

TECHNOLOGY POLICY INSTITUTE

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**COMMENTS OF THOMAS M. LENARD, PHD
PRESIDENT AND SENIOR FELLOW, IGROWTHGLOBAL**

SUBMITTED TO

**NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

ON

**THE CONTINUED TRANSITION OF THE TECHNICAL COORDINATION AND
MANAGEMENT OF THE INTERNET'S DOMAIN AND ADDRESSING SYSTEM:
MIDTERM REVIEW OF THE JOINT PROJECT AGREEMENT**

FEBRUARY 5, 2008

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Introduction

These comments are submitted to the National Telecommunications and Information Administration (NTIA) in response to its Notice of Inquiry (NOI) published November 2, 2007.¹ iGrowthGlobal is a 501(c)(3) research and educational organization that focuses on the economics of innovation and technological change in the United States and around the world. iGG produces original, rigorous research and sponsors educational programs and conferences on major issues affecting information technology and communications policy.

NTIA is requesting comments on (1) the continued transition to the private sector of the technical coordination and management of the Internet's domain name and addressing system; and (2) the progress made by the Internet Corporation for Assigned Names and Numbers (ICANN) toward fulfilling its responsibilities under the September

¹ These comments represent the views of the author. They do not necessarily reflect the views of iGrowthGlobal, its board or its staff.

2006 Joint Project Agreement (JPA) between NTIA and ICANN. The JPA called for a midpoint review of ICANN's progress and this NOI is part of that review.

The Internet is now the main driver of the digital economy, as well as a means to communicate and distribute information more efficiently and more widely than ever before. Thus, the governance of the Internet has far-reaching economic, political and social ramifications.

Companies are investing hundreds of billions of dollars in the Internet's infrastructure and in businesses that use the Internet. Despite these enormous investments, the Internet is still in its infancy. What it will look like ten years from now is largely unknown. ICANN's performance can help determine whether the Internet continues to flourish and grow, or whether it gets bogged down by bureaucratic and politicized decision making.

Since 1998, ICANN has operated under a Memorandum of Understanding (MOU) with the U.S. Department of Commerce. The JPA is the latest version of the MOU. ICANN argues in its comments in this proceeding that it is meeting its responsibilities under the JPA and therefore the JPA is no longer necessary.² It recommends that the JPA should be concluded and that ICANN should complete its transition to the private sector.

My major points are as follows:

- The fact that ICANN may be making progress toward meeting its responsibilities does not imply that the JPA is no longer needed. Indeed, it may demonstrate the value of the JPA. The JPA and the continuing tie to the Department of Commerce may account for ICANN's good performance.

² Comments of Peter Dengate Thrush, Chairman of the Board of Directors, ICANN, January 9, 2008.

- Given ICANN's undefined incentive structure, simply terminating the JPA is likely to lead to unanticipated and undesirable consequences. While it is useful to assess ICANN's progress, the overriding issue is how to structure ICANN so that it has the right incentives to behave the way we want it to behave over the long term. The JPA should only be concluded if there is a plan in place that defines and can assure ICANN's good performance over time.

ICANN's Principal Responsibilities

For the Domain Name System (DNS) to function effectively, a domain name must resolve to the desired unique IP address. ICANN's principal purpose is to make this happen and to ensure the stability and security of the DNS. This view is reflected in the Department of Commerce's 1998 White Paper on DNS coordination and management, which set forth the following responsibilities for a DNS administrator:

1. To set policy for and direct the allocation of IP number blocks;
2. To oversee the operation of the Internet root server system;
3. To oversee policy for determining the circumstances under which new top level domains would be added to the root system; and
4. To coordinate the assignment of other Internet technical parameters as needed to maintain universal connectivity of the Internet.

These are largely technical functions, with the exception of the third, which has a significant economic policy element. From its inception, ICANN has sometimes taken

on a larger regulatory role than is warranted.³ For example, although ICANN has approved new gTLDs (generic top level domains), competition in the registry market has not been as robust as it might be because ICANN's policies and its control of the root file have limited the overall number of gTLDs. In addition, ICANN has discouraged registry operators from introducing related services – a policy judgment that goes beyond its technical coordination function.

ICANN's Organizational Structure

Despite these problems, the Internet has flourished during the period that ICANN has been “in charge.” Nevertheless, ICANN's structure offers no assurance that this will continue.

ICANN is a unique organization. It is a non-profit corporation under California law, but unlike literally any other non-profit, ICANN makes decisions of major economic and social consequence throughout the world.

Profit-making corporations have as their goal maximizing value for their shareholders. In contrast, the goals of a non-profit, such as ICANN, are harder to define and changeable over time. ICANN likely has multiple goals in addition to the technical administration of the DNS. Some of those goals may be useful, but they may also include some or all of the following: increasing its influence on Internet policy; increasing the size of the organization; and, increasing employees' compensation, perquisites and stature.

³ See Bruce H. Kobayashi, *After the MOU Extension: More Competition, Less Regulation is the Solution to ICANN's Problems*, The Progress & Freedom Foundation, October 2006.

Because ICANN is a non-profit, it operates with almost no oversight. For example, management is not accountable to any shareholders. Management is accountable to a board of directors, but the board determines the rules under which it operates, including the rules governing election to the board.

ICANN has a guaranteed and growing stream of income from its monopoly on the bundle of services it provides in connection with administering the DNS. Dissatisfied “customers” have no place else to go. ICANN’s net revenues increased from \$29.8 million in 2006 to \$43.5 million in 2007 and its unrestricted net assets from \$18.4 million to \$35.2 million over the same period.⁴ This assured income gives ICANN great flexibility in pursuing a variety of goals. For example, it could give ICANN the ability to engage in litigation without the same financial pressures that face other litigants.

ICANN also has regulatory powers even though it is not called a regulator. For example, it has the authority to approve or disapprove new TLDs and new service offerings by registries. Unlike most regulatory agencies, however, ICANN does not have a defined policy mandate, nor is it constrained by procedural requirements. ICANN has the ability to define its own mandate and to adopt its own procedures. In addition there is no well-defined appeal mechanism for ICANN decisions as there is, for example, for regulatory agency decisions in the U.S..

ICANN faces only two sources of external control: the MOU/JPA with the U.S. Department of Commerce; and U.S. commercial law, which can sometimes be used in the event of contract or other disputes with ICANN.

⁴ ICANN Annual Report 2007.

The Risks Going Forward

In sum, ICANN doesn't have the normal constraints that either a profit-making firm or a regulatory agency has: There are no shareholders and no alternatives for its "customers." And, if ICANN goes beyond its technical mandate, it does not have a policy mandate to provide guidance or externally imposed procedural requirements. Aside from its self-determined procedures, there are only two factors that make ICANN accountable: U.S. commercial law and the JPA. Therefore, terminating the JPA and the remaining tie to the U.S. government would be a major step.

If the JPA is terminated, ICANN's behavior is likely to change in ways that may be difficult to predict. With guaranteed revenues, ICANN would be free to pursue any of a multiplicity of goals, as suggested above. For example, ICANN could easily become more regulatory – a tendency it has already exhibited. This would not be a good thing. There is no good public policy rationale for ICANN to be more regulatory.

ICANN has indicated that it intends to continue operating under U.S. law. In the absence of a JPA, however, it is not clear what would prevent ICANN from trying to change that status in the future and perhaps operate as an international organization. That would be a major change, depriving companies who are subject to ICANN decisions recourse under U.S. law.

If the JPA has made ICANN more accountable, then terminating it will make ICANN less accountable or accountable to different constituencies that may be less friendly to the Internet. Removing the tie to the U.S. doesn't necessarily mean that ICANN will become more "private" and less influenced by governments. For all the controversy that surrounds the current U.S. role, there are many countries that do not

share our commitment to promoting innovation, free markets and the free flow of information. It is not difficult to envision a governance structure that would be far less friendly to the development of the Internet than the one we now have.

Conclusion

If ICANN's progress is related to the JPA and the existing tie to the Department of Commerce, then terminating that arrangement would be counterproductive to continued progress. Before taking such a step, there needs to be a lot more analysis of its implications. Most importantly, there needs to be a lot more planning to develop a structure for a "privatized" ICANN, providing it with the right incentives and constraints that will assure the long-term health of the Internet.