

THE PRACTICAL NOMAD

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The Practical Nomad: How to Travel Around the World (3rd edition, 2004)

The Practical Nomad Guide to the Online Travel Marketplace (2001)

<http://www.practicalnomad.com>

7 July 2006

Attn: Fiona Alexander
Office of International Affairs
National Telecommunications and Information Administration
USA Department of Commerce
1401 Constitution Avenue, N.W., Room 4701
Washington, DC 20230 USA

Comments Re: NTIA Docket No. 060519136-6136-01,
Notice of Inquiry, "The Continued Transition of the Technical
Coordination and Management of the Internet Domain Name and
Addressing System" 71 *Federal Register* 30388-30389 (26 May 2006),
<[http://www.ntia.doc.gov/ntiahome/frnotices/2006/
NOI_DNS_Transition_0506.htm](http://www.ntia.doc.gov/ntiahome/frnotices/2006/NOI_DNS_Transition_0506.htm)>

Comments of Edward Hasbrouck on DNS Transition
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In Docket No. 060519136-6136-01 (71 *Federal Register* 30388-30389,
26 May 2006), NTIA has requested comments on "the progress to
date of the transition of the technical coordination and
management of the Internet DNS to the private sector,"
specifically to ICANN.

NTIA has asked for comments on the following specific (but not
limiting) questions, among others:

"2.... Has ICANN achieved sufficient progress in its tasks,
as agreed in the MOU, for the transition to take place by
September 30, 2006?"

"3. Are these core tasks and milestones still relevant to facilitate this transition and meet the goals outlined in the DNS White Paper and the U.S. Principles on the Internet's Domain Name and Addressing System? Should new or revised tasks/methods be considered in order for the transition to occur?

"4. The DNS White Paper listed several key stakeholder groups whose meaningful participation is necessary for effective technical coordination and management of the Internet DNS. Are all of these groups involved effectively in the ICANN process? If not, how could their involvement be improved?"

I am a journalist and consumer advocate, much of whose writing has been published on the Internet, and whose "beat" and one of whose books ("The Practical Nomad Guide to the Online Travel Marketplace", Avalon Travel Publishing, 2001) have focused on topics specific to the Internet and its use by consumers.

As a journalist, I have attempted to hold ICANN to its purported commitment to the maximum extent feasible of openness and transparency, through requests for documents and other records and through requests for notice of, and the opportunity to observe or audit, meetings of ICANN and its subsidiary bodies.

When these requests have been ignored or denied, I have attempted to hold ICANN to its commitment to due process, accountability, and oversight, through requests in different incidents for reconsideration and for independent review of the lack of openness and transparency of ICANN's decision-making procedures. Those requests have also been ignored.

I have thus been the person who has attempted most systematically and diligently to exercise the procedural, transparency, and oversight rights purportedly guaranteed by ICANN's corporate bylaws and the commitments in ICANN's Memorandum of Understanding with NTIA.

My unsuccessful attempts to exercise the rights purportedly guaranteed by the openness, transparency, and oversight provisions of ICANN's bylaws are chronicled at:

<http://hasbrouck.org/icann/>

To summarize my experience, and the conclusions I draw from it:

I requested access to documents and records, and notice and opportunity to attend, observe, or audit meetings of ICANN and subsidiary bodies related to ICANN's consideration of the proposed ".travel" sTLD. Those requests were ignored. Many of the documents and records I requested have never been released, others were released after months of delay, and meetings were closed and held with little or no notice and no opportunity for journalists, the public, or other stakeholders to attend, observe, or audit them.

I requested independent review of the lack of openness and transparency in the decisions made on "travel". So far as I know, no action has been taken on that request, which was made well more than a year ago on 8 April 2005:

<http://hasbrouck.org/blog/archives/000554.html>

Many months after receiving my request for independent review, ICANN claimed to have designated an independent review provider. But ICANN has not responded to any of my questions concerning this purported decision:

<http://hasbrouck.org/blog/archives/000964.html#ICDR>

When I contacted the organization ICANN claimed to have designated as its independent review provider, they told me they had never heard of ICANN and had no procedures applicable to review of decisions by ICANN:

<http://hasbrouck.org/blog/archives/001051.html>

Neither my request for independent review nor any other such requests, nor any procedures for independent review or designation of an independent review provider, have been posted on ICANN's Web site:

<http://www.icann.org/committees/indreview>

And none of the procedures applicable to the adoption of policies and procedures for independent review, or the designation of an independent review provider, have been complied with by ICANN:

<http://hasbrouck.org/blog/archives/001007.html#procedures>

My experience, and ICANN's (lack of) action on my requests, shows that contrary to ICANN's claims:

(1) ICANN and its constituent bodies do not, in fact, operate to the maximum extent feasible in an open and transparent manner.

(2) ICANN has not, in fact, put in place or allowed to operate any effective mechanism for oversight or accountability for decision-making or procedural due process within ICANN itself.

(3) ICANN has not, in fact, put in place or allowed to operate any mechanism for oversight, accountability, or review of ICANN's decision-making or procedural due process by any body external to or independent of ICANN.

I submit to NTIA that the effective involvement of all stakeholder groups, particularly consumers and other members of the public, is impossible without openness and transparency, and cannot be guaranteed without accountability and oversight -- all of which are lacking in the present operation of ICANN and its subsidiary bodies.

And the involvement of all stakeholders could best be improved, within the present system, by bringing ICANN into compliance with the requirements of ICANN's own bylaws for openness, transparency, accountability, and oversight.

The implementation of effective mechanisms to ensure the maximum extent feasible of openness and transparency in ICANN's decision-making procedures, as well as of effective independent oversight of ICANN's compliance with its Bylaws and other commitments, should be included in the milestones required by NTIA for any transition of DNS management.

In light of ICANN's repeated, false, claims that it is already operating in an open and transparent manner (and persistently ignoring the implications or even the existence of the words "to the maximum extent feasible"), and to be in the process of working towards an independent review procedure that still doesn't exist, NTIA should not be satisfied with a mere repetition by ICANN of its repeatedly-broken promises, but should require that the maximum extent feasible of openness and

transparency, and mechanism for independent oversight, be demonstrated in actual and effective operation.

Amendment 6 to the MOU between ICANN and NTIA provides in part that "ICANN agrees to ... 4. Continue to develop, to test, and to implement accountability mechanisms to address claims by members of the Internet community that they have been adversely affected by decisions in conflict with ICANN's by-laws, contractual obligations, or otherwise treated unfairly in the context of ICANN processes."

http://www.ntia.doc.gov/ntiahome/domainname/agreements/amendment6_09162003.htm

This condition of the MOU has not been met, and ICANN's continuing failure to take even the first step towards doing so (such as scheduling and giving public notice of a public meeting to consider beginning the process of developing policies and procedures for independent review, and to designate an independent review provider) is a material breach of ICANN's contractual commitment to NTIA. I demand that NTIA take prompt action to compel ICANN to cure this breach of contract, or to terminate NTIA's contracts with ICANN for breach of contract by ICANN.

ICANN's lack of openness and transparency is not limited to decisions made directly by ICANN itself. ICANN can delegate only that authority which ICANN possesses. Any valid delegation of authority by ICANN is therefore subject to the requirements of ICANN's bylaws that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." But there has been essentially no recognition of this principle in ICANN's decisions purporting to delegate authority, and no explicit condition in any publicly-disclosed delegation of authority by ICANN binding the decision-maker, as a decision-making agent of ICANN, to comply with the "maximum extent feasible" clause of ICANN's transparency bylaw.

Instead, ICANN has used the contracting out of key decisions as a means (albeit a legally invalid one contrary to its bylaws) to evade even that slight degree of transparency (limited in most cases to ex post facto publication of resolutions and votes) which it has acknowledged as applying to decisions made directly by ICANN's Board of Directors.

Some of ICANN's most important decisions have been delegated to contractors or third parties who have not acted, and have not been required by ICANN to act, in accordance with the procedural requirements of ICANN's bylaws. Despite the requirements of ICANN's bylaws, no effective mechanisms for reconsideration, independent review, or oversight by NTIA (or any other oversight body external to ICANN) have in fact been made available to journalists or stakeholders affected by their inability to observe or participate in the deliberations and decision-making of those third parties deriving their purported authority from delegations by ICANN.

For example, the task of reviewing and making recommendations on the most recent round of applications for new TLD's was delegated to a panel of "independent" evaluators whose identities and recommendations were kept secret until after ICANN's Board of Directors had received and acted on those recommendations, and who met entirely in secret. My requests as a journalist and stakeholder for notice of their appointment, identities, and meetings, and for an opportunity to observe or audit their meetings, were simply ignored. No minutes or records of their meetings have ever been made public. Since their reports were received and acted on by ICANN's Board of Directors at closed telephone "meetings", it is impossible to know why some of their recommendations on specific new TLD applications were adopted by the Board of Directors, and some were reversed.

As a journalist and stakeholder, I have requested that the closure of ICANN Board telephone "meetings" be reconsidered, but that request -- made more than a year ago in May 2005 -- has been ignored except for an acknowledgment from ICANN's corporate secretary that it was received and forwarded to ICANN's Reconsideration Committee. Although ICANN's bylaws require that all requests for reconsideration be posted on ICANN's Web site, that they be acted on within 90 days, and that the Reconsideration Committee report annually on the requests it has received, the actions it has taken on them, and the requests remaining outstanding, none of those things has yet been done with my request (or any others made during 2005), nor have I received any indication as to when, if ever, my request will be considered or acted on by the Committee or the Board.

The Committee on Reconsideration of ICANN's Board of Directors is clearly a "subsidiary body" of ICANN subject to the requirement of ICANN's bylaws that it operate with the maximum extent

feasible of transparency. But the Reconsideration Committee has never held a public meeting. Nor has it ever given public notice of when it will meet, or the agenda for or attendees at any of its meetings. My requests for notice of meetings of the Reconsideration Committee, and for an for an opportunity to observe or audit their meetings, have been ignored.

Similarly, the "authority" to set policy for sponsored TLD's has been (purportedly) delegated by ICANN to the entities designated by ICANN as sponsors. None of the publicly-disclosed portions of the contracts between ICANN and these sponsors contains any explicit acknowledgment that the purported delegation of authority by ICANN created a relationship in which the sponsor acts as agent for ICANN as the principal, or that the authority of the sponsor as agent for ICANN is limited by any of the limitations on ICANN's own authority. None of the publicly-disclosed portions of these agreements contains any explicit requirement of the "maximum extent feasible" of transparency in the exercise by the sponsor of decision-making authority delegated by ICANN, and none of the sponsors appears to have recognized any such requirement or limitation.

ICANN's habitual failure to comply with the procedural requirements of its own corporate charter and bylaws creates two risks, each of with endangers (to the extent that any aspect of ICANN's decision-making can endanger) the stability and security of the Internet:

First, almost all individual decisions which ICANN has made are vulnerable to challenge and nullification as not having been made in accordance with the procedures, the openness and transparency, and the availability of independent review required by ICANN's bylaws, and the requirement of its corporate charter that ICANN act only in accordance with those bylaws.

Second, ICANN's chronic failure to comply with its own bylaws, and its habit of taking action and making purported "decisions" contrary to those bylaws, provides sufficient ongoing cause for the Secretary of State of California, as overseer of compliance with ICANN's corporate charter, to dissolve the corporation at any time for ICANN's failure to act in accordance with its charter from the state of California.

In considering whether NTIA should terminate its oversight over ICANN, and whether it is appropriate for NTIA to delegate

authority to ICANN, NTIA should consider the continuing threat to the stability and security of the Internet posed by ICANN's vulnerability to dissolution as a corporation, and to nullification of many of its key decisions -- a risk entirely of ICANN's own creation, resulting from ICANN's failure to comply with the procedural standards to which it has bound itself in its bylaws, and to which it is bound by its charter from the state of California as a public-benefit non-profit corporation.

I would be happy to discuss these comments further at your public meeting in Washington on 26 July 2006.

Sincerely,

Edward Hasbrouck
7 July 2006

These comments are also available on the Web at:

<http://hasbrouck.org/articles/Hasbrouck_NTIA_comments-7JUL2006.pdf>

and at:

<<http://hasbrouck.org/blog/archives/001078.html>>