

Comments from KMC and Ping Registry Provider, Inc.

Karsten Manufacturing Corporation (KMC) and Ping Registry Provider, Inc.
(Ping)

welcome the opportunity to provide input to the Second Draft Report of the Cross Community Working Group on Enhancing ICANN Accountability (CCWG ACCOUNTABILITY). Ping is the registry operator of the .ping top level domain name, a closed, branded domain name. Ping reserves the right to revise or supplement this comment. We welcome outreach by the CCWG ACCOUNTABILITY should they wish to discuss any of the issues raised below.

The United States Should Not Give Up IANA Oversight

First and foremost, KMC and Ping do not believe that the transition of oversight from the U.S. Government should proceed. The fact that the community is engaged in this accountability enhancement process, indicates that many stakeholders believe that ICANN has not held itself suitably accountable for its actions, even with the NTIA looking over its shoulder. It is difficult to imagine what will happen when ICANN is no longer beholden to the U.S. Government to renew the IANA contract and to lend ICANN its legitimacy for policy functions. Instead, KMC and Ping believe that Congress should enhance its oversight of ICANN to ensure that a free and open Internet exists, without interference from foreign powers whose records on human rights and freedom of commerce leave much to be desired.

Imperative Changes to Fundamental Bylaws Prior to Any Transition

In the event this ill-conceived transition proceeds, KMC and Ping believe that ICANN must, at an absolute minimum, adopt the following changes to its "Fundamental" Bylaws to ensure a modicum of accountability:

- ICANN must have at least one "member" to ensure that it is subject to litigation in the event that staff or Board violate the Bylaws or the Affirmation of Commitments (AOCs), which AOCs must be incorporated into the Fundamental Bylaws. Access by aggrieved parties to the litigation mechanism of the member or members must be a low threshold, such that competitors of the aggrieved party are not able to block access to meaningful redress of harms caused by ICANN.

- Both ICANN and post-transition IANA should be prohibited from seeking or acting on "international organization" status or any other status that would preclude it from being held accountable in the U.S. federal courts, whether such status may be granted by the United States government or any other sovereign.

· Both ICANN and post-transition IANA should be subject exclusively to the law and jurisdiction of the federal courts located in a U.S. State.

· Both ICANN and post-transition IANA should be prohibited from taking any other action to change its composition and nature as to eliminate the possibility of liability under U.S. law. This restriction would prohibit both ICANN and post-transition IANA from changing the nature of their corporate status to avoid liability and thus accountability.

· The Fundamental Bylaws should require ICANN's Board and staff to act in the best interests of the Internet users community and not in the best interests of the ICANN and IANA corporations or any of their internal stakeholders (individual Board members, staff, vendors, etc.), in such times where there is a conflict between the two sets of interests.

Third Draft Report Necessary

Given the numerous open issues and the ICANN Board's recently proposed alternative to the accountability process, the CCWG ACCOUNTABILITY should issue a third draft report for public comment before submitting its final report.

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