Promoting Convenience, Choice, and Commerce on the Net

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ICANN Accountability & Transparency Review Team
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Few principles are more critical to the ICANN community than that of the accountability and transparency of the organization. ICANN's legitimacy hinges on its credibility in being accountable and transparent to the global Internet community that it serves.

It's fortunate that the Accountability and Transparency Review Team (ATRT) is the first review conducted under the Affirmation of Commitments (AoC), since further progress will build on its findings and recommendations. On behalf of NetChoice its members, I thank the members of the Review Team for taking on this critical and time-consuming responsibility.

For as long as NetChoice has participated in the ICANN process, the organization has sought to strengthen its accountability and transparency, with mixed results. In recent years, NetChoice has submitted comments on Improving Institutional Confidence and progress toward goals of the Joint Project Agreement between ICANN and the US Department of Commerce. We appreciate the opportunity to share the insights gleaned from those efforts, as we address the first 3 questions posed by the ATRT:

1) Do you think ICANN is accountable to all stakeholders? Can you identify a specific example(s) when ICANN did not act in an accountable manner?

Ironically, ICANN's repeated efforts to strengthen its accountability and transparency provide the best examples of how the organization has struggled with that very same goal.

ICANN has fallen short of being accountable to the community in three separate processes over the past three years: the mid-term review of the Joint Project Agreement (JPA); the Improving Institutional Confidence consultation; and comments on the conclusion of the JPA.

In 2007, ICANN sought to terminate its Joint Project Agreement with the US Government on the grounds that it had accomplished all the goals outlined in the document – including the establishment of a high-level of accountability and transparency.

To support this effort, ICANN published a lengthy report (http://www.icann.org/en/general/jpa-10-responsibilities-table-09jan08.pdf) detailing its achievements in the areas of accountability, transparency, security and the other responsibilities established under the JPA.

In the area of accountability, most of the achievements that ICANN identified were ongoing processes and consultations, rather than actual improvements that had been tried, tested, and made into permanent parts of ICANN processes.

In comments to both ICANN and the US Department of Commerce (http://www.ntia.doc.gov/ntiahome/domainname/jpamidtermreview.html), a broad cross-section of the Internet community asked ICANN to establish accountability mechanisms and protections before ending the JPA relationship.

Although community recommendations were extensive, several points were echoed by participants from across the spectrum of ICANN stakeholders.

- **Accountability Mechanisms:** Prior to severing the JPA relationship, a cross-section of community members called on ICANN to replace the JPA structure with a more effective and lasting mechanism for ensuring that the ICANN board could be held accountable to some entity other than itself. Although ICANN has since proposed several different accountability mechanisms, it has neither adopted – nor even formally considered – any proposal to establish functional accountability for ICANN board decisions.

- **Safeguard from Capture:** This was a key theme during the JPA process. Even stakeholders normally positioned on opposite sides of issues shared a belief that ICANN needed to establish functional mechanisms to prevent capture by governments or intergovernmental organizations. Although ICANN acknowledged the perceived threat of "internal" capture by ICANN stakeholders – an issue that was barely raised during the process – ICANN has not, to date, instituted any new mechanisms for preventing capture from external sources.

- **Transparency of Staff and Board decisions:** It's undeniable that ICANN has made a great deal more information available online in recent years, But one of the recurring criticisms leveled by community members is the opacity of how ICANN staff digests community comments and comes up with policy implementation plans. It is now impossible for stakeholders to learn whether and how their working group reports and comments were factored into staff reports and board decisions. In a bottom-up consensus body, the ability of stakeholders to track their promised impact on the process is critical. At the time of the JPA midterm review, this answer was not possible to know. Today, ICANN has yet to establish a mechanism to address this oft-voiced concern.

- **Redress:** The business community, in particular, requested that ICANN establish new mechanisms for redress where an ICANN Board decision adversely affected a company or industry. While ICANN has implemented and expanded some review processes, none of those processes provide any potential for relief outside of the Board deciding to reverse its own decision.

2) Do ICANN's accountability mechanisms, including the Ombudsman, the Board reconsideration procedure and the Independent Review Panel provide meaningful accountability and, if not, how could they be improved?

All of ICANN's accountability mechanisms suffer from the same problem: they exert no actual authority over the ICANN board. Here again, the various processes that ICANN has undertaken to strengthen its accountability are illustrative of the underlying problem. In multiple comment periods spread over several years, stakeholders have called on ICANN to be accountable to something or someone other than the vague concept of "the community."

The accountability mechanisms cited in the ATRT question cannot be used to alter a board decision. Only the board can alter a board decision. If the board's decisions cannot be challenged or changed, the board is not effectively accountable to anyone.

3) Do you think ICANN's processes and decision-making is transparent?

Like accountability, transparency is not a binary concept that is either ON or OFF. ICANN has made substantial improvements in transparency in recent years by providing more information in a very timely manner, although concerns remain.

As cited above, there remains the lingering problem of stakeholders not being able to learn how and whether their recommendations factor into the bottom-up process. More troubling is the occasional, but serious disconnect between the public policy-making process and the policy recommendations put forward for vote by the ICANN staff.

In a recent example regarding to the Draft Applicant Guidebook, Version 4, the ICANN staff appeared to create, from whole cloth, a new, previously undiscussed, two percent cross-ownership threshold, rather than strictly interpreting the board resolution from the Nairobi meeting. Despite hours of meetings and deliberations on vertical integration– and a board resolution on which to base the policy – staff created new policy, outside of the process and apparently outside of any transparency mechanisms.

If ICANN staff is going to play such a central role in creating policy, its actions must be more transparent to the affected community.

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