

TESTIMONY OF

THOMAS M. LENARD, PH.D.

PRESIDENT AND SENIOR FELLOW, THE TECHNOLOGY POLICY INSTITUTE

ISSUES CONCERNING THE INTERNET CORPORATION FOR ASSIGNED NAMES AND  
NUMBERS

BEFORE THE  
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY  
AND THE INTERNET

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

JUNE 4, 2009

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Chairman Boucher, Ranking Member Stearns and members of the Subcommittee. My name is Thomas Lenard and I am president and senior fellow at the Technology Policy Institute. TPI is a non-partisan, non-profit think tank that focuses on the economics of innovation, technical change and related regulation in the United States and around the world. Thank you for the opportunity to present my views on the issues associated with ICANN. The expiration of the Joint Project Agreement (JPA) this September provides a much-needed opportunity for a thorough evaluation of the structure, governance, and mission of ICANN and the Subcommittee's examination of these issues is very important.

In a recent TPI study, which I am submitting along with my testimony, my coauthor Professor Lawrence J. White of the NYU Stern School of Business and I addressed the recurring issue of ICANN's accountability. ICANN attempts to be responsive to the "Internet

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\* The views expressed here are those of the author and not necessarily those of the TPI board, fellows, or staff.

community,” but in fact is largely accountable to no one. This lack of accountability is not an indictment of ICANN’s staff or leadership; it is a function of its institutional design. ICANN’s non-profit corporation status, combined with the way it is funded and governed make accountability a serious problem. Its customers can’t go anywhere else, its board members are not answerable to any shareholders, and its decisions can’t be appealed to any court in the way that regulatory actions in the United States can. ICANN’s funders—the registries and registrars—can’t stop funding ICANN without going out of business themselves.

To study ways in which ICANN could become more accountable, we examined the structures of a number of organizations that perform a roughly comparable range of private-sector and quasi-governmental coordination and standard-setting functions. None of the organizations we considered operates with the independence that ICANN enjoys, even under the current nominal oversight by the Department of Commerce. In addition, virtually all of these other organizations are governed by their direct users, thereby building accountability into their structures.

We believe ICANN, too, should be governed by its direct users—the registries and registrars—rather than the vaguely specified “Internet community” at large. The registries and registrars have a strong incentive to assure that ICANN fulfills its responsibilities of managing the domain name system efficiently. Their incentives in this respect align with those of businesses and individuals, who are the Internet’s end users. For example, if ICANN were governed by the registries and registrars, it might have acted more quickly to address the incumbent domain name holders’ intellectual property protection issues. Moreover, because such a governance structure builds in its own external accountability, it could also more easily

allow for ending the current ties with the U.S. Government, which provide very imperfect accountability and are unpopular internationally.

We recognize that this proposal may be viewed as radical. But it has already stimulated a discussion of ICANN governance issues that otherwise might not have taken place.

Our study also addresses ICANN's mission. ICANN's scope should be clearly delineated. It should hew closely to the technical functions involved in administering the Domain Name System—i.e., coordinating the allocation of IP addresses, managing the DNS “root,” and ensuring the stability of the DNS.

ICANN should have a clear mission of encouraging competition and a minimal role as a regulator. This means allowing relatively free entry into the market for generic top-level domains (gTLDs) in order to bring the benefits of competition to consumers. ICANN's recent proposal to expand the number of gTLDs is consistent with a pro-competition mission, though it is probably possible to go further.

For freer entry of gTLDs to work well, however, protections for incumbent domain name holders must be strengthened, so that they are not subject to “nuisance” or “ransom” demands from new registries. As part of the current review, there needs to be a thorough examination of how this should be done and who should do it. ICANN is not well-equipped to be a regulator or an adjudicator of intellectual property disputes.

Issues as important and complicated as these merit a thorough evaluation, which cannot be completed by September. Therefore, we believe that the agreement with the Department of

Commerce should be extended in some form beyond its current expiration date while reforms are being considered and, hopefully, established. Reforming ICANN in a way that makes it truly accountable and clearly defines its scope of operations will ultimately make it feasible to end the JPA and, more importantly, ensure a vibrant, innovative, and competitive Internet in the future.