



**AT&T Comments in Response to ICANN Consultation on
Proposed Bylaws Changes to Improve Accountability
November 27, 2009**

AT&T is a strong supporter of private sector coordination of the Internet's unique indicators and the goal of maintaining ICANN as an independent, non-profit organization that is accountable to the global Internet community. ICANN's stakeholders have expressed their concerns in a variety of contexts that ICANN needs to establish improved transparency and accountability mechanisms. The purpose of this public comment process is to consider two discrete changes that the ICANN staff has proposed as ways to improve ICANN's accountability. These include revisions to the Bylaws to create (1) an independent review tribunal and (2) a special community vote to require reconsideration of a Board decision.

AT&T appreciates the staff initiative and effort in bringing these accountability proposals to the community, but we do not support further consideration or adoption of the staff proposals by the Board. The two discrete changes recommended by the staff must be considered within the broader context of the record that was developed over the past two years by the President's Strategy Committee ("PSC"), as well as the process leading to and including the Affirmation of Commitments ("AOC") recently announced by the U.S. Department of Commerce and ICANN. The proposed mechanisms do not sufficiently reflect the extensive input submitted by the ICANN community or represent the type of comprehensive plan for improving institutional confidence and accountability that is needed to implement the AOC.

AT&T urges ICANN to take this opportunity to approach accountability holistically, rather than in a piecemeal fashion. In particular, ICANN should build on the many constructive comments that have been submitted by a diverse cross-section of ICANN's stakeholders in the various public comment processes conducted by ICANN's PSC, with the goal of identifying all of the institutional changes and mechanisms need to implement the transparency, accountability and public interest commitments memorialized in the AOC. At the same time, ICANN should proceed with a sense of urgency to immediately undertake the development of improved accountability mechanisms as a necessary step in fulfilling its AOC obligations and facilitating the ongoing review process established by the AOC, which includes an initial review that must be completed by December 31, 2010.

In an effort to provide constructive ideas on a path forward, AT&T is providing its views on the mechanisms that must be developed to ensure that ICANN is accountable for its actions, and the process by which such mechanisms should be developed. The proposed mechanisms were previously described in AT&T's comments submitted earlier this year and are consistent with the comments submitted by various stakeholders.



1. **Develop a Charter that Reflects ICANN’s Mission and its Obligations to Stakeholders under the AOC**

ICANN should develop an authoritative and binding charter that reflects its obligations to stakeholders as articulated in the AOC. The existing ICANN Bylaws contain the seeds of this standard, but were drafted to protect the “corporate” ICANN entity and thus do not reflect the fundamental relationship between ICANN and its stakeholders. In particular, the Bylaws are “deliberately expressed in very general terms” and permit the Board to “pick and choose” among the core values that should apply in any given circumstance. Although the Bylaws speak of “balancing” competing values, they may be interpreted to permit the Board to disregard values altogether.¹ And while the Bylaws give the Board the authority to determine whether or not a particular core value is relevant, and to make choices about when and how to apply the core values, the Bylaws do not obligate the Board to explain its choices. Moreover, ICANN’s bylaws can be changed by a vote of two-thirds of the Board vote, without any requirement of actual agreement or acceptance by the ICANN stakeholders. Finally, the Bylaws give the Board the authority to articulate its obligations to the community, to interpret those obligations, and even to change those obligations based on confidential briefings and materials that are commissioned by the staff and reviewed exclusively by the Board. This structure lacks basic checks and balances needed to legitimize ICANN and safeguard its stakeholders.

ICANN should immediately launch a charter development initiative as critical step in defining its responsibilities and accountability under the AOC. For without such a charter, there will be no meaningful standard of review to assess whether ICANN has satisfied its public interest obligations and fulfilled its obligations to serve the community. This charter initiative should be managed by a group of experts consisting of both well-respected ICANN community members and independent experts drawn from outside the community, and it should build upon the work of the PSC and the input previously provided by the community.² The proposed

1 *See*, ICANN Bylaws, Section 2. “These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

2 The success of a charter initiative will depend upon the integrity, independence and credibility of those who drive it. Accordingly, AT&T would not support delegating this work to a consultant selected by ICANN management. Nor should it be run exclusively by members of the ICANN community answerable to specific constituencies or interest groups. Rather, we would propose a charter committee consisting of a community of members and outside experts. One approach would be to designate a workable number of PSC members and other members of the ICANN community with



charter should be vetted through a robust and meaningful global consultation process that is driven by the stakeholder community, with appropriate ICANN support:

- The charter should be grounded in the existing Bylaw’s mission statement and core values, along with the non-discrimination provisions of the Bylaws, and serve as the authoritative articulation of ICANN’s obligations under the AOC, including its mission, scope of responsibility, authority and commitment to its stakeholders, as well as to the global community of Internet users who are affected by its policies and practices.
- The charter should reaffirm ICANN’s public interest obligation under the AOC to serve as the trusted steward of the DNS and to maintain and respect its non-profit status in all of its activities. This requires ICANN to recommit to the principles upon which it was founded, and to avoid taking financial interests in its policy decisions.
- ICANN must embrace its unique responsibilities as articulated in the AOC, which includes ‘governance’ of the full range of unique indicators and which is broader than allocation of TLDs. Part of that governance should include the enforcement of contracts and agreements under which those indicators are allocated.

2. Develop Formal Administrative Procedures for ICANN Decision-making

ICANN should work with its stakeholder community to establish procedures for decision-making which are based on well-established principles of administrative procedure.³ Such procedures should require ICANN to:

- Issue advance notices of proposed “policy making” activities or major decisions by the staff and Board in draft form to ensure the community is aware of specific proposals and able to provide meaningful input, propose improvements and reply to other comments;
- Obtain full and comprehensive input from the community, with adequate timelines applicable to all ICANN stakeholders;

appropriate expertise, who would then select respected constitutional law, human rights, and dispute resolution experts from outside the community.

³ A number of countries have well-developed administrative procedures systems, and the OECD has done extensive work on regulatory reform, which provides a useful starting point for development of a formal notice and comment procedures. See, for example, the OECD’s *Background Document on Public Consultation*, available at: <http://www.oecd.org/dataoecd/4/43/36785341.pdf>; *Citizens as Partners OECD Handbook on Information, Consultation and Public Participation in Policy-Making*, available at <http://213.253.134.43/oecd/pdfs/browseit/4201131E.PDF>; *General principles and minimum standards for consultation of interested parties by the [European] Commission*, COM(2002)704, available at http://ec.europa.eu/civil_society/consultation_standards/index_en.htm.



- Provide written draft decisions that include detailed explanations for particular policy decisions and respond to the public comments filed, with an opportunity for the community to comment on those drafts;
- Publish clear, neutral staff analysis of comments received, the context in which comments were received, the rationale for the original staff recommendation, and how the staff recommendation is informed by the public comments received. When there are not adequate public comments, the staff analysis should discuss whether a postponement is justified and, if not, why it is appropriate to proceed; and
- Issue final decisions in writing that provide detail on all Board votes and that describe staff, consulting and legal input into the Board’s decision. Publish (with redactions as appropriate) all material reports, recommendations, presentation, and supporting materials provided to the Board.

3. Enhance Existing Accountability Mechanisms and Create Additional Mechanisms, Including a Fully Independent “Adjudicatory Panel”

The importance of establishing additional accountability mechanisms – including the establishment of an independent review panel with authority to review and rule on ICANN Board decisions in appropriate circumstances – cannot be overstated. The multi-stakeholder community has expressed significant concerns about ICANN’s processes and the fairness of many of its decisions. ICANN’s existing accountability mechanisms either depend on the support, resources, expertise and sympathy of the staff and the Board, or require a large financial commitment to pursue. They also do not rest on a formal set of obligations against which ICANN’s actions can be measured, and as ICANN considers them merely advisory, they do not offer meaningful recourse to either contracted parties or non-contracted party stakeholders. This lack of accountability has emerged as an urgent issue in the discussion of the introduction of new gTLDs.

The comments submitted by diverse stakeholders in the institutional confidence proceedings documented the clear need for improved and extended accountability mechanisms. There was also widespread support for creating a group of independent experts, which would include members of the community, to explore workable approaches to accountability. Rather than initiating a process that is independent and that builds on the input of the community, ICANN staff has now issued its own proposal to “establish a new Independent Review Tribunal with powers to review the exercise of decision-making powers of the ICANN Board under three general rubrics – “fairness, fidelity to the power, or cogency of decision-making.”

The review tribunal proposed by staff is not sufficiently independent and robust to ensure ICANN’s accountability to its stakeholders. At a minimum, the review tribunal should have the following characteristics



- The new and independent panel should consist of individuals in the private sector (in the broadest sense of that term) who will not actively engage in other ICANN processes and who possess the requisite legal and other expertise to act over time as the ‘adjudication body’;
- The panel should be an appeals body, and not a ‘supervisory entity’ with authority to initiate investigations of ICANN board decisions or actions;
- This independent panel should not replace ICANN’s other accountability mechanisms;
- The independent adjudicatory panel should be a private sector panel that is authorized to hear appeals of Board decisions or staff actions by affected stakeholders to assure adherence to the new charter and administrative procedural guidelines; and
- ICANN must provide for certain and stable funding and dedicated staff for the panel as part of its charter obligations.

ICANN also should establish an effective mechanism by which stakeholders can require a Board decision to be re-examined and overturned, or returned to the relevant policy entities within ICANN. The approach put forward by staff is not an effective approach to such a re-examination, in significant part because the support thresholds established by staff are unrealistic, requiring a super-majority vote of all three Supporting Organizations (“SO”) (whether or not its members are affected), and at least one of the Advisory Committees (“AC”) (again, whether or not the issues for which reconsideration is sought fall within the remit of these committees). Where SO and AC constituencies are affected by a policy, given the diversity of SO and AC constituencies, ICANN should invite all the SOs and ACs to provide their proposed approach as to how they would be able to respond to such a situation in which a Board decision will be re-examined. In addition, the staff proposal provides too much latitude for the Board to ignore the community’s call for reconsideration. While there may be circumstances when the Board, on the advice of experts, should be permitted to override the community’s call for reconsideration (e.g., based on stability or security considerations), the staff’s approach appears to provide latitude beyond what is necessary here.

The process used to develop and establish accountability mechanisms is just as important as the mechanisms themselves. As AT&T and others have suggested, ICANN should appoint a group of independent experts, including members of the ICANN community who have relevant expertise, to develop a proposal for an independent adjudicatory panel. Any such proposal must, of course, be based on a thorough understanding of ICANN and its mission, as well as input from the ICANN community. Once developed, this proposal should be brought to the ICANN community for consideration *before* being acted on by the Board.

In conclusion, AT&T recognizes that the political and economic environment in which ICANN exists today is fundamentally different from the environment that existed when ICANN was launched. ICANN’s decisions have massive implications for all parts of the Internet’s



ecosystem, including providers, governments and end users. Moreover, ICANN now has a specific obligation under the AOC to ensure “accountability, transparency and the interests of global Internet users”. Therefore, the development and implementation of enhanced accountability mechanisms are directly linked and complementary to the ongoing review process that will be established pursuant to the AOC. AT&T urges ICANN to initiate a comprehensive accountability proceeding that builds on the prior input of the community and comprehensively addresses ICANN’s obligations under the AOC.