



**AT&T Comments in Response to ICANN Consultation on the
“Draft Implementation Plan for Improving Institutional Confidence”
May 11, 2009**

AT&T Inc., on behalf of its affiliated companies, (“AT&T”) appreciates the opportunity to provide comments on ICANN’s Draft Implementation Plan for Improving Institutional Confidence (“Draft IIC Plan”). AT&T previously submitted comments on the ICANN President’s Strategy Committee (“PSC”) Transition Action plan on July 31, 2008 and October 20, 2008. In these comments, we reiterate our position that further improvements are needed for ICANN to operate effectively as a self-governing, private sector-led organization that represents the interests of the multi-stakeholder community it is intended to serve, and we offer constructive proposals for enhanced transparency and accountability mechanisms that will help to achieve the ultimate objectives of the transition process.

AT&T is a global IP network and Internet provider and, as such, is a major stakeholder in the Internet community. In this role, and in its position serving Internet end users around the globe, AT&T has a direct interest in and significant concerns about the predictability, resiliency, security and stability of the Domain Name System (“DNS”), the Internet as it is affected by the DNS, and ICANN itself.

As AT&T has stated many times, we support the private-sector led model of ‘governing’ the unique indicators of the Internet and the goal of maintaining ICANN as an independent, non-profit organization that is accountable to the multi-stakeholder global Internet community in carrying out its operational functions. AT&T also agrees with the five thematic concerns set forth in the Draft IIC Plan and the underlying goals of improving and strengthening institutional confidence in ICANN.

The Draft IIC Plan, however, falls short in proposing the type of comprehensive and fully formed plan that is needed to complete the transition process. In Section I, we discuss our comprehensive proposal for addressing the five broader thematic issues: (i) safeguarding against external and internal capture; (ii) enhancing transparency and accountability; (iii) meeting the needs of the global Internet community; (iv) maintaining financial and operational stability; and (v) ensuring the security and stability of unique Internet identifiers. These proposals build on AT&T’s earlier comments and go further than the Draft IIC Plan, particularly in the key areas of establishing procedural guidelines for public comment and decision-making and an independent judiciary to provide enhanced accountability. We also respond to some of the proposals included in the Draft IIC Plan. Section II discusses the need to continue the transition process until such time as ICANN develops and implements a comprehensive plan for improving institutional confidence, as set forth in its detailed commitments under the Joint Project Agreement (JPA).



I. A Comprehensive Plan for Improving Institutional Confidence, Particularly ICANN's Transparency and Accountability.

As in previous PSC and IIC documents, the Draft IIC Plan recognizes that improving institutional confidence requires a broad scope of activities touching every major component of ICANN's structure, procedures and relationship with the multi-stakeholder global Internet community. Once again, however, the Draft IIC Plan consists of a series of general proposals rather than a comprehensive and fully formed plan for improving institutional confidence. Without a comprehensive, detailed vision of what ICANN needs to become and a detailed plan for getting there, ICANN will not achieve the level of institutional confidence that is required to secure its status as an independent, private sector-led organization that represents the interests of the diverse stakeholder community it was formed to serve. We note, for example, that while ICANN indicated its intent to summarize and respond to the comments that were submitted during the PSC and IIC process, the Draft IIC Plan does not incorporate or respond to any of the input provided by the community in two rounds of public comment proceedings last year.

In its previous comments, AT&T discussed a number of specific proposals for improving institutional confidence. Building on these comments, AT&T outlines, in Attachment A to these comments, a detailed set of recommendations for each of ICANN's five broad themes. We have focused on providing additional detail on enhancements to ICANN's transparency and accountability, which are fundamental prerequisites for completing the transition process. Below is a brief discussion of AT&T's proposals and a comparison to the treatment of these issues in the Draft IIC Plan for each of the five issues.

1. Safeguarding Against External and Internal Capture

AT&T agrees with the PSC that safeguards are needed to protect ICANN from capture by any source, both external and internal. We agree with the proposals in the Draft IIC Plan to maintain the U.S. headquarters of ICANN, enhance the quality and effectiveness of GAC participation, and avoid potential conflicts of interest within ICANN. The Draft ICC Plan, however, does not yet provide adequately detailed analysis or comprehensive improvements to fully address these concerns. As discussed below, a detailed articulation of ICANN's underlying mission and responsibilities, and an organizational structure that facilitates participation and input from the multi-stakeholder community are two important mechanisms for guarding against capture.

ICANN should clearly define its role and authority in the form of a "Charter" that builds on the relevant bylaws provisions relating to its mission and core values. This definition should include an articulation of the parameters of ICANN's "narrow, technically oriented mission" of managing the operation of unique Internet identifiers. By delineating the limits of its authority and by committing in an enforceable way not to attempt to serve as a forum for general Internet policy development beyond those metes and bounds, ICANN can help to reduce the risk of external capture, particularly from



intergovernmental entities. In the following section, AT&T discusses the need for a detailed Charter as the foundation for ensuring and enhancing ICANN's accountability to the multi-stakeholder community.

Moreover, a stable organizational structure that balances the diverse interests of ICANN stakeholders is essential to avoiding both external and internal capture. It will also help to promote broad participation if members of the global Internet community are empowered to participate and affect decisions within ICANN. AT&T has included this issue in its proposal, but it is not addressed in the Draft IIC plan. We also note that the GNSO restructuring and other proposed organizational changes are still in process, so this is an important area that remains in a state of flux within ICANN. Given the uncertainty and contention that is occurring in the GNSO restructuring alone, the development and implementation of a holistic plan for ICANN's organization structure that meets the needs of diverse stakeholders is important to the success of the transition process.

AT&T supports efforts to expand the level and effectiveness of government participation in ICANN through the GAC as a way to safeguard against external capture. We do think the focus should be to preserve the current structure of the GAC and to make its participation within ICANN more effective by improving supporting activities. While ICANN and the GAC should have good relationships with international and intergovernmental organizations, we do not see that the goal of broader and deeper participation in GAC is served by holding meetings in New York or Geneva. A better alternative would be to hold a GAC meeting in conjunction with the annual Internet Governance Forum (IGF) meeting, which would also support the participation of these governmental representatives in the IGF. ICANN also should continue to investigate additional remote participation and travel support options that target developing countries, including the proposed focus on the UN's list of 50 least developed countries.

The broader issue of effective participation is essential to the success of ICANN's "bottom-up", consensus-based processes. While the Draft IIC Plan mentions capture due to apathy, it fails to provide details on how the current decision-making process should be improved to enhance meaningful participation and input from the multi-stakeholder community. We address this issue generally in the following section on accountability. The Draft IIC Plan also fails to address the specific issue of business user participation and support for ICANN. AT&T and others have raised concerns about the challenge of maintaining participation and support of the business user community, including current uncertainty regarding representation and voting rights within ICANN. We urge ICANN to address this important issue as part of the IIC process.

AT&T fully supports the PSC recommendation that ICANN maintain its headquarters in the U.S. to "ensure certainty" for its contracts and other stakeholder agreements. It is important that this critical finding not be undermined or confused in any way by expanding ICANN's legal presence in other jurisdictions. We are strongly opposed to the proposal that ICANN explore establishing subsidiary legal presences in other jurisdictions, particularly because the implications of this expansion are not at all



clear. The area of non-commercial law is, as the PSC acknowledges “an emerging area of international law.” In addition, the high-level legal analysis attached to the PSC report fails to evaluate all of the risks and implications of establishing legal presences, which could include antitrust and tax issues. And under no circumstances should additional legal presences create any opportunity for “forum shopping” that would undermine the contractual certainty that currently exists.

2. Transparency and Accountability to the Multi-Stakeholder Community

In order to provide sufficient transparency and accountability, ICANN should establish clear written guidelines for conducting its business, including decisions affecting its organization and structure, substantive decisions and contractual compliance activities. The Draft IIC Plan provides only high-level concepts and recommendations for enhancing the public consultation process. ICANN should provide a detailed description for a transparent decision-making process in the design phase of this proceeding, and it also should establish more robust accountability mechanisms than the limited proposals in the Draft IIC Plan.

AT&T proposes that ICANN implement full “Administrative Procedure Act” notice and comment procedures for public consultation and decision-making. This should include elements such as:

- Issue notices of proposed actions or final decisions in draft form so that the community has advance notice of specific proposals and can provide meaningful comment;
- Provide staff support, such as economic and legal analysis, and supporting materials early in the process to facilitate full public comment;
- Obtain full and comprehensive input from the community with adequate timelines for public comments and opportunity for reply comments; and
- Issue detailed final decisions that identify the voting positions of Board members and be supported by a full analysis of the comments received from the community and the basis for the decision.

The IIC proceeding provides an opportunity for ICANN to conduct public consultations and decision-making in accordance with these procedures. Accordingly, ICANN should incorporate the public comments that have been received into its recommendations and, importantly, explain the rationale for not including specific input and proposals from the community in the Draft IIC Plan.

An important new component of AT&T’s plan for enhancing transparency and accountability is the establishment of an ‘independent judiciary’ through which it would be accountable to the community in general and to members of the community affected by its actions and inactions. Such a mechanism would be funded by ICANN, but



maintained and operated in a truly independent and arms-length manner. A committee of independent experts should be utilized to develop a proposed structure and operating rules for its independent judiciary. It is critically important that, in addition to effective internal decision-making and reconsideration mechanisms, there be a robust external accountability mechanism in place that is practically – rather than just theoretically – available to enforce the duties and preserve the protections articulated in the ICANN Charter. Meaningful access to an independent judiciary, funded by ICANN, can substitute for direct governmental (or intergovernmental) oversight. AT&T notes, however, that an independent judiciary does not yet exist, and will not come into existence overnight.

As other parties have expressed, AT&T is concerned that the extraordinary measure of board removal is so extreme that it will not serve as an effective accountability measure in practice. Moreover, AT&T previously raised significant concerns about the need for ICANN to avoid establishing an economic interest for the organization in its DNS policies and related decisions. These concerns apply to issues such as how ICANN uses auctions to address disputes in allocations of Top Level Domain (“TLD”) strings. ICANN should address these issues before launching new TLDs, which will raise these potential conflicts of interest.

3. Meeting the Needs of the Global Internet Community

AT&T agrees that internationalization is about more than just the location and jurisdiction of ICANN offices and staff. We support efforts to continue and expand outreach to the global Internet community, which can include remote participation, translation and regional outreach. These outreach efforts should be designed to include a diverse representation of stakeholders, including government representatives and business users in less developed countries.

While these activities will help to promote the internationalization of ICANN, the introduction of Internationalized Domain Names (IDNs) has a key role to play in internationalizing the Internet itself. We recommend that ICANN devote more attention and resources to deliver on the promise of IDNs, which includes addressing security and operational issues associated with undertaking significant change to the functioning of the Internet.

As previously discussed, we strongly oppose the recommendation to explore the establishment of additional subsidiary legal presences in other jurisdictions. This proposal would introduce uncertainty and the potential for forum-shopping, either by ICANN itself or other contracting parties.

4 Financial and Operational Stability

AT&T agrees that financial and operational stability must remain a core commitment of ICANN through the implementation of the major changes it is proposing in a number of areas. We also agree that maintaining the not-for-profit status of ICANN



is an essential element that must be safeguarded as other changes are undertaken. Not only is it important to maintaining ICANN's legitimacy as the steward of critical Internet resources, but it cabins ICANN's exposure with respect to taxation, legal liability and other issues. As discussed further in Section II, we do not believe these issues have been adequately addressed as part of the transition process.

We also remain concerned about the impact that the planned introduction of large numbers of new gTLDs will have on ICANN's stability, given the amount of revenue involved, the dramatic increase in the management functions which it entails and other overarching concerns that have been raised by AT&T and others. ICANN should provide greater detail about anticipated funding requirements and the actual funding sources that will be utilized as part of the analysis and design phase of the IIC process, including the budget requirements for full implementation of the IIC plan itself.

5. Security and Stability of the Internet's Unique Indicators

AT&T supports the proposal for ICANN to be a thought leader on security and stability issues, while maintaining its focus on the core mission of serving as the trusted steward for the coordination for the unique indicators. In response to significant attention to this topic in the public comments on the Draft New gTLD Guidebook, the ICANN Board appropriately tasked the SSAC and RSAC to undertake a study regarding the simultaneous introduction of IDNS, IPv6, DNSSEC, and vast numbers of new gTLDs to the root. This type of proactive action must be an essential component of ICANN's approach to security and stability issues.

ICANN should publish the long-awaited white paper that details the proposed role for ICANN on security and stability issues, and identifies how it will undertake such functions. Overall, ICANN must ensure that the stability of the DNS and its impact on the Internet remain the primary and overriding priority in all decisions and activities. ICANN should consider adding more technical experts to the staff and find ways to engage with the community on a more regular and systematic basis to develop responses to security and stability issues.

II. The Transition Process Must Continue Until Transparency and Accountability Mechanisms Are Fully Developed and Implemented

ICANN operates in an environment of broader challenges and questions about the role of governments and intergovernmental organizations with respect to Internet governance. The private sector-led model of ICANN is unique and continues to be subject to challenge and attempted encroachment by other entities. Therefore, ICANN must remain cognizant of the real risk of external capture and other threats to its continued existence as an independent organization as it proceeds with the transition process and the development of a comprehensive plan for improved institutional confidence.



With this in mind, it is worth noting that the genesis of the IIC proceeding can be traced back to ICANN's "Affirmation of Responsibilities" in the JPA. ICANN affirmed and agreed that it would be guided by ten areas of responsibilities, including improvements in transparency, accountability, the multi-stakeholder model and corporate governance. While the comments filed by AT&T and others in the JPA Mid-Term review process expressed support for ICANN as a private sector-led organization that represents the multi-stakeholder community which it services, significant concerns were raised about whether ICANN was prepared to operate fully independent of the JPA.

The Draft IIC Plan is not sufficiently developed, let alone implemented, to obviate the need for the type of accountability provided by ICANN's Affirmation of Responsibilities under the JPA. Some have suggested that there is no need for a transition and that the JPA does not provide day-to-day oversight over ICANN's functions and activities. The Affirmation of Principles has guided ICANN's work in recent years and the JPA has had a concrete effect in enhancing ICANN's accountability to the multi-stakeholder community. And while the JPA has not interfered in the ongoing functions of ICANN, it has served an important role in limiting ICANN's exposure under antitrust and tax law.

Indeed, the ongoing IIC proceeding is a testament to the fact that the Affirmation of Responsibilities under the JPA continues to have relevance today. After careful review of the circumstances and challenges facing ICANN, and taking into account the short amount of time remaining before the JPA expires, AT&T's position is that the transition process must continue until a comprehensive plan for improving institutional confidence has been developed and implemented. Significant work remains to be done, such as the creation of a detailed Charter setting forth the boundaries of ICANN's authority and its responsibilities to its stakeholders, implementation of clear Administrative Procedure Act-type procedures and establishment of an independent judiciary to protect ICANN's legitimacy by ensuring its accountability. ICANN is simply not able to complete all of these important tasks prior to September 30, 2009.

AT&T supports moving forward with a comprehensive approach to improving institutional confidence that includes further input from the multi-stakeholder community, PSC involvement, additional focus and applied resources from ICANN staff, and involvement of a group of expert advisors to develop and implement concrete proposals. We believe it is important for the transition process to continue without being driven by the looming September 30 deadline. We urge ICANN to act constructively and proactively to work towards some type of continued agreement beyond that date. The stakes are simply too high to rush into declaring ICANN fully independent without having in place a comprehensive structure that safeguards ICANN from external and internal capture, maintains important legal protections and ensures meaningful accountability to replace existing oversight structures. Ultimately, the support and confidence of ICANN's diverse multi-stakeholder community is the strongest defense against capture and other threats to its existence. Indeed, that is the main purpose of the improving institutional confidence process, which has made progress but has not yet been completed.



III. Conclusion

In summary, ICANN has yet to address several key elements that are basic to improving institutional confidence. ICANN must have a set of baseline transparency and accountability mechanisms in place that are supported by the broad community of stakeholders. At a minimum, this must include a well-defined Charter setting forth ICANN's role and responsibilities, a structured notice and comment process to support reasonable, reviewable decision-making, and an independent judiciary that serves as a meaningful accountability mechanism. AT&T supports the continuation of the private sector-led model of ICANN and offers the attached plan as a constructive proposal to advance the development of enhanced transparency and accountability. We look forward to further discussion and participation as ICANN continues to address these important foundational issues and to set its future direction.



ATTACHMENT A

Proposed Comprehensive Improving Institutional Confidence Plan

1. **Safeguarding Against External and Internal Capture.** As part of the transition plan, ICANN should establish robust safeguards against both external and internal capture.
 - Maintain a clear focus on ICANN's technically oriented responsibilities for ensuring the stability and technical operation of the Domain Name System (DNS). ICANN should clarify that it is not responsible for broader Internet governance or policy issues.
 - Structure ICANN constituency organizations to provide meaningful representation and voting participation for key ICANN stakeholder groups and a balance of economic and other interests.
 - Enhance the quality and effectiveness of Governmental Advisory Committee participation by enhancing the current structure and supporting activities. Continue to interact with international, governments and intergovernmental entities on issues related to ICANN's core mission and responsibilities for unique Internet identifiers.
 - Remain headquartered in the U.S. to avoid increasing the risk of external capture by government, directly or through a treaty organization. All ICANN agreements with contracted parties should continue to be subject to the laws of a single jurisdiction in order to avoid forum shopping and uncertainty.
 - Enhance the transparency of ICANN's decision-making process for organizational decisions, policy development and contractual compliance activities.
 - Continue the current practice of posting extensive information and materials on the ICANN website, with improved timelines for releasing information.
 - The goal should be maximum awareness, input and participation by members of the ICANN community.
 - Continue and expand affiliation and interest disclosure requirements for Board members, staff and organization representatives, as well as a detailed code of conduct for avoiding conflicts of interest.



- Maintain the geographic diversity, accountability and independence of the ICANN Board by providing Board members with reasonable compensation and continuing to make available comprehensive written minutes of ICANN Board meetings.

2. Accountability to the Multi-Stakeholder Community. ICANN should establish best-in-class procedures and standards of conduct to ensure that it is accountable to the broad multi-stakeholder community in general, as well as to individual stakeholders who are harmed by ICANN's actions or inaction.

- Create a stand-alone Charter that serves as the authoritative articulation of ICANN's authority and duties. The Charter should encompass and expand on the mission and core values provisions of ICANN's existing Bylaws. Affirmative ratification by ICANN stakeholder organizations should be required to effect changes to the Charter which are recommended by the Board.
- Establish formal Administrative Procedure Act-type notice and comment procedures for obtaining public comments and issuing policy decisions that reflect multi-stakeholder community input, including:
 - Issue notices of proposed actions or final decisions in draft form so that the community has advance notice of specific proposals and can provide meaningful comment;
 - Provide staff support, such as economic and legal analysis, and supporting materials early in the process to facilitate full public comment;
 - Obtain full and comprehensive input from the community with adequate timelines for public comments and opportunity for reply comments; and
 - Issue detailed final decisions that identify the voting positions of Board members and be supported by a full analysis of the comments received from the community and the basis for the decision.
- Improve the existing reconsideration process by formalizing and expanding the grounds for seeking reconsideration beyond violations of ICANN Bylaws.
- Create an independent judiciary that is responsible for holding ICANN, including the Board and staff, accountable for its decisions and actions and for ensuring that ICANN respects the constraints, obligations and protections contained in the new Charter.
- Maintain an ombudsman who has adequate independence and is responsive to community concerns and issues.



3. **Meeting the Needs of the Global Internet Community.** ICANN should continue and expand its concerted efforts to actively engage with the global Internet community.
 - 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. Expand accessibility by supporting real-time translation during ICANN meetings and maintaining the travel support program for participants from less developed countries.
 - Continue outreach efforts to engage the global Internet community, including in-person meetings.
4. **Financial and Operational Stability.** ICANN should establish specific plans for funding and operational stability that are based on a clearly defined mission statement.
 - Avoid taking any economic interest in DNS policies and related decisions in order to actual or potential conflicts of interest.
 - Develop detailed plans for ICANN's ongoing operations and any proposed future projects.
 - Prepare estimates of anticipated funding requirements that are based on these operational plans.
5. **Continued Security and Stability of the Internet's Unique Indicators and Operational Stability.** ICANN should act as a thought leader on Internet security and stability issues, while continuing to focus on its core technical mission of operating and maintaining the stability of the DNS.
 - Ensure that the stability and security of the DNS and its impact on the Internet is the primary and overriding priority in all decisions and activities undertaken by ICANN.
 - Establish a team of technical experts to focus on identifying and responding to emerging security threats related to the DNS and unique Internet identifiers.
 - Maintain a cost-based fee structure as a safeguard against conflicts of interest and potential mission creep that would destabilize ICANN.