9 January 2008

Suzanne R. Sene,
Office of International Affairs,
National Telecommunications and Information Administration
1401 Constitution Avenue, N.W., Room 4701
Washington, DC 20230

(MS Word copy via 3.5" floppy disk and via email to JPAMidTermReview@ntia.doc.gov)

Re: Midterm Review of the Joint Project Agreement

Dear Ms. Sene,

This letter is ICANN's submission in response to the Midterm Review of the Joint Project Agreement (JPA) between ICANN and the United States Department of Commerce.

Summary of ICANN's position

The Board of ICANN believes:

- The JPA – like the memorandums of understanding before it – has helped ICANN to become a stable organization;
- ICANN has executed the terms of the JPA commenced in September 2006;
- ICANN is meeting its responsibilities under the JPA;
- The JPA is no longer necessary. Concluding it is the next step in transition of the coordination of the Domain Name System (DNS) to the private sector;
- This step will provide continuing confidence that the original vision laid out in the White Paper is being delivered;
- Concluding the JPA will not affect existing accountabilities expressed in the IANA contract and the United States Government's participation through the Governmental Advisory Committee.

Background and Introduction

On November 25, 1998, the United States Department of Commerce (DOC) on behalf of the United States Government (USG) entered into a Memorandum of Understanding (MOU) with the Internet Corporation for Assigned Names and Numbers (ICANN), a private sector, not-for-profit corporation.

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The purpose of this was to effect the transition of Domain Name System management to the private sector.

The idea to transition DNS management arose from a White Paper published by the USG. See
http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm#N_16_

In that White Paper the USG said:

> "The U.S. Government is committed to a transition that will allow the private sector to take leadership for DNS management…The U.S. Government would prefer that this transition be complete before the year 2000. To the extent that the new corporation is established and operationally stable, September 30, 2000 is intended to be, and remains, an "outside" date."

Now – more than nine years and seven versions of the MOU later – ICANN and the U.S. Department of Commerce are assessing ICANN's performance with regard to 10 responsibilities set out in a Joint Project Agreement signed in September 2006. The Joint Project Agreement is between ICANN and the U.S. Department of Commerce and a Midterm Review is being undertaken.

13 status reports in nine years

Over the last nine years ICANN has provided 13 status reports to the Department of Commerce. Each includes a list that outlines performance according to agreed tasks set out in the seven Memorandums of Understanding that have been signed in that time. See
http://www.icann.org/general/agreements.htm

Through this process, the ICANN community undertook the institution-building tasks necessary for it to take up the role envisaged in the White Paper.

Just some of these achievements have included:

- Introducing competition in domain name registration services for gTLDS, including the implementation of new TLDs;
- Implementing the Uniform Domain Name Dispute Resolution Policy for resolving cyber-squatting and other intellectual property disputes;
- Establishing formal legal arrangements with the regional Internet Registries, including the establishment of the Address Supporting Organization;

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- Establishing agreements with ccTLD operators, including the establishment of the Country Code Names Supporting Organization. ICANN-ccTLD agreements are now in place with ccTLD operators who represent over 60% of ccTLD registrants worldwide;
- Developing a contingency plan to ensure continuity of operations;
- Establishing a community consultative process for the integrated development of ICANN's Strategic Plan, Operational Plan and Budget; and,
- Implementing a financial strategy that delivers predictable and sustainable sources of revenue.

ICANN's progress over this time has been substantial, with ICANN consistently growing and evolving to meet its obligations and responsibilities. The Affirmation of Responsibilities in the 2006 Joint Project Agreement is a set of ongoing responsibilities that the Board of ICANN itself has developed to measure ongoing achievements. A table outlining these achievements is attached to this submission.

Notice of Inquiry

The Notice of Inquiry for this Midterm Review has been made public, with a request for comment on ICANN's performance

The questions asked of commenters are the same for each of the 10 responsibilities and are:

- What progress do you believe ICANN has achieved with regard to each Responsibility since October 1, 2006?
- If you believe that progress has been made, please explain how and why?
- Could more be done by ICANN in each area?

Could ICANN do more?

Significant progress has again been made over the period of the JPA and, as stated above, it is outlined in the attached table. For each of the 13 status reports provided so far, that has always been the case. The focus of the organization and its innovative model always has been and always will be progress and evolution. That is the model's great value: it is in constant improvement.

Security and stability is a never-ending pursuit; operational excellence is a never-ending pursuit; transparency and accountability is a never-ending pursuit. The conclusion that there is always work to be done can be made of each of the 10 responsibilities the Board has developed.

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To ask 'Could more be done by ICANN in this area' is a question that will always lead respondents to say: 'Yes. ICANN can do more'. ICANN believes that more should always be done. To conclude that it can do no more is the antithesis of what ICANN needs and aspires to be. A flexible, responsive private-sector entity with global stakeholders must always 'do more' in all areas of its responsibility.

That the organization does always strive to do more is reflected in the content of the 13 progress reports arising from the seven MOUs. In the early years of ICANN's formation, the tasks that ICANN agreed to perform were what could be termed 'establishment' tasks. That is, activities that were designed to grow the organization and its relationships.

Specifically, in the past, the Department of Commerce has rightly assessed whether ICANN has:

- clarified its mission and responsibilities;
- reformed its decision-making processes to ensure the views of Internet stakeholders are heard;
- developed an effective advisory role for governments;
- inquired as to whether ICANN has adequate financial and personnel resources to carry out its mission.

All these measures reflected an appropriate level of review for an organization in set-up phase. The Board considers that ICANN has now, with the assistance of the DOC and other stakeholders, reached a greater level of maturity as an organization, with a stable revenue base and adequate professional staff resources.

That is, there has been a shift from 'start up' activities as an organization that no longer requires regular operational scrutiny by the Department of Commerce. The ongoing scrutiny of performance of the organization is the Board's responsibility.

Has ICANN met the 10 Responsibilities in the JPA?

Significantly, the responsibilities in the JPA are not milestones or measures that were determined by the U.S. Department of Commerce. They are milestones that the ICANN board adopted themselves. The list of achievements (with supporting documents) is long and appears attached to this submission. It is also to be found in ICANN's 2007 Annual Report.

At the ICANN meeting in Los Angeles, October 29 to November 2, 2007, John Kneuer, then Assistant Secretary of the Department of Commerce, in his opening address to the meeting, noted:

> "As I said, the important measurements are the ten criteria that were adopted by the board resolution. Those were commitments that ICANN made to its board, and the board will ultimately be the judge of whether or not ICANN is meeting those responsibilities".

The ICANN Board believes that ICANN is meeting these responsibilities sufficiently. It also believes that meeting them is an ongoing task and that ICANN will continue to make progress. The table outlining these achievements is evidence of the Board's confidence.

The Board considers that the responsibilities are being addressed and there is an organizational capacity to always improve upon performance, so there is no need for the continuation of the operational oversight the JPA symbolizes.

Is Transition still the goal?

Clearly, both ICANN and the USG believe that transition of DNS management, as envisioned in the establishment of the ICANN model, is still the goal. Representatives of the Department of Commerce have expressed strong support publicly for this goal and ICANN's role:

> "...the Department continues to be supportive of private sector leadership in the coordination of the technical functions related to the management of the DNS as envisioned in the ICANN model". **John Kneuer, Written Testimony to the Senate, September 20, 2006.**

> "At the outset, I would like to reiterate the United States' strong support for ICANN as the technical manager of the Internet DNS and related technical operations. We continue to support the private sector leadership and the innovation and investment that has characterized the development and expansion of the Internet around the globe. Preserving the stability and security of the DNS is imperative so that this phenomenal growth can continue. And ICANN's focus on the DNS security matters are critical to this effort. The ICANN model, conceived to allow full participation by all interested stakeholders in decisions and policymaking, albeit not easy, is the most effective approach to the coordination of these technical functions." **Meredith Atwell Baker, then Deputy Assistant Secretary for Communications and Information in the National Telecommunications and Information Administration, Opening Address, Welcome Ceremony, ICANN Meeting San Juan, Puerto Rico, June 25, 2007.**

> "…our public consultation process revealed broad support for the continued transition to the private sector. The majority of interested stakeholders endorsed the original principles put forward to guide this transition, stability and security, competition, bottom-up policy coordination, and broad representation." **John Kneuer, Opening Address, Welcome Ceremony, ICANN Meeting Los Angeles, October 29, 2007.**

The real question: What is the next step to transition?

If the model is right for the task, if ICANN is continuing to meet its responsibilities set out in the JPA, and there is still commitment to transition by all parties, then the real question at this point is not 'Could ICANN do more?' but: 'What is the next step to transition?'

In the White Paper of 1998 the U.S. Government took a leadership role when the President directed the Secretary of Commerce to privatize the Domain Name System in a manner that increases competition and facilitates international participation in its management.

To its great credit, this is a position that the USG has held in the public domain for over nine years. In doing so it has stood for values of freedom, enterprise, and importantly, coordination - not control.

The USG's commitment to transition of this function is a position for which it is greatly admired. After nine years of trialing this private-sector coordination model the Board believes that a further step is required.

The Board proposes that the JPA is no longer necessary and can be concluded.

What effect will completion of the JPA have?

Completion of the JPA will clearly signal that the USG's policy of mentoring a strong ICANN has been successful. This success should be commemorated. Any past era of operational intervention in the Board's role (under law) to be responsible for the conduct of ICANN's day-to-day operations will be seen to have clearly ended.

It will not change arrangements under the IANA contract, through which ICANN staff are authorized to insert domain names to the root zone. It will not change the cooperative arrangement that the USG has with Verisign Corporation to manage the 'A' root server. It will not end the USG's participation in ICANN through the Governmental Advisory Committee.

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These are all accountabilities that will remain in place without the JPA.

However, conclusion of the JPA will have a powerful and long-lasting effect on the confidence of Internet and Internet users.

Long term confidence in a coordinated Internet

As this submission points out, the JPA was a necessary instrument in ICANN's formative years. But now, the JPA contributes to a misperception that the DNS is managed and overseen on a daily basis by the U.S. government. Ending the JPA will provide long-term stability and security for a model that works.

It will provide confidence to all participants that the investment of time, thought and energy for over nine years has secured an Internet coordination body that will always be owned by all stakeholders, not managed or overseen by any one entity.

Finally, it will assist in delivering on the White Paper's original ideal that no single government should manage or be perceived to manage this function, but that a private organization where all the stakeholders are represented should.

Yours sincerely,



Peter Dengate Thrush
Chairman of the Board of Directors
ICANN