008 identified a number of areas in which additional work was needed to fulfill the commitments ICANN made to the stakeholder community through the "Affirmation of Responsibilities" attached to the JPA. There is broad consensus that while there has been progress in some areas, a number of tasks require significant attention and formal integration into ICANN's organizational structure and processes. In response to ICANN's request for comments on its "Improving Institutional Confidence" initiative, AT&T submitted a comprehensive plan for improving institutional confidence and achieving the goals of an independent, accountable and sustainable organization.[8]

Below, and as an attachment, we focus in detail on four key elements of that comprehensive plan to improve ICANN's accountability so that it can fully evolve into an independent, private-sector led organization and trusted steward of the DNS.

1.   ICANN Must Develop a Charter that Describes its Mission and its Obligations to Stakeholders

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[8]   http://forum.icann.org/lists/iic-implementation-plan/pdfqjMgnVdq4w.pdf (last visited June 8, 2009).

ICANN must develop an authoritative and binding statement of its agreement with the community, which we refer to as a "charter" or a "compact." The existing ICANN Bylaws contain the seeds of this standard, but were drafted to protect the "corporate" ICANN, and do not fully articulate the fundamental relationship between ICANN and its stakeholders. In particular, the Bylaws are "deliberately expressed in very general terms" and permit the Board to "pick and choose" among the core values that should apply in any given circumstance.[9] Although the Bylaws speak of "balancing" competing values, they may be interpreted to permit the Board to disregard values altogether. And while the Bylaws give the Board the authority to determine whether or not a particular core value is relevant, and to make choices about when and how to apply the core values, the Bylaws do not obligate the Board in any meaningful way to explain its choices. ICANN's bylaws can be changed by a vote of two-thirds of the Board vote, without any requirement of actual agreement or acceptance by the ICANN stakeholders. And finally, according to ICANN's management, the Bylaws give the Board the authority to articulate its obligations to the community, to finally interpret those obligations, and even to change those obligations based on confidential briefings and materials that are commissioned by the staff and reviewed exclusively by the Board. This structure lacks the most basic of checks and balances needed to legitimize ICANN and safeguard its stakeholders.

ICANN should immediately launch a charter development initiative to define and clarify to whom ICANN is accountable, and for what. This initiative should be managed by an experts group consisting of both well respected ICANN community members and independent experts drawn from outside the community, and should build upon the work of the President's Strategy

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[9]   "These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values." ICANN Bylaws, Section 2.

Committee.[10] The proposed charter should be vetted through a robust and meaningful global consultation process that is driven by the stakeholder community, with appropriate ICANN support:

- The ICANN charter should be grounded in the existing Bylaw's mission statement and core values, along with the non-discrimination provisions of the Bylaws, and serve as the authoritative articulation of ICANN's mission, scope of responsibility, authority, and duties to its stakeholders, and to the global community of Internet users who are affected by its policies and practices.

- The charter should reaffirm ICANN's obligation to serve as the trusted steward of the DNS and to maintain and respect its non-profit status in all of its activities. This requires ICANN to recommit to the principles upon which it was founded, and to avoid taking financial interests in its policy decisions.

- ICANN must embrace its unique stewardship role, which includes 'governance' of the full range of unique indicators, and which is broader than allocation of TLDs. Part of that governance should include the enforcement of contracts and agreements under which those indicators are allocated.

- While ICANN's present bylaws, mission statement and core values are a good starting point for the development of its compact with the stakeholder community, the charter should be a distinct articulation of the fundamental elements of the bargain between ICANN and its stakeholders that cannot be changed without the consent of the ICANN community.

2.   Formal Administrative Procedures for ICANN Decision-making

ICANN should work with its stakeholder community to establish clear procedural guidelines for decision-making which are based on well established principles of administrative procedure, and include notice and comment processes.[11] Such procedures should require ICANN to:

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[10]   The success of a charter initiative will depend upon the integrity, independence, and credibility of those who drive it. Accordingly, AT&T would not support delegating this work to a consultant selected by ICANN management. Nor should it be run exclusively by members of the ICANN community answerable to specific constituencies or interest groups. Rather, we would propose a charter committee consisting of a community of members and outside experts. One approach would be to designate a workable number of PSC members and other members of the ICANN community with appropriate expertise, who would then select respected constitutional law, human rights, and dispute resolution experts from outside the community.

[11]   A number of countries have well-developed administrative procedures systems, and the OECD has done extensive work on regulatory reform, which provides a useful starting point for

- Issue advance notices of proposed "policy making" activities or major decisions by the staff and Board in draft form to ensure that the community is aware of specific proposals and able to provide meaningful input, propose changes and improvements, and reply to other comments received;

- Obtain full and comprehensive input from the community with adequate timelines applicable to all ICANN stakeholders; and

- Provide written draft decisions that include detailed explanations for particular policy decisions and respond to the public comments filed, and provide an opportunity to comment on those drafts;

- Publish clear, neutral staff analysis of comments received, the context in which comments were received, the rationale for the original staff recommendation, and how the staff recommendation is informed by the public comments received. When there are not adequate public comments, the staff analysis should discuss whether a postponement is justified and, if not, why it is appropriate to proceed. The community should have an opportunity to comment on the staff analysis.

- Issue final decisions in writing that provide detail on all Board votes and that describe staff, consulting, and legal input into the Board's decision. Publish (with redactions as appropriate) all material reports, recommendations, presentation, and supporting materials provided to the board.

3. Enhanced Accountability Mechanisms and Creation of an Independent "Adjudicatory Panel"

Establishing accountability that meets the needs and expectations of ICANN's stakeholders presents a significant challenge. The 'eco-system' in which ICANN exists today, both politically and economically, and in scope and scale, is fundamentally different from the environment into which ICANN was launched. ICANN's decisions have massive implications

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development of a formal notice and comment procedure. See, for example, the OECD's *Background Document on Public Consultation,* available at: http://www.oecd.org/dataoecd/4/43/36785341.pdf; *Citizens as Partners OECD Handbook on Information, Consultation and Public Participation in Policy-Making,* available at http://213.253.134.43/oecd/pdfs/browseit/4201131E.PDF; *General principles and minimum standards for consultation of interested parties by the [European] Commission,* COM(2002)704, available at http://ec.europa.eu/civil_society/consultation_standards/index_en.htm.

for all parts of the Internet's ecosystem, including providers and users. As a result, no single element of the community should own or control ICANN's processes. As the global reach of the Internet grows, along with its utilization as a fundamental form of communications/connectivity to many aspects of daily and economic life, there will be ongoing pressures on the private sector model of DNS governance. This must be recognized, and embraced as part of ICANN's present and its future.

Today, the multi-stakeholder community lacks confidence in ICANN's processes and in the fairness of many of its decisions. ICANN's existing "accountability" mechanisms are inadequate, and were recognized as such from the start.[12] They either depend entirely on the support, resources, expertise and sympathy of the staff and the Board, or require an enormous financial commitment to pursue. They do not rest on a fundamental standard and formal set of obligations against which ICANN's actions can be measured, and as ICANN considers them merely advisory, they do not offer meaningful recourse to either contracted parties or non-contracted party stakeholders. This lack of accountability has emerged as an urgent issue in the discussion of the new gTLD introduction and in connection with restructuring of ICANN's supporting organizations and has been acknowledged in ICANN' own public consultation process conducted by the President's Strategy Committee.

ICANN's existing accountability mechanisms have failed to provide meaningful accountability as demonstrated by the following:

- The role of the Ombudsman remains unclear to most participants in ICANN, and there is no evidence that the views of the Ombudsman have ever affected Board or staff action.

- After initial attempts to use it, the community has now written off the Reconsideration Process, which is undertaken behind closed doors, depends on the willingness of Board

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[12] See, *Accountability Framework Assistance Project Recommendations Regarding Accountability*, 23 August 2002 ("The ERC Blueprint begins but does not complete the job of providing accountability mechanisms to ensure important aspects of some of the most important core values that it has identified. The ERC Blueprint identifies several mechanisms for enhancing ICANN's accountability to the Internet community it serves and begins the work of building a strong accountability framework, but I remain concerned that the Blueprint framework will ultimately prove inadequate precisely because, as the ERC acknowledges, today ICANN must play a global policy role.") http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm

members to review the actions of staff and fellow Board members, and is supported entirely by the staff most likely to have been involved in the initial decision.

- ICANN itself describes the Independent Review process as the "ultimate" accountability mechanism on the one hand and merely advisory on the other hand. In addition, ICANN asserts that Board actions deserve a degree of deference nearly impossible to overcome, and places the entire burden of overcoming the assumption of good faith on the petitioner through expensive international commercial arbitration. If ICANN is correct about the scope, impact, and terms under which the IRP operates, it will rarely make sense for a uniquely injured complainant to devote the considerable resources required to initiate international arbitration designed to produce advice that ICANN is free to ignore. It is even less clear who would have either the standing or motivation to invoke the Independent Review process to address widespread dissatisfaction with a Board decision that affects the broad set of stakeholders and is not limited to impact or harm to a specific individual or company.

Indeed, ICANN itself has recognized the inadequacies of its existing accountability mechanisms. Based on community concerns about the absence of meaningful accountability, the President's Strategy Committee (PSC) proposed two additional mechanisms, a Board recall process and a "community reconsideration request" mechanism. The PSC's proposed Board recall mechanism contemplates recall of the entire Board, and will not provide meaningful accountability because no responsible member of the community would be willing to invoke the procedure. The PSC's proposed community reconsideration request mechanism has all of the deficiencies of the existing reconsideration mechanism, and few additional benefits.

The PSC documented the clear need on a priority basis for improved and extended accountability mechanisms, and called for the creation of an 'experts committee' including members of the community to explore workable approaches to accountability. Unfortunately, ICANN has yet to dedicate the resources or time to create the recommended "experts committee." Rather than developing proposed accountability mechanisms with community input and independent experts as recommended by the PSC, ICANN staff has now issued an unvetted proposal to "establish a new Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN Board under three general rubrics – fairness, fidelity to the power, or cogency of decision-making." AT&T welcomes the ICANN staff proposal signaling its willingness to consider meaningful accountability mechanisms. The proposal reflects some of the widely accepted characteristics of effective accountability mechanisms contained in the proposals of AT&T and other community stakeholders. While AT&T welcomes

this evidence of staff support for enhanced accountability, the selection and operation of the proposed review tribunal is not sufficiently independent and robust to ensure ICANN's accountability to its stakeholders. Unfortunately, the staff proposal also lacks important characteristics of truly independent review bodies, as described in a number of readily available resources, including:

- Basic Principles on the Independence of the Judiciary endorsed by the General Assembly of the United Nations in resolutions 40/32 of 29 November 195 and 40146 December 1985;

- Speech by the Honorable John D. Richard, Chief Justice of the Federal Court of Canada, as delivered in a speech entitled "Maintaining a Strong Judiciary: The View from Canada", 5th Worldwide Common Law Judiciary Conference, Sydney, Australia;

- Council of Europe Committee of Ministers Recommendation No R(94) 12 "On the Independence, Efficiency and Role of Judges, adopted October, 1994; and

- American Bar Association Principles on Judicial Independence and Fair and Impartial Courts, dated August 2007.

ICANN should establish an independent adjudicatory panel and work with the stakeholder community to strengthen its existing accountability mechanisms in order to ensure that ICANN is accountable to members of the community it serves. ICANN should appoint a group of independent experts with full authority to develop, with input from members of the ICANN community with relevant expertise, a proposal for an independent adjudicatory panel. AT&T's comments offer some concepts that could be considered, among others, in the development of such a mechanism.

Once developed, this proposal should be brought to the ICANN community for consideration before being acted on by the Board, and should have the following characteristics:

- The new and independent panel should consist of individuals in the private sector (in the broadest sense of that term) who will not actively engage in other ICANN processes and who possess the requisite legal and other expertise to act over time as the 'adjudication body.'

- The panel should be an appeals body, and not a 'supervisory entity' with authority to initiate investigations of ICANN board decisions or actions.

- This independent panel should not replace ICANN's other accountability mechanisms.

14

- The Independent Adjudicatory Panel should be a private sector panel that is authorized to hear appeals of Board decisions or staff actions by affected stakeholders to assure adherence to the new Charter and administrative procedural guidelines.

- ICANN must provide for certain and stable funding and dedicated staff for the panel as part of its Charter obligations.

The importance of the independent review panel that has the authority to review and rule on ICANN Board decisions in appropriate circumstances ensures compliance with the Charter and procedural guidelines cannot be overstated. While there is widespread agreement about the need for enhanced accountability, the manner in which this independent accountability mechanism is developed and the way it operates are equally important. AT&T strongly supports the establishment of an independent adjudicatory panel in a manner that is consistent with the private-sector led model of ICANN and does not rely on a governmental or intergovernmental structure.

ICANN also should task a panel of experts to address deficiencies and propose improvements in ICANN's existing accountability mechanisms, including:

- Enhancing the Ombudsman's services, which should include providing greater independence to the Ombudsman and transparency about Board or staff decisions that are inconsistent with the advice of the Ombudsman;

- Refining the scope of the existing reconsideration and independent review processes to permit parties harmed by Board actions or staff decisions to pursue recourse; and

- Establishing mechanisms for the provision of independent staff and professional advice to the Reconsideration Committee and Board on these matters.

4.   **Enhanced Internationalization and Participation from the Community of Stakeholders**

ICANN should continue its efforts to actively engage with the global Internet community, with a particular focus on increasing participation by business users and governmental representatives:

- Improve administrative and process support to the Governmental Advisory Committee (GAC) to strengthen the interaction and participation mechanisms provided by ICANN,

including a particular focus on increasing the participation of governments from developing countries in the GAC and ICANN's processes.

- Create a unique forum for bringing senior business leaders and senior governmental representatives together at an ICANN meeting, or at the IGF, on an annual basis. The forum should be open to community observers, focused suitably to senior attendees, and addressing security and stability of the Internet's unique indicators.

- Work with industry associations and business organizations to improve and increase business user awareness and participation in ICANN, including creating materials and mechanisms suitable to that group of stakeholders.

- Continue efforts to provide consistent communications and conduct regular outreach and awareness-raising efforts with various stakeholders in the community.

- Conduct ICANN meetings and workshops in a way that maximizes accessibility and encourages input and participation from a wide range of participants.

- Continue and enhance the use of international translations for official ICANN materials and transcripts of ICANN meetings and consultations and supporting real-time translation during ICANN meetings.

- Maintain the travel support program for participants, including governmental representatives, from least developed countries and continue outreach efforts to engage the global Internet community, including in-person meetings.

CONCLUSION

ICANN's long-term legitimacy depends upon its taking meaningful steps to develop and formally implement organizational changes that ICANN has only recently signaled its willingness to consider. We welcome the ICANN staff's recent suggestions about mechanisms to improve confidence in the institution, but also believe that the ICANN community is only now starting a very important conversation that deserves and requires ICANN's and the community's full attention.

While DOC plays no day-to-day role in ICANN's operations, it has, over the years, lent legitimacy to ICANN's actions, safeguarded its independence, and discouraged potential attacks arising under competition, tax, and other law. It also has provided a level of protection from internal or external capture. Given the work to be done, and taking into account the current environment, AT&T believes that ICANN and its global stakeholder community would be best

served by preserving some formal relationship with the DOC pertaining to its non-IANA functions in the near term in order to enable ICANN to focus on building the accountability mechanisms required to secure its claims to legitimacy and independence.

AT&T recognizes that the JPA is a mutually negotiated agreement, but hopes that ICANN's Board and senior staff will carefully consider the risk that is faced from external capture. Dissolving its relationship to the USG outside the IANA context is not the solution to this, or other challenges that ICANN faces. Ultimately, it is ICANN's stakeholders who will give it the legitimacy and credibility that it must have to become the trusted steward of the DNS. ICANN has more work to do before it achieves that form of credibility with its stakeholders; and this must be its priority in the next year.

(attachment follows)

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Attachment to AT&T Comments to NTIA NOI
Stakeholder Proposal for an Independent and Accountable ICANN
June 8, 2009

In this document we focus in detail on four key elements of a comprehensive plan to improve ICANN's accountability so that it can fully evolve into an independent, private-sector led organization and trusted steward of the Domain Name System.

1.   **ICANN Must Develop a Charter that Describes its Mission and its Obligations to Stakeholders**

ICANN should work with its stakeholder community to create a binding "charter" or "compact" grounded in the existing Bylaw's mission statement and core values to serve as the authoritative articulation of ICANN's mission, scope of responsibility, authority, and duties to its stakeholders, and to the global community of Internet users who are affected by its policies and practices. This will help to fulfill ICANN's responsibilities in the areas of Accountability, Corporate Responsibility and Corporate Administrative Structure.

- The Charter should reaffirm ICANN's obligation to serve as the trusted steward of the DNS and to maintain and respect its non-profit status in all of its activities. This requires ICANN to recommit to the principles upon which it was founded, and to avoid taking financial interests in its policy decisions.

- ICANN must embrace its unique stewardship role, which includes 'governance' of the full range of unique indicators, and which is broader than allocation of TLDs. Part of that governance should include the enforcement of contracts and agreements under which those indicators are allocated.

- While ICANN's present bylaws, mission statement and core values are a good starting point for the development of its compact with the stakeholder community, the Charter should be a distinct articulation of the fundamental elements of the bargain between ICANN and its stakeholders that cannot be changed without the consent of the ICANN community.

2.   **Formal Administrative Procedures for ICANN Decision-making**

ICANN should work with the stakeholder community to establish clear procedural guidelines for decision-making, based on well-established principles of administrative procedure, including notice and comment and 'reply' processes. This will help to fulfill ICANN's responsibilities in the areas of Transparency, Accountability, Multi-stakeholder Model, Corporate Responsibility and Corporate Administrative Structure. Such procedures should require ICANN to:

- Issue advance notices of proposed "policy making" activities or major decisions by the staff and Board in draft form to ensure that the community is aware of specific proposals

and able to provide meaningful input, propose changes and improvements, and reply to other comments received;

- Obtain full and comprehensive input from the community with adequate timelines applicable to all ICANN stakeholders; and

- Provide written draft decisions that include detailed explanations for particular policy decisions and respond to the public comments filed, and provide an opportunity to comment on those drafts;

- Publish clear, neutral staff analysis of comments received, the context in which comments were received, the rationale for the original staff recommendation, and how the staff recommendation is informed by the public comments received. When there are not adequate public comments, the staff analysis should discuss whether a postponement is justified and, if not, why it is appropriate to proceed. The community should have an opportunity to comment on the staff analysis.

- Issue final decisions in writing that provide detail on all Board votes and describe staff, consulting, and legal input into the Board's decision. Publish (with redactions as appropriate) all material reports, recommendations, presentation, and supporting materials provided to the board.

3.   Enhanced Accountability Mechanisms and Creation of an Independent "Adjudicatory Panel"

ICANN should establish an Independent Adjudicatory Panel and work with the stakeholder community to strengthen its existing accountability mechanisms in order to ensure that ICANN is accountable to members of the community. This will help to fulfill ICANN's responsibilities in the areas of Accountability, Multi-stakeholder Model, Corporate Responsibility and Corporate Administrative Structure.

- The independent adjudicatory panel should be a private sector panel that is authorized to hear appeals of Board decisions or staff actions by affected stakeholders to assure adherence to the new Charter and administrative procedural guidelines.

- The panel should consist of independent individuals who are not actively engaged in ICANN and who have legal and other requisite expertise to act over time as the 'adjudicatory body' for appeals of ICANN Board and staff decisions.

- ICANN should develop and ensure stable funding for the Independent Adjudicatory Panel as part of its Charter obligations.

- Improve ICANN's existing accountability mechanisms, including:

o   Enhancing the Ombudsman's services, which should include providing greater independence to the Ombudsman and transparency about Board or staff decisions that are inconsistent with the advice of the Ombudsman;

o   Refining the scope of the existing reconsideration and independent review processes to permit parties harmed by Board actions or staff decisions to pursue recourse.

o   Establish mechanisms for provision of independent advice [staff and legal] to the Reconsideration Committee and Board on these matters.

4.   Enhanced Internationalization and Participation from the Community of Stakeholders

ICANN should continue its efforts to actively engage with the global Internet community, with a particular focus on increasing participation by business users and governmental representatives. This will help to fulfill ICANN's responsibilities in the areas of Transparency, Accountability, Multi-stakeholder Model, Role of Governments and Corporate Responsibility.

- Improve administrative and process support to the Governmental Advisory Committee (GAC) to strengthen the interaction and participation mechanisms provided by ICANN, including a particular focus on increasing the participation of governments from developing countries in the GAC and ICANN's processes.

- Create a unique forum for bringing senior business leaders and senior governmental representatives together at an ICANN meeting, or at the IGF, on an annual basis, focused suitably to senior attendees, and addressing security and stability of the Internet's unique indicators.

- Work with industry associations and business organizations to improve and increase business user awareness and participation in ICANN, including creating materials and mechanisms suitable to that group of stakeholders.

- Continue efforts to provide consistent communications and conduct regular outreach and awareness-raising efforts with various stakeholders in the community.

- Conduct ICANN meetings and workshops in a way that maximizes accessibility and encourages input and participation from a wide range of participants.

- Provide international translations for official ICANN materials and transcripts of ICANN meetings and consultations and supporting real-time translation during ICANN meetings.

- Maintain the travel support program for participants from less developed countries and continue outreach efforts to engage the global Internet community, including in-person meetings.