

# Additional NARALO ALAC Candidates' Responses - 2012

## Additional Comments from the Candidates for the NARALO ALAC Representative position

In response to Glenn McKnight's question regarding a recent article entitled: [Foreign Policy: The UN Takes On The Internet](#), posted on 9 August 2012.

**Eric Brunner-Williams**

Posted on 10 August 2012

Hi Glenn,

I'm running for the North American RALO ALAC Rep, not writer for Foreign Policy, so I'm going to skip over the low hanging fruit like whether the ITU is an obscure UN agency and so forth.

The At-Large issue is the ALAC advice to the corporation board ...

will it help the board or ... not, and the NARALO issue is which of its candidates to elect, representing the region, which will best contribute to the ALAC authoring advice which will help the Board.

You may recall that the US DoC/NTIA issued a Request for Information on the IANA Function, a NOTICE under the Administrative Procedures Act (APA). The response of the CEO, and presumably the Board, a COMMENT under the APA, viewed the IANA Functions as integral to the larger role of the contractor (ICANN).

The views of then-CEO Beckstrom were endorsed by the ALAC in its COMMENT.

The DoC/NTIA received several comments which offered a significantly different view on the contractual dependency of the IANA Functions and other functions exercised by the contractor (ICANN). I wrote one, co-signed by Beau Brendler and Jean-Jacques Subrenat, as did Bill Manning and Dimtry Burkov.

You may also recall that the DoC/NTIA rejected the theory offered in the Beckstrom letter and subsequently published a Request for Proposals in the Federal Register for a competitive award of the IANA Function, independent of the other roles carried out by the current contractor.

The point I'm attempting to make is that agreement isn't advice, and the ALAC, which includes a candidate in the current election, agreed with a view rejected by government -- its advice did not help the Board.

Obviously, which candidate this RALO elects as its ALAC Rep can have an effect on the counsel available to the Board from the ALAC.

This is a long note, and I've not even gotten to the thicket of interests, issues and choices that eventually do present the opportunity for ALAC to advise the Board -- possibly not in agreement with the prevailing expressions of interest and framing of issues and consequences of choices. I'll take these up in what I hope will be a two cups of coffee note, like this one, tomorrow, or the next day I have network access, somewhere on the north shore of Lake Superior.

Eric Brunner-Williams

Candidate, NARALO ALAC Rep. election 2012

Posted on 10 August 2012

Hi Glenn,

This is the continuation of the note I sent the na-discuss list yesterday. As a reminder, I'm running for the North American RALO ALAC Rep, not writer for Foreign Policy, so I'm going to skip over the low hanging fruit like whether the ITU is an obscure UN agency and so forth.

The fundamental issue for the contractor (ICANN) exercising delegated rule making authority from the DoC/NTIA (Froomkin theory) or as a sui generis public-private multi-stakeholder actor (Simms theory) are not identical. No court has decided which theory, Professor Froomkin's, or Outside Counsel Simms's, is correct, so one needs to consider both.

If ICANN exercises delegated rule making authority, then ICANN needs to advise the DoC/NTIA on what issues raised by third party governments present no technical or administrative challenges to the current operational practice. This may, as advice must, in theory, be inconsistent with the government's current position of record as it enters discussion with other governments.

If ICANN is sui generis -- and Mr. Simms' theory appears to have been holed below the waterline earlier this year when the government held competitive bidding through the GSA for the IANA Function, not once, but twice -- then it need not, in theory, advise the government on issues which do not have operational or contractual consequences. It may decline to offer advice which may be inconsistent with the government's current position.

This then, whether or not to attempt to form advice which may be not a mere echo or paraphrase of the government's current position, is a "choice of theory of ICANN" question.

Posted 12 August 2012

Glenn,

The continuation of the note I sent the na-discuss list earlier was truncated\* -- this is the conclusion of that note.

The first fragment ended with this para:

"This then, whether or not to attempt to form advice which may be not a mere echo or paraphrase of the government's current position, is a "choice of theory of ICANN" question."

A restatement of this, also from the Froomkin-Simms series of articles in the Lewis and Clark Technology Law Review, is whether one views the contractor as exercising government agency, or not. In my view, the contractor exercises government agency. A widely held view is that ICANN is already, by some unidentified process, been made independent of the USG, and so exercises no government agency. As I mentioned in the prior fragment, this view is difficult to reconcile with the first competitive tender of the IANA Function contract since the initial, non-competitive award to USC/ISI decades ago, as well as the relatively brief period -- 36 months -- of the award to the incumbent contractor.

As a candidate running for the North American RALO ALAC Rep, my plain view on the "choice of theory of ICANN" question is that ICANN "exercises government agency."

I think the corporation has a duty to advise the DoC/NTIA on what issues raised by third party governments present no technical or administrative challenges to the current operational practice.

I think the ALAC has a consequent duty to advise the Board on the issues. As I noted before, advice may be inconsistent with the Board's, and the government's current positions of record on the issues.

In sum, thus far, my first note addressed the question of whether there is an issue relevant to the choice of candidates, and this, my second note, in two accidental parts, addressed the question of whether the ALAC has a duty to advise on the issues. In my next note (and I do hope I can wrap this up in just one more "two cup note") I'll briefly point out what advice I think the Board, and the government, require from the By Laws entity tasked to provide advice reflecting the public interest unrestricted by territorial concerns.

Eric Brunner-Williams

Candidate, NARALO ALAC Rep. election 2012

\* I was in Wawa (Ojib for "goose") Ontario. Downstream bandwidth was adequate for POP, upstream bandwidth was apparently not, and of course, sitting around for a sequence of HTTP POSTs to complete was out of the realm of endurable wastes of time.

Posted 12 August 2012

Hi Glenn,

This is the third part of the note I sent the na-discuss list on the 10th. My first note addressed the question of whether there is an issue relevant to the choice of candidates, my second note, in two accidental parts, addressed the question of whether the ALAC has a duty to advise on the issues.

In this note I'll briefly point out what I think is in the public interest unrestricted by territorial concerns, and can be communicated as formal advice, to the Board, and government.

Unfortunately, the mistake as to cause for the growth of the internet has to be dealt with, as taken at face value ordinarily sane people start saying things about the UN that used to just decorate rural billboards erected by the John Birch Society, or merely recite the deregulatory mantra that has lead to market failure in so many areas of the economy.

Senator Ron Wyden (D OR) chairs the Congressional Internet Caucus. He claims the absence of regulation is the primary cause for the growth of network attached devices.

The importance of the mistake as to cause is that "growth" appears to be objective (a sequence of numbers increasing non-linearly over time), and is argued in the Wyden narrative to be the primary cause for "innovation" and material and cultural well-being. I've the impression that this is the "standard narrative" in industry in North America.

The better analysis is that NIC prices dropped from the tens of thousands of dollars for the VAX 11/780 (I bought several for SRI's facilities in the mid-80s), to unpriced single-chip elements of the standard single board computer. Moore's Law was not restricted to NIC components, nor was it restricted to those NIC components the East Asian winners of the single board integration economic competition selected for their North American sales.

The price of attaching a device to a network dropped under a force as fundamental as gravity, unrelated to the public policy of any national business, research or commodity computer market, in particular, the climate in Silicon Valley, or Inside the Beltway.

The Wyden narrative can then only survive if attachment to networks in national market is sensitive to regulation. In my years of working through the IETF (my first contribution was to RFCs 1122 and 1123, though earlier I'd written the standard socket API description), I've not heard that device attachment rates correlated to any but draconian policies (e.g., Burma, North Korea), and the determining factor generally was business uptake and consumer discretionary spending. In short, its all about declining manufacturing cost and access to capital, not the presence, or absence, of the modern administrative state.

If regulation cannot be shown to have measurable effect, then the public interest is not necessarily identical to the the corporate, and momentary\* administration interests in deregulation.

Whether the regulatory oversight arises from the FTC (consumer protection), the FCC (telecommunications regulation), the DoJ (competition regulation), the DoC (through, or independent of ICANN), or some other agency of government\*\*, alone or in combination, or through agencies of the United States and one or more additional governments, the claim that regulation will have measurable adverse effect is unsupported except by ideology or economic interest in the absence of regulatory oversight.

Thus the ALAC advice to the Board should be to distance itself from the claims, unsupported by data, that deregulation, not DARPA dollars leading manufacturers down the Moore's Law manufacturing cost curve, created the current, unequal, but regionally pervasive, distributed computing capability.

Further, the ALAC advice to the Board should be that regulation, by one or more agencies, of one or more governments, presents no intractable issue, and that as the incumbent contractor, it can accommodate transition to a contractual model with two or more public authorities.

I know this all comes down to the ITU boogie man, it has been this way for decades of fencing between the connectionless (data) and the connectionist (voice) technical communities. The ITU has gotten less anachronistic -- in terms of technologies -- but it remains tied to a territorial and revenue model that challenge -- fundamentally -- the routing and transport model I helped document in RFCs 1122 and 1123.

However, the choices available to government, and therefore its contractor, are not limited to one, or one hundred and eighty governments. Many trans-national resources are policed by a small number of governments acting in the broader interest, with significant policy participation by civil society, such as ALAC offers currently.

As a reminder, I'm running for the North American RALO ALAC Rep, not writer for Foreign Policy, so I've skipped over the low hanging fruit like whether the ITU is an obscure UN agency and so forth.

Eric Brunner-Williams

Candidate, NARALO ALAC Rep. election 2012

\* Deregulation as a policy began during the Reagan and Bush I Administrations, continued during the Clinton Administration, and continued during the Bush II Administration. I recommend the accessible introduction to the second and third editions of Fox's Administrative Law, available at any academic law library, for a few thousand word summary of status of the American administrative state.

\*\* the DoD oversight period ended when I was at SRI, and despite the current froth of "cyber security" rhetoric and legislation, it is my hope that militarization of the civil data infrastructure will not increase.

Cc: Senator Ron Wyden, District Office, 405 East 8th Ave., Suite 2020 Eugene, OR, 97401 (via snail mail)

Posted 12 August 2012

Glenn,

Thanks for the thought provoking post. I've greatly enjoyed writing bits of a response over the past several days. The first note was written while minding children splashing about the beach on the north shore of Lake Huron. The second note was written in part in Wawa, and in part while again minding children splashing about the beach on the north shore of Lake Superior, as was the whole of the third note.

It has been a very pleasant writing experience, off-line, with intermittent access when traveling by road.

v4 exhaustion and the slow uptake of v6 point to futures of broken nets -- either due to carrier grade NATs, putting "smarts" back into the dumb network -- leading the connectionless network away from the end to end argument towards the connectionist (ITU) network model, or due to gateways essentially implementing the same scoping of address meaning -- leading the connectionless network away from the single address space (and hence single root) model towards an interconnect of national or regional networks model (see ITU, supra).

The ITU's proposal to replace the working regional address registries may fail, I contributed a policy note to the U.S. Delegation to the ITU Meeting on IPv6 (Geneva), in March of 2010, making the case that transnational populations could be adversely affected by making v6 allocations only through national registries -- an example being the Rom population in Europe, and one or more European governments pursuing policies adverse to Roms and in violation of the Treaty of Europe and International Law.

However, it is hard to keep a straight face and make the claim that the ITU must necessarily do worse at new gTLD policy making than ICANN has in the past year. If the ITU did exactly what ICANN did, adding only an equity of member state limit on identical business models, then ICANN's own diversity and inclusive goals would be better met than is currently the case -- where most of the approximately 2,000 identical business case applications are made by North American applicants using domestic or off-shore tax haven domiciles.

The next three years, when the IANA Functions contract is up for competitive bid again, when more than one bidder can be expected, will be very, very challenging for ICANN as an institution, and for the continued existence of its "public interest" mission contained in both the Green and White Papers.

Eric Brunner-Williams

Candidate, NARALO ALAC Rep. election 2012

**Evan Leibovitch**

Posted on 10 August 2012

On 10 August 2012 09:12, Eric Brunner-Williams <[ebw@abenaki.wabanaki.net](mailto:ebw@abenaki.wabanaki.net)>wrote:

> You may recall that the US DoC/NTIA issued a Request for Information  
> on the IANA Function, a NOTICE under the Administrative Procedures Act (APA).  
> The response of the CEO, and presumably the Board, a COMMENT under  
> the APA, viewed the IANA Functions as integral to the larger role of  
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> the Beckstrom letter and subsequently published a Request for  
> Proposals in the Federal Register for a competitive award of the IANA  
> Function, independent of the other roles carried out by the current contractor.  
>

And then, after all that hemming and hawing, the IANA contract was eventually awarded to....  
the current contractor.

Given the lack of transparency on all sides, we have no way of knowing whether the USG rejection of the original ICANN position was on genuine philosophical grounds, political gamesmanship vis the EU and ITU, or simply trying to extract more concessions from ICANN. But the end result was the status quo.

The effect on this process of Beckstrom's letter, the ALAC agreement with it, or any ancillary comments is impossible to determine but was likely negligible.

The point I'm attempting to make is that agreement isn't advice, and the

> ALAC, which includes a candidate in the current election, agreed with

> a view rejected by government -- its advice did not help the Board.

>

I am puzzled by the logical leap from "the ALAC's point of view being rejected by the US government", to "its actions were unhelpful or the wrong thing to do". I am quite sure I -- and many of you -- hold many personal beliefs that are contrary to various facets of US (or for that matter, Canadian or any) government policy. Expressing those beliefs is hardly unhelpful, and sometimes it is absolutely necessary.

One thing is for certain, though... ALAC's bylaw-defined role is to advise ICANN, not the US government. Our advice to ICANN on other matters -- most notably on the excesses of over-zealous trademark protection and use of the DNS redirection as a tool of law enforcement -- would similarly be rejected. But that does not make it wrong (let alone unhelpful) to provide such advice. In our comments on the GAC "scorecard" on the gTLD program, the ALAC sometimes sided with the governments (to the chagrin of some of our colleagues in civil society). But we also frequently pushed back, agreeing with the established ICANN positions as being closer to what we perceived as the global public interest. And sometimes we suggested a middle ground between the two.

What ALAC \*has\* done -- something in which I have played a significant role

-- is markedly improving the relationship between ALAC and governments within the ICANN sphere. I was one of the co-authors of the first-\*ever\* joint GAC-ALAC statement, on gTLD applicant support. That effort produced results, changing previously-firm ICANN's policy; having that kind of results-producing collaboration happen was more important than having my signature on it. And more collaborative work is yet to come, as we research areas of common concern such as ICANN's lack of transparency and its difficulty in enforcing its own contracts.

Cheers,

- Evan