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# DOMAIN NAME SYSTEM PRIVATIZATION: IS ICANN OUT OF CONTROL?

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON  
OVERSIGHT AND INVESTIGATIONS  
OF THE  
COMMITTEE ON COMMERCE  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

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JULY 22, 1999  
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**Serial No. 106-47**

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# DOMAIN NAME SYSTEM PRIVATIZATION: IS ICANN OUT OF CONTROL?

THURSDAY, JULY 22, 1999

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON COMMERCE,  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 11 a.m., in room 2322, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Bilbray, Bryant, Bliley (ex officio), Klink, Stupak, and DeGette.

Also present: Representatives Tauzin, and Pickering.

Staff present: Eric Link, majority counsel; Paul Scolese, majority professional staff; Mike Flood, legislative clerk; and Edith Holleman, minority counsel.

Mr. UPTON. Good morning everyone. One piece of housekeeping before we get started. I want to acknowledge and thank the Berkman Center for Internet and Society at Harvard Law School for carrying today's proceeding live over the Internet.

While the Berkman Center has an ongoing relationship with one of today's principle witnesses, the Internet Corporation For Assigned Names and Numbers, or ICANN, I have received assurances that the funding for Berkman's presence here today is being provided directly by Harvard University.

I might also add that this hearing is also being webcasted on the committee's website. I hope that many Internet users take advantage of this opportunity to listen in on the subcommittee's proceedings.

Today the subcommittee will examine the administration's efforts to transfer control of the Internet domain name system from the public sector to the private sector. This transition is important because the domain name system is a critical component of the Internet that routes all Internet traffic and allows users to locate websites and ensure e-mail is properly sent and hopefully received.

As such, it plays a vital role in the stability of the Internet. Under the direction of a 1997 Presidential Directive, the Department of Commerce moved to end the Federal Government's role in the DNS. To achieve this, the Department of Commerce released a series of proposals. The Department of Commerce's final proposal, known as the "White Paper," outlined the transfer of many of the DNS management functions to a private not-for-profit corporation.

This corporation was to be created by the Internet community at large through a consensus-building process. Ultimately, ICANN was selected and recognized as this not-for-profit corporation by Commerce in October 1998.

Many of the current DNS functions, such as registering .com, .net, and .org domain names are carried out by Network Solutions, Inc. or NSI. NSI carries out these functions under an exclusive cooperative agreement with the Department of Commerce.

NSI signed this cooperative agreement with the National Science Foundation in 1993. NSF managed this cooperative agreement until it was transferred to Commerce in September 1998. The Committee on Commerce gained direct jurisdiction of this issue when NSF transferred the cooperative agreement to the Department of Commerce in September 1998.

In October 1998, Chairman Bliley began reviewing the administration's selection of ICANN, how it was formed, and the selection of ICANN's board members. During the course of today's hearing, I think you will come to see that these questions are just as relevant today as they were last fall. The Department of Commerce recognized ICANN in November 1998 as the private sector body who would assume responsibility for the management of the domain name system. In the 8 months that have passed since then, ICANN has attempted to start filling its obligations to the administration.

Most notably, ICANN is responsible for introducing competition into the registration of domain names. Introducing competition in this area requires the cooperation of NSI, since under its agreement with the Department of Commerce, NSI maintains the authoritative registry of domain names.

Competition for Internet domain name registration currently is in a test period, with three competitors offering registration services, and two others soon to follow. Today we will hear from 3 of the 5 test-bed registrars.

Recently some problems have developed in the transfer of the domain name system from the public sector to the private sector. For instance, the test-bed period for competitive registrars has been extended several times. Also, NSI and ICANN have been unable to reach an agreement addressing the transfer of fundamental responsibilities relating to Internet management. This impasse needs to be addressed before the administration's transfer plan can go much further.

Finally, many observers have taken issue with several decisions made by ICANN's unelected interim board of directors, including their decision to hold portions of their meetings in private, a well as the imposition of a \$1 per domain name fee. However, following an inquiry by Chairman Bliley regarding these practices, ICANN announced that it was suspending both until further notice.

Today's hearing will provide an opportunity to explore the present state of the domain name system's transition, and evaluate whether the administration's plan, as it is currently being implemented, may benefit or threaten the Internet.

In addition to hearing from the three principal players in this situation, the Department of Commerce, ICANN and NSI, we also



will be hearing from a variety of interested parties who will share their perspective on the present situation.

I thank all of today's witnesses for testifying before this subcommittee on a matter that I am sure will take on increasing importance. I would note, too, that those in attendance need to move from the back wall, or else you will be asked to leave. So, if you can spread out a little so we can shut that door, it will be helpful.

I yield at this time my ranking member and friend, Mr. Klink. [The prepared statement of Hon. Fred Upton follows.]

PREPARED STATEMENT OF HON. FRED UPTON, CHAIRMAN, SUBCOMMITTEE ON  
OVERSIGHT AND INVESTIGATIONS

One piece of housekeeping before we get started today. I want to acknowledge and thank the Berkman Center for Internet and Society at Harvard Law School for carrying today's proceedings live over the Internet. While the Berkman Center has an ongoing relationship with one of today's principal witnesses, the Internet Corporation for Assigned Names and Numbers, I have received assurances that the funding for Berkman's presence here today is being provided directly by Harvard University. I might also add that this hearing is also being webcasted on the Committee's website. I hope that many Internet users take advantage of this opportunity to listen in on the Subcommittee's proceedings.

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Under the direction of a 1997 Presidential Directive, the Department of Commerce moved to end the Federal government's role in the DNS. To achieve this, the Department of Commerce released a series of proposals. The Department of Commerce's final proposal known as the "White Paper"—outlined the transfer of many of the DNS management functions to a private, not-for-profit corporation. This corporation was to be created by the Internet community at large through a consensus-building process. Ultimately, the Internet Corporation for Assigned Names and Numbers—or ICANN ("eye-can")—was selected and recognized as this not-for-profit corporation by the Department of Commerce in October 1998.

Many of the current DNS functions, such as registering com, net and org domain names are carried out by Network Solutions, Inc.—or NSI. NSI carries out these functions under an exclusive cooperative agreement with the Department of Commerce. NSI signed this cooperative agreement with the National Science Foundation in 1993, and the National Science Foundation managed this cooperative agreement until it was transferred to the Department of Commerce in September 1998. The Committee on Commerce gained direct jurisdiction of this issue when National Science Foundation transferred the cooperative agreement to the Department of Commerce in September 1998.

In October 1998, Chairman Bliley began reviewing the Administration's selection of ICANN, how ICANN was formed, and the selection of ICANN's interim board members. During the course of today's hearing, I think you will come to see that these questions are just as relevant today as they were last fall.

The Department of Commerce recognized ICANN in November 1998 as the private sector body who would assume responsibility for the management of the domain name system. In the eight months that have passed since then, ICANN has attempted to start fulfilling its obligations to the Administration. Most notably, ICANN is responsible for introducing competition to the registration of domain names. Introducing competition in this area requires the cooperation of NSI, since under its agreement with the Department of Commerce, NSI maintains the authoritative registry of domain names. Competition for Internet domain name registration currently is in a test period, with three competitors offering registration services and two others soon to follow. Today we will hear from three of the five test bed registrars.

Recently, some problems have developed in the transfer of the domain name system from the public sector to the private sector. For instance, the test bed period for competitive registrars has been extended several times. Also, NSI and ICANN have been unable to reach an agreement addressing the transfer of fundamental responsibilities relating to Internet management. This impasse needs to be addressed

before the Administration's transfer plan can go much further. Finally, many observers have taken issue with several decisions made by ICANN's unelected interim board of directors, including their decision to hold portions of their meetings in private, as well as the imposition of a \$1 per domain name fee. However, following an inquiry by Chairman Bliley regarding these practices, ICANN announced that it was suspending both until further notice.

Today's hearing will provide an opportunity to explore the present state of the domain name system's transition, and evaluate whether the Administration's plan, as it currently is being implemented, may benefit or threaten the Internet. In addition to hearing from the three principal players in this situation—the Department of Commerce, ICANN and NSI—we also will be hearing from a variety of interested parties who will share their perspective on the present situation.

I thank all of today's witnesses for testifying before this subcommittee on a matter that I'm sure will take on increasing importance.

Mr. KLINK. I thank the chairman again for holding what I think is a very important hearing on the governing of the Internet and the process under which the Commerce Department is attempting to introduce competition into the domain name registry system. I thank the majority for working with the minority on the witnesses here today. They have been very cooperative.

The concept of turning over a major portion of the international Commerce to a non-profit, non-governmental organization is a grand, complex, and fascinating experiment which has never been tried before. We do not know if, in the long-run, it is going to be successful.

If we can judge by the number of calls and visits to our office from several of the parties before us today, there is a great financial interest in the outcome. I do hope, however, that despite the title of this hearing, the majority's mind has not been made up about this very new organization, ICANN, but that we are all open to a full and fair discussion of the issues at hand today.

The Internet Corporation For Assigned Names and Numbers was established last fall to bring competition to the business of registering Internet domain names and moving it from the control of the Department of Commerce to a non-governmental organization. Currently this business, which is worth hundreds of millions of dollars annually, and growing exponentially, is in the hands of Network Solutions, Inc., through a cooperative agreement with the Commerce Dept. NSI, by operating a government-created monopoly, has grown from a minuscule private company in 1993, which was being paid by the U.S. taxpayers for its services, to a publically held, \$120 million-plus company, to whom every person in the world who wants a .com, or .org address pays \$70 every 2 years.

Make no mistake, this is a very lucrative business. In the first quarter of 1999, NSI's earnings increased by 130 percent over the first quarter of 1998. Its stock is currently selling for \$140 a share compared to less than \$20 a year ago.

One of the witnesses today will testify that annual revenues for domain name registrations are expected to be in excess of \$2 billion in 4 years. Registrars also provide other Internet services. In our economic system, no one can support the continued existence of such a monopoly.

I can only hope, Mr. Chairman, that the purpose of this hearing is not going to be to tear apart or even cripple ICANN, an organization that has been in existence for less than a year, so that the competition in domain name registration is delayed again, and

again, with the deliberate or the unintended effect of extending a monopoly. Recently there have been some very disturbing reports on the threats of Internet disruption, intellectual property claims of the ownership of the .com registry, and delay tactics by NSI to prolong its unique market position.

Today its Chief Executive Officer was quoted in the Washington Post as saying, "ICANN is not necessary." In its testimony, NSI says that it does not have to recognize ICANN, although the Commerce Department has directed them otherwise. NSI also appears to be saying that it, alone, will decide if ICANN's procedures for accrediting new registrars are legitimate or if there is industry consensus.

On the other hand, without any industry input, NSI requires 2-year registrations with a large penalty for transferring from one registrar to another. That can only benefit NSI. I am concerned about what appears to be a school yard bully approach. I expect the Department of Commerce to take firm and appropriate steps to deal with these issues.

I have to say that I have seen no indication of that to-date. I also expect to receive today from NSI their response and their unequivocal commitment to furthering full and open competition as soon as possible. It is one thing to bring forward legitimate issues.

It is quite another for the dominant market player to refuse to participate in a process because it cannot fully control it. In a growing market, there should be room for everyone, but everyone is going to have to give a little. We will also hear from several witnesses today that they believe that ICANN has over-stepped its authority as a non-representative organization with an unelected board.

In this environment in which many parties have vested interest in the outcome and eventual scope of ICANN's authority, it can be difficult for policymakers to determine which issues are legitimate and which are being raised to cause delay or confusion in creating a new competitive structure.

However, some of them appear to be worth looking at. They include the alleged dominance of large corporations with significant trademark issues at ICANN. Who should determine the procedures for resolving trademark disputes? Should ICANN use its process for accrediting registrars to impose unilaterally an alternate dispute resolution process on every holder of a .com or .org address, or to set jurisdictions for settling trademark disputes?

Should ICANN limit the number of domains and the resulting increase in competition because trademark holders do not want to review large numbers of domains for possible infringements. In its White Paper, Commerce even suggest that ICANN should order its registrars to refuse to grant famous name domain addresses to parties that do not hold the trademark for those names.

Many, many people have legitimate claims to addresses that may be or may become someone else's trademark. Who is to determine what a famous name is? The issue of accountability is a major one for both ICANN and NSI. If ICANN is not responsible to any government or governmental organization, to whom does an aggrieved party go when a decision by ICANN, or one of its agents, has damaged that party's business or their relationship?

When the interim Chairman of ICANN tells a consumer representative that pro-consumer policies will never be adopted by the board, we must wonder exactly what type of organization we are setting up. ICANN's habit of holding part of its board meetings in closed sessions also appears to be a mistake.

On the other hand, to whom is NSI accountable in its pricing and contract conditions? Another very important question is how long NSI should retain its second monopoly as the administrator of the registry data base without any competitive process to subject fees and services to market review?

Already, potential competitors are alleging that these fees are out of control. NSI claims it actually owns the data base to do what it wants with it. In the long-run, the stability of the Internet is not dependent on a particular software configuration or the number of competing domain registries. It must be under the control of an organization that is perceived by all stakeholders to be completely trustworthy and fair.

For an organization like ICANN to survive without government controls and rules, it cannot be perceived as being under the control of one interest group or another. Congress must move expeditiously to ensue that full competition is commenced immediately.

ICANN must move expeditiously to ensure that it is a representative organization and has some authority to carry out its mandate, but neither can do so without the full cooperation of Network Solutions.

If this is not received, I predict that only the lawyers will benefit in the end.

I thank the chairman.

[The prepared statement of Hon. Ron Klink follows:]

PREPARED STATEMENT OF HON. RON KLINK, A REPRESENTATIVE IN CONGRESS FROM  
THE STATE OF PENNSYLVANIA

Mr. Chairman, thank you for holding this very important hearing on the governance of the Internet and the process under which the Commerce Department is attempting to introduce competition into the domain name registry system. The concept of turning over a major portion of international commerce over to a non-profit, non-governmental organization is a grand, complex and fascinating experiment which has never been tried before. We do not know if, in the long run, it will be successful. If we can judge by the number of calls and visits to our offices from several of the parties before us today, there is great financial interest in its outcome. I do hope, however, that, despite the title of this hearing, the majority's mind has not already been made up about the very new organization, but is open to a full and fair discussion of the issues at hand today.

The Internet Corporation for Assigned Names and Numbers (ICANN) was established last fall to bring competition to the business of registering Internet domain names and move it from the control of the Department of Commerce to a non-governmental organization. Currently, this business—which is worth hundreds of millions of dollars annually and growing exponentially—is in the hands of Network Solutions Inc. (NSI) through a cooperative agreement with the Commerce Department. NSI, by operating a government-created monopoly, has grown from a minuscule, private company in 1993 which was being paid by the U.S. taxpayer for its services to a publicly held, \$120 million-plus company to whom every person in the world who wants a dot-com or dot-org address pays \$70 every two years.

Make no mistake—this is a very lucrative business. In the first quarter of 1999, NSI's earnings increased by 130 percent over the first quarter in 1998. Its stock is currently selling for \$140 a share compared to less than \$20 a year ago. One of the witnesses today will testify that *annual revenues* for domain name registrations are expected to be *in excess of \$2 billion in four years*. And registrars also provide other Internet services.

In our economic system, no one can support the continued existence of such a monopoly. I can only hope, Mr. Chairman, that the purpose of this hearing is not to tear apart or even cripple ICANN, an organization that has been in existence for less than a year, so that competition in domain name registration is delayed again and again with the deliberate or unintended effect of extending a monopoly. Recently, there have been some very disturbing reports of threats of Internet disruption, intellectual property claims of the ownership of the dot-com registry and delay tactics by NSI to prolong its unique market position. Today, its chief executive officer was quoted in the *Washington Post* as saying ICANN is not necessary. In its testimony, NSI says that it does not have to recognize ICANN, although Commerce has directed them otherwise. NSI also appears to be saying that it alone will decide if ICANN's procedures for accrediting new registrars are legitimate or if there is industry consensus. On the other hand, without any industry input, NSI requires two-year registrations with a large penalty for transferring from one registrar to another. That can only benefit NSI. I am very concerned about this school yard bully approach, and I expect the Department of Commerce to take firm and appropriate steps to deal with these issues. I must say that I have seen no indication of that to date. I also expect to receive today from NSI their response and their unequivocal commitment to furthering full and open competition as soon as possible. It is one thing to bring forward legitimate issues; it is quite another for the dominant market player to refuse to participate in a process because it cannot fully control it. In a growing market, there should be room for everyone, but everyone is going to have to give.

We also will hear from several witnesses today that they believe that ICANN has overstepped its authority as a non-representative organization with an unelected board. In this environment in which many parties have a vested interest in the outcome and eventual scope of ICANN's authority, it can be difficult for policymakers to determine which issues are legitimate and which are being raised to cause delay or confusion in creating a new competitive structure. However, some of them appear to be worth looking at. They include the alleged dominance of large corporations with significant trademark issues in ICANN. Who should determine the procedures for resolving trademark disputes? Should ICANN use its process for accrediting registrars to impose unilaterally an alternate dispute resolution process on every holder of a dotcom or dot-org address or to set jurisdictions for settling trademark disputes? Should ICANN limit the number of domains—and the resulting increase in competition—because trademark holders don't want to review large numbers of domains for possible infringements? In its White Paper, Commerce even suggested that ICANN should order its registrars to refuse to grant "famous name" domain addresses to parties not holding the trademark for those names. Many, many people may have legitimate claims to addresses that may be or become someone else's trademark. Who determines what a "famous name" is?

The issue of accountability is a major one for both ICANN and NSI. If ICANN is not responsible to any government or governmental organization, to whom does an aggrieved party go when a decision by ICANN or one of its agents has damaged that party's business or other relationships? When the interim chairman of ICANN tells a consumer representative that proconsumer policies will never be adopted by the board, we must wonder exactly what type of organization we are setting up. ICANN's habit of holding part of its board meetings in closed sessions was also a mistake. On the other hand, to whom is NSI accountable in its pricing and contract conditions?

Another very important question is how long NSI should retain its second monopoly as the administrator of the registry database without any competitive process to subject fees and services to market review. Already potential competitors are alleging that these fees are out of control. But NSI claims that it actually owns the database and can do whatever it wants with it.

In the long run, the stability of the Internet is not dependent on a particular software configuration or the number of competing domain registries. It must be under the control of an organization that is perceived by all stakeholders to be completely trustworthy and fair. For an organization like ICANN to survive without governmental controls and rules, it cannot be perceived as being under the control of one interest group or another. Commerce must move expeditiously to ensure that full competition is commenced immediately; ICANN must move expeditiously to ensure that it is a representative organization and has some authority to carry out its mandate. But neither can do so without the full cooperation of Network Solutions. If this is not received, I predict that only the lawyers will benefit.

## MASTERS OF INTERNET DOMAINS GO TO WAR

[The Washington Post, July 22, 1999]

By Rajiv Chandrasegaran

Quietly tapped by a Washington lawyer acting on the wishes of a reclusive university researcher, the 10 board members were meant to be the first trustees of the Internet: volunteer stewards who would assume technical control of the global computer network and break up Network Solutions Inc.'s lucrative monopoly in registering electronic addresses.

It was a task that was almost universally cheered by Internet activists and businesses when the group was formed nine months ago. But not anymore. A growing number of critics contend that the group, dubbed ICANN, is stealthily morphing into a regulatory agency for the traditionally unregulated Internet.

Leading the charge against ICANN—by underwriting activists and hiring lobbyists—has been one very self-interested party: Herndon-based Network Solutions, which is refusing to participate in ICANN's plans for competition.

The battle between ICANN and Network Solutions has the potential to disrupt the \$150 billion flow of information and commerce on the Internet, as both sides engage in a tug of war over the network's master database of addresses. The fight also underscores how the Internet has graduated from being a creature of high-minded and free-wheeling academics into a big business proposition that is struggling to establish some form of professional management.

Technical control of the Internet has long rested with the U.S. government, which created the network in the 1960s. But in a coming-of-age moment for the online world, the Clinton administration decided last year to transfer its authority to the private sector—through ICANN.

ICANN is headed by Esther Dyson, an author and analyst who is one of the technology industry's best-known leaders. She has forcefully warned Network Solutions that it could lose its right to assign and manage addresses, its chief source of revenue, if it does not cooperate with ICANN. But Network Solutions has been unmoved, refusing to even recognize ICANN as a legitimate organization. "They're not really necessary," said Jim Rutt, Network Solutions' chief executive.

Dyson argues that Network Solutions' opposition to ICANN's plans to foster competition isn't based on principle, but out of a desire to "prolong its monopoly."

Administration officials have called Network Solutions' refusal to deal with ICANN "extremely destabilizing for the Internet" and "quite harmful to its development." Network Solutions, in turn, has warned that there would be "serious security and stability issues" for the Internet if the company is stripped of its ability to manage addresses that end with ".com," ".org" and ".net." Network Solutions warned such a move could result in ICANN and the government "disconnecting 5 million Internet addresses."

"The risks are very high," said Harris Miller, the president of the Information Technology Association of America. "The thought that these obscure techie issues are somehow going to affect the operation of the Internet is really a very scary proposition."

Network Solutions, ICANN and the administration all have incentives to reach an agreement without a bloody fight. For Network Solutions, not striking a deal with the other two and risking the chance it could lose its address-management role could worry many of its investors, who recently have bid the company's stock to record highs on the assumption that it will continue to dominate the address business. For the administration and ICANN, yanking away NSI's address-management function could open them to criticism that they are fracturing the network.

"I think we're all interested in making this work," Dyson said.

At the same time, industry and government sources say the negotiations have not progressed significantly in recent weeks, creating a high possibility that no side might decide to take drastic action. "The process," said one source close to the matter, "is not moving forward the way it should be."

The roots of the current conflict extend back to 1992, when the Internet was the territory of academics and computer enthusiasts. Needing an organization to manage addresses on the network—known as "domain names"—the National Science Foundation entered into a cooperative agreement with defense contractor Science Applications International Corp., which eventually spun off the business as Network Solutions.

As businesses began their frenetic rush to the Internet, Network Solutions' arcane agreement, which allowed it to charge \$35 a year to register a domain, quickly turned into a lucrative government-sanctioned monopoly. To date, the company has registered more than 5 million domain names, helping it post an \$11.2 million profit on revenue of almost \$94 million last year.

Soon, other firms began demanding a piece of the action, arguing that having a monopolist running the operation was impeding the growth of electronic commerce. After debating the issue for months, the White House decided last year to open domain registrations to competition and have a nonprofit corporation manage the process.

It turned out to be easier said than done.

There was no nonprofit group ready to assume the reins, so the government turned to Jonathan B. Postel, one of the Internet's founders. A Birkenstock-wearing researcher at the University of Southern California who had long been critical of NSI's monopoly, Postel set about soliciting suggestions from the Internet community for the corporation's board.

Postel then drew up a list and had his Washington-based lawyer, Joe Sims, contact the prospective members. He included such industry and academic luminaries as Dyson and Linda Wilson, the president of Radcliffe College. But just as the group was readying its first meeting last fall, Postel died.

The organization, formally named the Internet Corp. for Assigned Names and Numbers, eventually was pulled together by Sims. In April it picked five firms, including Dulles-based America Online Inc., to begin offering domain registrations on a test basis. ICANN has selected two dozen other firms to offer competing registration services, but they will not be able to until ICANN, Network Solutions and the Commerce Department can agree on pricing and other issues.

Under the government's competition plan, Network Solutions would become one of several firms offering address registration services, but it would still have the sole right to run the master database of addresses. That database would tell firms if a certain address already is taken, preventing them from issuing a duplicate. The firms would pay a small fee to Network Solutions to keep track of addresses, but thus far, Network Solutions and the government thus far have been unable to agree on the size of the fee.

Meanwhile, from almost the instant it was founded, ICANN has come under fire from many quarters of the Internet community. Activists have questioned the way the board was picked and its decision to meet behind closed doors. The board's subsequent decisions to charge a \$1 fee on every domain to fund its operations and support a World Intellectual Property Organization plan aimed at resolving trademark disputes further enraged the activists, who worry that ICANN is moving well beyond its technical management mandate to more broadly regulate the Internet.

"The Internet has been successful because it never had any centralized management," said Tony Rutkowski, an Internet consultant in Northern Virginia who performs some work for Network Solutions. "ICANN appears to be out to change that."

ICANN officials deny they are moving beyond technical oversight and say much of the criticism reflects natural growing pains as the Internet moves to a self-governing structure. Nevertheless, Dyson admits it was a "political and practical mistake" to hold closed meetings and vows that future gatherings will be open. And on Monday, ICANN decided to abandon the \$1 fee, which was called an "Internet tax" by critics.

"It became an issue that distracted from our mission," Dyson said. She said ICANN, which is essentially broke, instead will look for contributions from businesses and the government to keep the group afloat.

Dyson and Sims blame Network Solutions for much of the opposition to ICANN, which Sims believes, is being used as a whipping boy for Network Solutions' disagreements with the government. "We're an easier target than the government," said Sims, who contends that Network Solutions "has put a lot of work into supporting, encouraging and actually paying for critics" of ICANN. Network Solutions also has enlisted a team of high-powered lobbyists, led by Dan Dutko, whose firm also represents AT&T Corp. and the parent company of Federal Express, to press its case on Capitol Hill.

Today, House Commerce Committee Chairman, Thomas J. Bliley Jr. (R-Va.) plans to hold a hearing titled: "Domain Name System Privatization: Is ICANN Out of Control?"

Given the differences that remain among Network Solutions, ICANN and the administration, sources close to the negotiations believe there is a high possibility the Commerce Department either would strip the firm of its address-management function or the company would simply walk away from the agreement, opening itself to competition on more favorable terms and forcing the government to file a lawsuit if it wants to have someone else run the address database.

Industry and academic experts following the debate worry that both sides are playing a high stakes game of political chicken with the Internet's critical infrastructure.

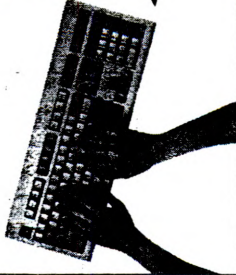
"There's an awful lot at risk here," said Michael Froomkin, a law professor at the University of Miami who recently helped start a group called ICANN Watch. "And thus far, neither side seems to be doing much to minimize that risk."

## How the Internet's Address Directory Works

**1** When a user types in a World Wide Web address, the request is passed along to the user's Internet service provider.

**2** When the ISP receives the request, it first searches its own servers for the corresponding Internet protocol number, a unique number assigned to each Internet "domain," analogous to a telephone number. Most large ISPs have a "name server" that contains the IP numbers for many commonly accessed Internet domains. The IP number for [www.washingtonpost.com](http://www.washingtonpost.com), for instance, is 209.130.187.10. The number does not denote a geographic location; instead, it identifies the ISP that hosts the site and the particular point on the ISP's network where the site is located, allowing traffic to find the site.

[www.washingtonpost.com](http://www.washingtonpost.com)



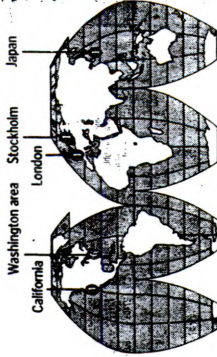
**3** If the IP number is located, the site is contacted and sends back a page that is displayed on the user's screen. The entire process usually takes less than a second.

**4** If the IP number for the site is not stored on the ISP's servers, the ISP then queries one of 13 "root" servers, the Internet's equivalent of the White Pages phone directories. These servers are all authentic lists of domain names and their corresponding IP numbers. Once the number is found, the site is accessed.



**5** Network Solutions, which manages the master database of all domains that end in ".com," ".org" and ".net," updates the 13 root servers daily. It runs the "root server," which is considered the authoritative server for the Internet as a whole.

*There are 13 root servers in the world—10 of them in the United States.*



BY MICHAEL LEVY—THE WASHINGTON POST



Mr. UPTON. Are you a lawyer?

Mr. KLINK. I am not a lawyer.

Mr. UPTON. I recognize the chairman of the full committee, Mr. Bliley.

Chairman BLILEY. Thank you, Mr. Chairman.

I am glad you are holding this hearing today. The Internet domain name system is at a critical crossroads. It appears that there may be serious roadblocks to achieving a successful move to private control of this system.

Consumers, teachers, and businesses have a stake in seeing that this system go from government control to the private sector. Today's hearing provides an opportunity for the committee and the public to question the administration's actions on this plan.

We will hear from the key players on this matter, including ICANN, the Department of Commerce, and Network Solutions, as well as others with an interest in this process. Today also marks the first time that ICANN will appear in a public forum since it was selected last October to run the day-to-day mechanics of the Internet.

As part of our larger E-commerce initiative, the committee has focused on the domain name system. In June of last year, the subcommittee on Telecommunications, Trade, and Consumer Protection held a hearing on the future of the domain name system.

As I said at the start of that hearing, "we must see to it that the transfer of the domain name system ensures stability and continuity. The failure of the domain name system could have a profoundly negative impact on electronic commerce."

Given the popularity of the Internet for business, learning, and entertainment, I believe that this statement is even more true today than it was in June of last year. That is why, since last June, the committee has investigated the transition of the domain name system to the private sector.

We wrote last October to the administration to inquire about the selection of ICANN. Most recently, last month we asked ICANN and the Department of Commerce to explain in more detail the reasons for some of ICANN's actions and the Department's view of these actions.

We asked ICANN about the notion that board meetings may be held in private, and the notion of a \$1 per domain name fee. Think about that; \$1 collected for each name, as millions of names come online. I believe this is an unauthorized tax on the American people. Since my inquiries, ICANN appears to be backing down on both of these misguided ideas.

Needless to say, the impact that ICANN's actions could have on the Internet and E-commerce is huge. The committee is obligated to ask questions. Indeed, failure to ask them would have been a lapse of duty on our part. There has been much finger-pointing between ICANN, Network Solutions, and the Department of Commerce about who is to blame for this morass and, in particular, the failure of Network Solutions and ICANN to reach an agreement on the transfer.

I believe the Department of Commerce needs to answer a few questions on whether they had a well thought-out plan. I must say that, at least to this observer, it does not appear some basic issues

were adequately considered by the administration before it adopted and implemented its privatization plan.

Therefore, I urge the Department of Commerce to redouble its efforts in this very important area, in order to ensure that the Internet's stability is not threatened by continuing disagreements related to the transfer.

I have said on many prior occasions that I fully support the goals of the administration's White Paper, which calls for the privatization of the domain name system. However, my support for this process does not mean that I, or this committee, will turn a blind eye when confronted with troubling developments during this transition. The Internet is too important to this Nation, and the world at large, for this committee to stay on the sidelines.

Thank you, Mr. Chairman for your work on this hearing. I want to thank all the witnesses today for their appearance. I look forward to their testimony.

Mr. UPTON. Thank you, Mr. Chairman. Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman.

Mr. Chairman, I am eager to get to testimony, so I will not make a long opening statement. I would ask unanimous consent to put my full statement and also for other committee members who are not here to put their opening statements in the record.

Mr. UPTON. Without objection, all members of the subcommittee and the committee will be allowed to put in their remarks.

Ms. DEGETTE. Thank you, Mr. Chairman.

As in many parts of the country, my home State of Colorado is participating in the boom associated with the rapid expansion of the Internet and Internet-related services. Sometimes the pace change is breath-taking and so are the economics, I think as evidenced by our audience here today.

A key component of this economic marvel is that after the Federal Government provided funding and then developed much of the Internet in its early day, the free market was allowed to voluntarily invest capital, assume risk, and usually to reap the reward of its investment, often with spectacular results. Today I think we are addressing another very important piece of the Internet, the domain name system and our attempts to privatize the registry. Without this system, the Internet would be like an international highway system without any road signs. Obviously, a central, standardized, internationally recognized registry is necessary for success.

In reviewing the written testimony submitted in advance by some of the witnesses today, I am concerned, as others have expressed, about the progress that is being made in moving the domain name system registry into the open market where competition can benefit the consumer in the way it has in so many other Internet-related services by adding value, significantly reducing cost, and spurring innovation.

I am also concerned that while we await this expected progress, there appears to be a private contractor reaping significant benefits from an apparent monopoly over the domain name system registry. I am told that the number of domain names registered is doubling every 9 months. Thus, we should be experiencing a tremendous economy of scale.

I look forward to hearing from the Commerce Department witnesses, ICANN and NSI, as to why we are keeping these expected benefits from consumers and why competition is being hindered in this service. I expect the issue of the apparent monopoly is, itself, the heart of the matter and it could easily consume this hearing, as well as other hearings. I am aware there are many issues of concern regarding the establishment of ICANN. We have heard many of them here today. I believe it would be difficult for this committee to flesh out and address all of those issues in just one hearing, but I do believe they are worthy topics.

I want to thank you, Mr. Chairman, for taking this step forward. I look forward to additional hearings on this topic, if we need. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. UPTON. Thank you. Mr. Bilbray.

Mr. BILBRAY. Yes, Mr. Chairman.

I want to thank you for convening this hearing today on this complex and critical issue. Mr. Chairman, I would say that I think this hearing is important for a number of reasons. There are a number of what I see as primary questions that need to be examined here and now, such as the status of the continuing progress toward competition in the NSI, the past activities and future intentions of ICANN, and the question of administrative oversight of the entire process.

Those are important discussions that we need to make. I think that this hearing will shed a good deal of light on these questions. From reading the testimony of the first panel of witnesses, it would appear that a heightened level of understanding, and perhaps communication, now exist between the committee, NSI, and ICANN.

This is beneficial for the purpose of this hearing and more for the broader discussion of the bigger issues. The continuing positive growth of the of the Internet is at stake. Mr. Chairman, I hope this is what we will keep in mind as we hear the testimony of witnesses.

We are in a unique position of being able to profoundly influence the continuing development of the Internet and clearly it is essential that we carefully consider all of the information and scenarios before us so that we can proceed in a wiser manner.

At the end of the day, we need to be assured that the Internet and the infrastructure that operates it is available, understandable, and accountable, not to us or any one entity, but to the public at large, the student, the businessman, and the consumer.

We have much to learn and to understand about how the future of the Internet will be shaped. We have a responsibility to do what we can in order to see that it is done as appropriately as humanly possible.

Thank you again for holding this hearing, Mr. Chairman. I look forward to the testimony of the witnesses. I yield back.

Mr. UPTON. Thank you, Mr. Bilbray.

Does the chairman of the Telecommunications Subcommittee wish to make an opening statement? Mr. Tauzin.

Mr. TAUZIN. Mr. Chairman, if I did make an opening statement, it would almost be exactly word-for-word what the chairman of our full committee has already delivered. I want to tell him, make it ditto. I deeply appreciate his statement today.

I would only add that just a few months ago, if anyone asked what ICANN was, they would have guessed it was some sort of support group for the work of Dr. Normal Vincent Peale. It is only sort of newly arrived on the scene. It is obviously something we need to learn a great deal more about.

I can also tell you that I have met with a number of the witnesses who are here today from the Commerce Department, Ms. Burr, in particular, I can assure I have learned that she is not related, as some have claimed, to the infamous trader Aaron Burr.

Mr. UPTON. I thought that was Richard Burr.

Mr. TAUZIN. And neither is she related to our great patriot Richard Burr. Again, I want to thank you and the Oversight Committee for doing this work. This is critical to the Internet. The work you do in this Oversight hearing we will follow closely, the Telecommunications Committee, because of course it is critical to our work in ensuring that all of us on the Commerce Committee that commerce is not only protected, but enhanced in this process.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you. Welcome, witnesses.

For the audience, I would note that Ms. Becky Burr is the Acting Associate Administrator for the Office of International Affairs of the National Telecommunications Information Agency at the Department of Commerce; Ms. Esther Dyson, Interim Chairman of ICANN; Mr. Mike Roberts, Interim President and CEO for ICANN; and Mr. Jim Rutt, CEO for Network Solutions, and Mr. Pincus, General Counsel of the Department of Commerce.

We have a long-standing practice in this subcommittee of taking testimony under oath. Do any of you have objection to that?

[Chorus of nays.]

Mr. UPTON. Also, under House Rules, you are allowed to have counsel, if you wish to have it. Do any of you wish to have counsel here?

[Chorus of nays.]

Mr. UPTON. I am just checking. We are not lawyers up here. If you would stand and raise your right hand.

[Witnesses sworn.]

Mr. UPTON. Thank you. You are now under oath.

We will start with Ms. Burr.

**TESTIMONY OF ANDREW J. PINCUS, GENERAL COUNSEL; ACCOMPANIED BY BECKY BURR, ACTING ADMINISTRATOR, OFFICE OF INTERNATIONAL AFFAIRS, NATIONAL TELECOMMUNICATIONS INFORMATION AGENCY, DEPARTMENT OF COMMERCE; ESTHER DYSON, INTERIM CHAIRMAN, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, ACCOMPANIED BY MIKE ROBERTS, INTERIM PRESIDENT AND CHIEF EXECUTIVE OFFICER, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; AND JIM RUTT, CHIEF EXECUTIVE OFFICER, NETWORK SOLUTIONS INCORPORATED**

Ms. BURR. I am here with the General Counsel.

Mr. PINCUS. Thank you, Mr. Chairman.

Ms. Burr and I appreciate the opportunity to testify before this subcommittee on behalf of the Commerce Department regarding

management of the domain name system. Continuing the dialog, as Chairman Bliley mentioned, that has been going on now for more than a year with the committee on this subject, we certainly welcome the interaction and hope it will continue as this process moves on into the future.

It has by now become a cliché to observe that the Internet is a totally new phenomenon, born global, growing at a rate unprecedented for a new medium of communications and commerce, and changing rapidly as technology evolves. We believe that this new phenomenon requires a new approach from government, in particular, the administration has made private sector leadership and minimal government involvement the keystone of its electronic commerce policy. Ultimately, of course, it is the role of government to ensure that the public interest is protected.

If the private sector cannot accomplish that, then government must act. We believe we must give the private sector a reasonable chance to do the job. Unlike many aspects of the Internet, domain name management has not been a private sector function.

It has been conducted entirely under the auspices of the Federal Government. For example, as several of the committee members have mentioned domain name registration services have been available from only one company, Network Solutions, that operates pursuant to an agreement with the government.

In July 1997, the President directed Secretary Daley to make the governance of the domain name system private and competitive. Following two rounds of notice and comment, and consideration of more than 1,000 comments, as the chairman mentioned, the Commerce Department in June 1998 issued a Statement of Policy, the White Paper, that is the blueprint for this transition process.

The White Paper set forth substantive conclusions with regard to domain name management policy, and also laid out a process for the transition to private sector management and the transition to competition. The first step in the privatization process came at the end of November 1998 when, after another public comment process, the Commerce Department entered into a Memorandum of Understanding with ICANN.

The terms of that MOU are important. It did not confer immediately upon ICANN responsibility for domain name system management. Rather, it is an agreement, "to jointly design, develop, and test the mechanisms and procedures that should be in place to transition domain name system management responsibility from the U.S. Government to a private sector not-for-profit entity."

Once testing is successfully completed, the MOU states "it is contemplated that DNS management will be transitioned." Obviously if the project is not successful, that transition of responsibility will not occur. The MOU also incorporates a number of protections.

It bars, for example, singling out one party for disparate treatment, prohibits unjustified or arbitrary actions, and requires that this private sector management operation be setup in accordance with the principles that are laid out in the White Paper.

ICANN agreed to do something that was literally unprecedented; create a private sector organization that encompasses all of the many and varied Internet constituencies, to do that on a global

basis, and to create a process that would allow for consensus-based decisionmaking with respect to domain name management issues.

Given that tall order, it is not at all surprising that ICANN is not finished yet. It also is not surprising that mid-course corrections have been necessary. It would have been amazing, I think, if ICANN had done everything perfectly right along in this process that no one has ever carried out before.

For example, we have advised ICANN to eliminate the \$1 fee, open its board meetings to the public, and make certain other changes. Surely, additional other corrections will be necessary. ICANN is now, as it was supposed to be at this point, along the road to completion, but still a work in progress.

I would like to make one last point about ICANN. The White Paper recognized that at the same time that ICANN was creating its structure for consensus-based decisionmaking, the interim board would be required to make specified, initial decisions; particularly, those relating to establishing competition.

We simply could not postpone the introduction of competition until ICANN's structure was finalized. As several members of this subcommittee have mentioned, getting competition into the system was just too important.

Therefore, the process of introducing competition has moved forward. It is also important to note that ICANN is not the only entity with work to do. A fundamental principle of our domain name policy, as I have said, is ensuring competition. That means that Network Solutions, which operates the central registry of names for the commercially significant domains, .com, .net, and .org must agree to principles that will produce real competition between it and other registrars.

Network Solutions now provides both its registry, central registry, and retail registrar services pursuant to its agreement with the government and therefore it operates under government oversight. For that government oversight to be eliminated, it must be replaced by principles that will ensure competition.

That means that Network Solutions, and other providers of registration services to the public, must operate under the same rules so we have a level playing field for competition. It means that Network Solutions must not be able to use its position as the sole operator of the central registry in which all names must be placed for the system to work.

It cannot use that position to advantage its own registration operation or disadvantage competing registration providers; some of which, as the chairman mentioned, will be testifying before this subcommittee later today. We have laid out in some detail what we see are the relevant issues in the response to Chairman Bliley's letter. Our discussions with NSI are ongoing, but as yet none of these issues have been resolved satisfactorily.

Thank you again for the opportunity to appear before this subcommittee. Ms. Burr and I look forward to answering your questions.

[The prepared statement of Andrew J. Pincus follows:]

PREPARED STATEMENT OF ANDREW J. PINCUS, GENERAL COUNSEL, DEPARTMENT OF  
COMMERCE

Thank you, Mr. Chairman and Members of the Committee, for this opportunity to report on progress towards transitioning management of the Internet domain name system ("DNS") to the private sector.

The Commerce Department's Statement of Policy on the *Management of Internet Names and Addresses* (the "White Paper"), issued thirteen months ago, identified a number of tasks to be undertaken on a priority basis in order to transition DNS management to the private sector: (1) private sector creation and organization of a new, not-for-profit corporation to conduct DNS management; (2) rapid introduction of competition in the provision of domain name registration services; (3) adoption of policies to reduce conflicts between trademark holders and domain name registrants; and (4) review of the root server system to increase the security and professional management of that system.

*Creation and Organization of New Corporation*

The Internet Corporation for Assigned Names and Numbers (ICANN) has made considerable progress toward establishing the structures for representative decision making contemplated in the White Paper, but there is still important work to be done:

- ICANN's top priority must be completing the work necessary to put in place an elected board of directors on a timely basis. Specifically, it must do everything within its power to establish the Supporting Organizations, and ensure the election of nine board members by those Organizations to begin serving at the November 1999 Board Meeting. And it must work diligently to complete the process for electing at-large directors by June 2000.
- ICANN should eliminate the \$1 per-year per domain name registration user fee. Although the user fee may be determined to be an appropriate method for funding ICANN's activities, it has become controversial, and we believe a permanent financing method should not be adopted until after the nine elected members are added to the ICANN Board in November. That will ensure that this important decision is made in accordance with the representative, bottom-up process called for in the White Paper. In the meanwhile, we will work with ICANN and the entire Internet community, to the extent permitted by law, to obtain interim resources for ICANN.
- ICANN should immediately open its board meetings to the public. Transparency is critical to establishing trust in decision making. And trust is essential for ICANN's ultimate success. As a general matter, ICANN has undertaken the vast majority of its work in an open and transparent manner. The final step of opening the board meetings is critical to establishing trust in ICANN.
- There is concern in the Internet community about the possibility of over-regulation, and therefore ICANN should assure all registrars and registries, through contract, that it will restrict its policy development activities to matters that are reasonably necessary to achieve the goals specified in the White Paper and that it will act in accordance with the procedural principles set forth in the White Paper.

With these actions, and the other steps already taken by ICANN, we believe that ICANN will put itself on a very firm footing to achieve the goals and principles spelled out in the White Paper. The ICANN apparently agrees and wrote to the Department of Commerce on July 19, 1999 indicating that these suggestions would be implemented.

*Introduction of Competition in Domain Name Registration*

Again, there has been considerable progress: the Shared Registration System (SRS) has been created; new registrars have been accredited under guidelines established by ICANN; Network Solutions, Inc. (NSI) has licensed the SRS to those registrars on an interim basis; and testing of the SRS has begun. But significant work still remains to be done in order to establish robust competition:

- NSI must fulfill its obligation to recognize ICANN as required by Amendment 11 of the Cooperative Agreement. This requires NSI and ICANN to reach agreement on a number of contractual issues. The transition of DNS management to the private sector can succeed only if all participants in the domain name system—including NSI—subject themselves to rules emerging from the consensus based, bottom-up process spelled out in the White Paper.
- With respect to NSI's provision of registry services—as to which an unsupervised NSI would be able to exercise market power today and for the foreseeable future—we believe the NSI-ICANN agreement must assure reasonable super-

vision to prevent the exercise of that market power in a way that injures consumers. With respect to NSI's provision of registrar services, robust competition in the provision of those services—and the lower prices and greater choice that are the benefits of competition—cannot occur until all purveyors of those services abide by the same rules.

- But what if an agreement cannot be reached? NSI's view is very clear. Its position is that when the Cooperative Agreement terminates, whether prematurely or upon its expiration on September 30, 2000, NSI will be free to operate these domains without any supervision by the government. The Commerce Department believes just as strongly that NSI does not have the legal right to operate these domains in the authoritative root in perpetuity. We believe that all or part of the functions now performed by NSI under the Cooperative Agreement could be reassigned through a competition and, unless NSI won the competition, it would cease to have any legal right to provide the recompeted services. And even if that were not so, an NSI unconstrained under U.S. law would quickly become a target of action by other countries in order to protect consumers against the exercise of market power.
- This path—failure to reach agreement with ICANN, recompetition of the Cooperative Agreement and the likely results that would follow, together with action by foreign governments—would be extremely destabilizing for the Internet and therefore quite harmful to its development. We have been able to reach agreement with NSI in the past each time it has been necessary to do so in order to enable the DNS process to move forward. There is no reason to believe that agreement cannot be reached on the remaining questions. We believe all parties should put aside inflammatory rhetoric, set aside parochial concerns, and work for a fair solution that is in the interest of the entire Internet community.
- NSI and the Department of Commerce must reach agreement on a post-Testbed license for registrars' use of the SRS. Remaining issues include modification of the SRS to allow registrars to offer different term lengths (and thus compete on this basis in addition to price); and allowing registrants to switch registrars without forfeiting the time remaining on an existing registration contract, upon payment of a cost-based transfer fee (the current system requires the transferring registrant to forfeit all time on its existing registration and pay an additional two-year fee). We are very concerned that imposing this monetary penalty on transfer of existing registrations among registrars creates a barrier to robust competition. We also must reach agreement on the size of the per-registration fee to be paid to NSI as registry.
- NSI and the Department of Commerce also must resolve issues regarding the availability of the WHOIS database, and the .com, .net, and .org zone files. NSI took certain actions earlier this year without the consent of the Commerce Department that restricted access to this information, which had previously been widely and readily available to the Internet community. We strongly support the prohibition of uses that adversely affect the operational stability of the Internet, but we oppose other restrictions on third-party use of this information, which has been compiled by NSI in the course of its operations under the authority of the U.S. Government.
- The Commerce Department and NSI also must reach agreement concerning the appropriate use of the InterNIC.net website. The Commerce Department believes that InterNIC should remain a neutral website for the purpose of educating the public about the introduction of competition in domain name registration and possibly for providing a comprehensive WHOIS service.

#### *Domain Names and Trademarks*

- The provisions of the ICANN Accreditation Agreement, together with the recommendations of the World Intellectual Property Organization (WIPO) when fully implemented, reflect the recommendations of the White Paper related to reducing friction between trademark owners and domain name holders. We commend ICANN for its prompt action on these issues, and urge it to proceed promptly, pursuant to the appropriate ICANN procedures, to establish a uniform dispute resolution procedure for cybersquatting.

#### *Management of the Root Server System*

- The Department of Commerce and ICANN are proceeding to implement the White Paper's call to develop and implement means to increase the security and professional management of the Internet root server system.

I want to thank the Committee for inviting me to testify today on this important issue. We have attached our response to Chairman Bliley's letter of June 22, 1999 which discusses these issues in greater detail. As always, the Department of Com-



merce welcomes the Committee's interest in the DNS process. I would be pleased to answer any questions you may have at this time.



**GENERAL COUNSEL OF THE  
UNITED STATES DEPARTMENT OF COMMERCE**  
Washington, D. C. 20230

July 8, 1999

The Honorable Tom Bliley  
Chairman, Committee on Commerce  
United States House of Representatives  
Room 2125 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Bliley:

I am writing to respond to your letter to Secretary Daley dated June 22, 1999, in which you express concern about recent steps taken by the Internet Corporation for Assigned Names and Numbers ("ICANN") related to the transition to privatized management of the Internet Domain Name System ("DNS").

The Department of Commerce welcomes the Committee's continuing interest in this process. As you point out in your letter, we share the same goal: transitioning DNS management responsibility to a new, not-for-profit corporation "governed on the basis of a sound and transparent decision making-process, which protects against capture by a self-interested faction." To this end, Department staff has regularly met with the Committee staff to provide information and to seek Congressional input concerning this complex process.

Before turning to the specific questions posed in your letter, I thought it would be useful to provide a more general report on the status of the DNS transition process.

#### Summary

The Commerce Department's Statement of Policy on the *Management of Internet Names and Addresses* (the "White Paper"), issued thirteen months ago, identified a number of tasks to be undertaken on a priority basis in order to transition DNS management to the private sector: (1) private sector creation and organization of a new, not-for-profit corporation to conduct DNS management; (2) rapid introduction of competition in the provision of domain name registration services; (3) adoption of policies to reduce conflicts between trademark holders and domain name registrants; and (4) review of the root server system to increase the security and professional management of that system.

#### Creation and Organization of New Corporation

ICANN has made considerable progress toward establishing the structures for representative decision making contemplated in the White Paper, but there is still important work to be done:

- ICANN's top priority must be completing the work necessary to put in place an elected board of directors on a timely basis. Specifically, it must do everything within its power to establish the Supporting Organizations, and ensure the election of nine board members by those Organizations to begin serving at the November 1999 Board Meeting. And it must work diligently to complete the process for electing at-large directors by June 2000. (Page 11)

- ICANN should eliminate the \$1 per-year per domain name registration user fee. Although the user fee may be determined to be an appropriate method for funding ICANN's activities, it has become controversial, and we believe a permanent financing method should not be adopted until after the nine elected members are added to the ICANN Board in November. That will ensure that this important decision is made in accordance with the representative, bottom-up process called for in the White Paper. In the meanwhile, we will work with ICANN and the entire Internet community, to the extent permitted by law, to obtain interim resources for ICANN. (Page 11)
- ICANN should immediately open its board meetings to the public. Transparency is critical to establishing trust in decision making. And trust is essential for ICANN's ultimate success. As a general matter, ICANN has undertaken the vast majority of its work in an open and transparent manner. The final step of opening the board meetings is critical to establishing trust in ICANN. (Page 12)
- There is concern in the Internet community about the possibility of over-regulation, and therefore ICANN should assure all registrars and registries, through contract, that it will restrict its policy development activities to matters that are reasonably necessary to achieve the goals specified in the White Paper and that it will act in accordance with the procedural principles set forth in the White Paper. (Page 17)

With these actions, and the other steps already taken by ICANN, we believe that ICANN will put itself on a very firm footing to achieve the goals and principles spelled out in the White Paper.

#### Introduction of Competition in Domain Name Registration

Again, there has been considerable progress: the Shared Registration System (SRS) has been created: new registrars have been accredited under guidelines established by ICANN; NSI has licensed the SRS to those registrars on an interim basis; and testing of the SRS has begun. But significant work still remains to be done in order to establish robust competition:

- NSI must fulfill its obligation to recognize ICANN. This requires NSI and ICANN to reach agreement on a number of contractual issues. The transition of DNS management to the private sector can succeed only if all participants in the domain name system – including NSI – subject themselves to rules emerging from the consensus based, bottom-up process spelled out in the White Paper.
  - With respect to NSI's provision of registry services – as to which an unsupervised NSI would be able to exercise market power today and for the foreseeable future – we believe the NSI-ICANN agreement must assure reasonable supervision to prevent the exercise of that market power in a way that injures consumers. With respect to NSI's provision of registrar services, robust competition in the provision of those services – and the lower prices and greater choice that are the benefits of competition – cannot occur until all purveyors of those services abide by the same rules. (Page 14)
  - But what if an agreement cannot be reached? NSI's view is very clear. Its position is that when Cooperative Agreement terminates, whether prematurely or upon its expiration on September 30, 2000, NSI will be free to operate these domains without any supervision by the Government. The Commerce Department believes just as strongly that NSI does not have the legal right to operate these domains in the authoritative root in perpetuity. We believe that all or part of the functions now performed by NSI under the Cooperative Agreement could be reassigned through a competition and, unless NSI won the competition, it would cease to have any legal right to provide the recompeted services. And even if that were not so, an NSI unconstrained under US law would quickly become a target of action by other countries in order to protect consumers against the exercise of market power. (Page 18)
  - This path – failure to reach agreement with ICANN, recompetition of the

Cooperative Agreement and the likely results that would follow, together with action by foreign governments – would be extremely destabilizing for the Internet and therefore quite harmful to its development. We have been able to reach agreement with NSI in the past each time it has been necessary to do so in order to enable the DNS process to move forward. There is no reason to believe that agreement cannot be reached on the remaining questions. We believe all parties should put aside inflammatory rhetoric, set aside parochial concerns, and work for a fair solution that is in the interest of the entire Internet community. (Page 19)

- NSI and the Department of Commerce must reach agreement on a post-Testbed license for registrars' use of the SRS. Remaining issues include modification of the SRS to allow registrars to offer different term lengths (and thus compete on this basis in addition to price); and allowing registrants to switch registrars without forfeiting the time remaining on an existing registration contract, upon payment of a cost-based transfer fee (the current system requires the transferring registrant to forfeit all time on its existing registration and pay an additional two-year fee). We are very concerned that imposing this monetary penalty on transfer of existing registrations among registrars creates a barrier to robust competition. We also must reach agreement on the size of the per-registration fee to be paid to NSI as registry. (Page 20)
- NSI and the Department of Commerce also must resolve issues regarding the availability of the WHOIS database, and the .com, .net, and .org zone files. NSI took certain actions earlier this year without the consent of the Commerce Department that restricted access to this information, which had previously been widely and readily available to the Internet community. We strongly support the prohibition of uses that adversely affect the operational stability of the Internet, but we oppose other restrictions on third-party use of this information, which has been compiled by NSI in the course of its operations under the authority of the U.S. Government. (Page 21)
- The Commerce Department and NSI also must reach agreement concerning the appropriate use of the InterNIC.net website. (Page 22)

#### Domain Names and Trademarks

- The provisions of the ICANN Accreditation Agreement, together with the recommendations of the World Intellectual Property Organization (WIPO) when fully implemented, reflect the recommendations of the White Paper related to reducing friction between trademark owners and domain name holders. We commend ICANN for its prompt action on these issues, and urge it to proceed promptly, pursuant to the appropriate ICANN procedures, to establish a uniform dispute resolution procedure for cybersquatting. (Page 23)

#### Management of the Root Server System

- The Department of Commerce and ICANN are proceeding to implement the White Paper's call to develop and implement means to increase the security and professional management of the Internet root server system. (Page 24)

#### A. Background

The Internet we know today grew rapidly from its origins as a United States government research project into an international medium for commerce, education, and communication. When the application known as the World Wide Web was launched, the information riches of the Internet became readily accessible to non-technical end-users. No longer an exclusive province of computer scientists, a broad range of interests -- commercial, non-profit, educational, and other -- joined the Internet community and began using the Internet to communicate, to exchange ideas and information, and to conduct commerce.

When the Administration began its review of electronic commerce issues in 1996, there were two existing governmental mechanisms for coordinating the DNS. Those government mechanisms

consisted of (1) a cooperative agreement between the National Science Foundation (NSF) and Network Solutions, Inc. (NSI) for managing the generic top level domains (gTLDs) (the Cooperative Agreement), and (2) a contract between the Defense Advanced Research Projects Agency (DARPA) and the Information Sciences Institute (ISI) at the University of Southern California under which the ISI performed a number of management and policy coordination functions collectively known as the Internet Assigned Numbers Authority (IANA). By early 1997, it was clear that although these mechanisms had adequately managed the system in its early years, each had inherent limitations that could create a drag on the growth of the Internet.

With respect to technical and policy coordination, IANA functioned ably for years under the leadership of the late Dr. Jon Postel. Dr. Postel was a well respected technologist, skilled in the art of conflict resolution as well. As the Internet community became increasingly diverse, however, and as the disputes became commercial in nature, it became unworkable to rely on a single individual to coordinate the domain name system. Dr. Postel recognized this and initiated an international discussion, called the International Ad Hoc Committee (IAHC) in September of 1996. The IAHC process led to the creation of the gTLD Memorandum of Understanding (gTLD MOU). The Administration was concerned that the gTLD MOU relied too heavily on international governmental bodies and did not enjoy adequate support from the commercial community and other private sector communities.

The Cooperative Agreement between NSF and NSI made NSI the exclusive provider of registration services in the .com, .net, and .org gTLDs, encompassing both management of what we now refer to as the central database, or "registry" function, as well as serving as the interface with individual domain name registrants, the "registrar" function. Initially, NSF paid NSI to perform these tasks. Beginning in 1995, however, NSF authorized NSI to charge \$70 for a two-year registration.

For a number of reasons, primarily having to do with the global nature of the Internet, .com, .net, and .org today enjoy a dominant position in the most commercially valuable Internet registrations.<sup>1</sup> Registrations in .com, .net and .org account for nearly 75% of all third level domain name registrations.<sup>2</sup> Put simply, a .com, .net, and .org domain name today is the overwhelming choice for entities launching commercial and non-profit Internet applications designed to appeal to a multinational audience. In more conventional economic terms, registering a name in these domains is so commercially attractive that an exclusive provider of registry or registrar services for these domains would be able to exercise market power in dictating the terms for the provision of those services, because its terms are not likely to be subject to competition from alternative name registration options. Whether or not competition will develop in the future is not possible to predict, but today – and for the reasonably foreseeable future – there simply is no competitive alternative.

Consumers and businesses around the world began to complain about the absence of competition in this lucrative domain name registration market. Governments around the world complained that it was inappropriate that these services were available exclusively through a monopoly created and controlled by the United States government.

Thus, when the Administration began work on DNS privatization there was widespread disapproval of the then-current DNS management structure, and change was clearly needed to address a number of issues:

- There was widespread dissatisfaction about the absence of competition in domain name registration.

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<sup>1</sup> In addition to the gTLDs there are over 200 country-code top level domains (ccTLDs) that might have been expected to provide some competition. But relevant data indicate that the ccTLDs have not yet presented a serious challenge to the commercial dominance of the gTLDs. For example, even the largest ccTLD, .de (Germany) accounts for only 4% of all registered domains. Source: NetNames Ltd. <http://www.netnames.com>.

<sup>2</sup> Source: NetNames Ltd. <http://www.netnames.com>.

- Conflicts between trademark holders and domain name holders had become increasingly common, and mechanisms for resolving these conflicts were expensive and cumbersome.
- Commercial users, many of whom were staking their future on the successful growth of the Internet, were calling for a robust and professional management structure.
- An increasing number of Internet users resided outside the United States, and they desired increased participation in the formulation of policy related to the management of the DNS.
- Continued direction and funding of DNS activities by U.S. research agencies was becoming inappropriate, given the increasingly global and commercial nature of the Internet.

On July 1, 1997, the President released *A Framework for Global Electronic Commerce* and directed the Secretary of Commerce to manage the DNS in a manner that increases competition and facilitates international participation in its management.

On June 5, 1998, the Department of Commerce issued a Statement of Policy entitled *Management of Internet Names and Addresses* (the "White Paper").<sup>3</sup> The White Paper was the product of an extensive public consultation process that included a Request for Comments (RFC), on which the Department received more than 430 comments, and a discussion draft entitled *A Proposal to Improve the Technical Management of Internet Names and Addresses* (the "Green Paper"), on which the Department received more than 650 comments.<sup>4</sup> In addition to conducting a careful review of the comments received on the RFC and the Green Paper, the Administration consulted extensively with a wide variety of members of the Internet community including Internet engineers, businesses using the Internet, intellectual property holders, civil liberties advocates, non-commercial domain name holders, Internet users, and governments around the world. The Department of Commerce also consulted with Congress, and participated in three Congressional hearings.

The White Paper, reflecting the views of the overwhelming majority of commenters, called upon the private sector to create a new, not-for-profit corporation to assume responsibility, over time, for the management of certain aspects of the DNS. The White Paper identified four specific functions to be performed by this new corporation:

- To set policy for and direct the allocation of Internet protocol (IP) number blocks;
- To develop overall policy guidance and control of top level domains (TLDs) and the Internet root server system;
- To develop policies for the addition, allocation, and management of gTLDs, the establishment of domain name registries and domain name registrars and the terms, including licensing terms, applicable to new and existing gTLDs and registries under which registries, registrars, and gTLDs are permitted to operate;
- To coordinate maintenance and dissemination of the protocol parameters for Internet addressing.

The White Paper also articulated the fundamental policies that would guide United States participation in the transfer of DNS management responsibility to the private sector: stability; competition; private, bottom-up coordination; and representation.

The White Paper listed a number of tasks to be undertaken on a priority basis.

First, the creation and organization of a new, not-for-profit corporation to manage the DNS. The White Paper anticipated the need for an interim or initial (the terms are used interchangeably) Board of Directors of the new, not-for-profit corporation to carry out

<sup>3</sup> Tab 1.

<sup>4</sup> The RFC, the Green Paper, and public comments on these documents are posted online at [www.ntia.doc.gov/ntiahome/domainname/domainhome.htm](http://www.ntia.doc.gov/ntiahome/domainname/domainhome.htm).

specific tasks expeditiously. The interim board was to establish a system for electing the Board of Directors the new corporation and complete its organization in accordance with the White Paper principles.

Second, the White Paper identified as a high priority the rapid introduction of competition in the provision of domain name registration services. The interim board of the new corporation was to develop policies for the addition of new TLDs and to establish qualifications for domain name registries and registrars. The Department of Commerce committed to enter into an agreement with NSI by which NSI would agree to take specific actions, including commitments as to pricing and equal access, designed to permit the development of competition in domain name registration and to approximate the conditions that would be expected in the presence of marketplace competition.

Third, the White Paper recommended that the new corporation promptly adopt specific policies designed to reduce conflicts between trademark holders and domain name registrants. The White Paper indicated that the United States would ask the World Intellectual Property Organization (WIPO) to convene an international process to develop a set of recommendations on these matters to be presented to the Interim Board for its consideration as soon as possible.

Fourth, the White Paper committed the United States to undertake a review of the root server system to recommend means to increase the security and professional management of the system. The recommendations of this study were to be implemented as part of the transition process, and the new corporation was to develop a comprehensive security strategy for DNS management.

The following is an examination of progress made to date, and work remaining to be done, in each of these areas.

## **B. Private Sector Creation and Organization of the New Corporation**

The White Paper's call for private sector creation of a new, not-for-profit corporation to manage DNS issues resulted in five separate submissions, each of which was posted by NTIA for comment.<sup>5</sup> The submissions and comments received evidenced clear support for moving forward with the submission of the IANA on behalf of the Internet Corporation for Assigned Names and Numbers (ICANN). On October 20, 1998, NTIA wrote to ICANN noting the public support for moving forward with the ICANN model.<sup>6</sup> NTIA's letter also cited a number of specific concerns raised by commenters, and asked ICANN to address these concerns. Following receipt of a revised ICANN submission<sup>7</sup>, the Department of Commerce entered into a Memorandum of Understanding with ICANN for collaborative development and testing of the mechanisms, methods, and procedures necessary to transition management responsibility for specific DNS functions to the private sector.<sup>8</sup> The MOU constituted recognition of ICANN as the new, not-for-profit corporation for DNS management and specifically contemplated ultimate transition of management responsibility to ICANN. Consistent with the White Paper approach, however, any such transition would occur over time as the corporation becomes operational and stable.

Also in October of 1998, the Department of Commerce and NSI amended the Cooperative Agreement to facilitate the stable evolution of the domain name system in accordance with the

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<sup>5</sup> These submissions, and public comment on them, are posted at [www.ntia.doc.gov](http://www.ntia.doc.gov).

<sup>6</sup> Tab 2.

<sup>7</sup> Tab 3.

<sup>8</sup> Tab 4.

White Paper. Amendment 11 to the Cooperative Agreement<sup>9</sup> had four specific purposes, including "the recognition by NSI of the new, not-for-profit corporation when recognized by the U.S. Government in accordance with the White Paper." Because Amendment 11 was executed on October 7, 1998, prior to the Department of Commerce's recognition of ICANN on November 25, 1998, the new not-for-profit corporation was referred to in Amendment 11 as "NewCo." Amendment 11 also extended the Cooperative Agreement through the transition period (until September 30, 2000) but specifically provided that as the United States Government transitioned DNS responsibilities to ICANN, corresponding obligations under the Cooperative Agreement would be terminated and, as appropriate, covered in a contract between NSI and ICANN.

### 1. Progress on Organization of ICANN and Election of Board of Directors

ICANN's achievements are very impressive, especially given the difficulty in creating a new organization to represent the multifaceted Internet community. Over the past seven months it has made steady progress in establishing structures for the representative, bottom-up processes contemplated in the White Paper.

ICANN's submission to the Department of Commerce, which included its Bylaws and Articles of Incorporation, contemplated the creation of three policy development bodies, called "supporting organizations" or "SOs." Half of the elected board, or nine members, were to come from the SOs.<sup>10</sup>

In keeping with the principle of private, bottom-up coordination, the SOs were to be self-forming bodies.

- On March 4, 1999, ICANN provisionally recognized the first SO, the Domain Name Supporting Organization (DNSO). The DNSO is comprised of seven separate constituency groups, and on May 27, 1999, ICANN recognized six of the DNSO's seven initial constituencies; recently the final initial constituency -- non-commercial domain name holders -- released a compromise organizational document.
- ICANN has received a consensus proposal for the formation of the Protocol Supporting Organization, which it expects to recognize at its next meeting in August.
- Organizers of the Address Supporting Organization have not reached agreement on a consensus proposal, although we understand that progress is being made. It is hoped that a consensus proposal will emerge prior to ICANN's August meeting.

As a result of the progress on SO formation, ICANN is expected to add nine new, elected members to the Board of Directors by the time it meets in Los Angeles on November 2, 1999.

In response to Internet community consensus that some members of the board should be elected by a vote of ICANN members, ICANN revised its Bylaws to require the election of nine At-Large Directors. The ICANN Board has taken the following steps to implement a system for electing At-Large Directors:

- As one of its first actions, ICANN created a Membership Advisory Committee (MAC) to develop recommendations for a membership structure that would elect

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<sup>9</sup> Tab 5.

<sup>10</sup> On December 21, 1998, ICANN posted guidance on the preparation and submission of proposals for the three supporting organizations (SOs). The ICANN guidance called for the SOs to be self-organizing, in keeping with the White Paper principle of bottom-up decision making. As a result, organization of each of the SOs has proceeded at a pace not within ICANN's control. ICANN has acted, however, upon request of the organizers, to facilitate SO formation.

its nine At-Large Directors (and thus replace the initial or interim board with elected board members).

- The MAC submitted its recommendations for an open membership structure in May, 1999.
- ICANN staff will report in August on the administrative requirements, cost, outreach, and logistical requirements of implementing the MAC recommendations.

## **2. Progress Towards Implementation of Additional Assurances with Respect to Due Process**

The ICANN bylaws commit the corporation to develop an independent review process, to provide an additional check on actions taken by the corporation that are not consistent with its Articles of Incorporation and Bylaws. On March 31, 1999, ICANN announced the creation of an Independent Review Advisory Committee with representatives from seven countries. This committee is charged to advise ICANN on creation of a structure for independent third party review of ICANN decisions. It has already begun its work and is expected to report at the August meeting.

## **3. Important Remaining Tasks**

ICANN has accomplished much in the seven months since it was recognized by the Department of Commerce at the end of 1998, but there is still more work to be done. The Department wrote to ICANN on July 8, 1999, suggesting that ICANN take several specific steps in order to implement appropriately the principles set forth in the White Paper.<sup>11</sup> These suggestions are summarized below:

### **a. Complete ICANN organizational structure and elect Board of Directors**

As indicated above, ICANN is moving towards completion of its organizational structure and Board election process. It is critical that ICANN do everything within its power to finalize the organization of the SOs and produce nine elected board members by November.

The Department of Commerce also expects the ICANN Board to move expeditiously to establish a process and time-line for electing At-Large Directors. This task must be ICANN's highest priority. Indeed, we can think of very little that is more important to the success of this experiment in self-ordering than the prompt establishment of a fully elected Board of Directors. At the same time, we believe that no good will be served by moving forward on elections without appropriate structural safeguards to prevent capture and/or election fraud. We have called on ICANN to complete this process by June 2000.

### **b. Following the Addition of Elected Board Members in November, adopt a comprehensive self-funding arrangement based on fair and transparent funding mechanisms**

The White Paper stated that the new not-for-profit corporation should be funded by Internet stakeholders, including registries and registrars. ICANN concluded that it should initially finance its operations through a payment by registrars of a user fee of \$1 per year per domain name registered. This payment obligation was included in the accreditation agreement formulated by ICANN after notice, opportunity to comment, and a public meeting.<sup>12</sup>

In recent weeks the user fee has become controversial. Although the \$1 fee may be determined to be an appropriate method for funding ICANN activities, and we believe such a fee would be lawful,<sup>13</sup> we believe that ICANN should eliminate the fee. Adopting a permanent financing

<sup>11</sup> Tab 6.

<sup>12</sup> The draft Accreditation Guidelines, including a draft Accreditation Agreement, was posted by ICANN for public comment on February 8, 1999. These drafts, and the public comments submitted, can be found on the ICANN web site, at [www.icann.org](http://www.icann.org).

<sup>13</sup> This is discussed in greater detail below.



system is an important step that, we believe, should await the addition of the nine elected Directors in November. That will ensure that this important decision is made through a representative, bottom-up process.

To date, ICANN has been funded through corporate contributions and extensions of credit. In the short term our recommendation means that ICANN must receive government funding, continue to rely on corporate contributions, or finance itself through some combination of both sources. We pledge to work with ICANN and the entire Internet community, to the extent permitted by law, to secure interim resources for ICANN.

c. ***Implement Procedures Designed to Enhance Transparency and Ensure Due Process***

To date, all ICANN Board meetings have provided for a day of public input into key questions that have been posted online in advance. This public input has then been followed by a day in which the Board meets in closed session, discusses the issues in light of the public input, and then makes decisions. Minutes of the meetings have been provided promptly, but the discussions have not been made public. At this important time, when the process is still evolving and the creation of public trust is crucial to the success of ICANN, we also recommend that ICANN immediately open its board meetings to the public. The Board must, of course, retain the ability to close its meetings when proprietary, confidential, personnel, or litigation-related matters are being discussed.

C. **Introduction of Competing Registrars in .com, .net and .org**

One of the principal short-term goals identified in the White Paper is the introduction of competition in the provision of domain name registration services. Under the MOU with ICANN and Amendment 11 to the Cooperative Agreement with NSI, the Department of Commerce, ICANN, and NSI all are required to participate in opening the gTLDs currently administered by NSI under the Cooperative Agreement to multiple registrars who would compete with one another in providing services to new and existing domain name registrants. Amendment 11 provided for the development, deployment, and licensing by NSI (under a license agreement to be approved by the Department of Commerce) of a mechanism to allow multiple registrars to submit registrations for the gTLDs for which NSI now acts as the registry. This system is known as the Shared Registration System, or SRS. Under the MOU, ICANN is called upon to accredit competing registrars (Accredited Registrars, as identified in Amendment 11) through development of an accreditation procedure that subjects such registrars to consistent requirements designed to promote a stable and robustly competitive DNS.

1. **Progress with Respect to the Introduction of Competition**

Considerable progress has been made toward introducing competition, but a number of serious issues remain unresolved.

a. ***ICANN's Adoption of Registration Accreditation Guidelines and Selection of Registrars***

On February 8, 1999, ICANN issued proposed guidelines for the selection and accreditation of registrars in the .com, .net, and .org domains. The accreditation guidelines (Guidelines), which included a draft agreement between ICANN and Accredited Registrars (the Accreditation Agreement) addressed financial and business qualifications, privacy and security issues, the provision of up-to-date registration information, the need for prepayment of registration fees, and other items. The Guidelines also specifically provided that Accredited Registrars would implement trademark dispute resolution policies when and if such policies were adopted by ICANN.

All of the issues contained in the Guidelines and the Accreditation Agreement, with the exception of privacy issues, were explicitly contemplated in the White Paper. With respect to privacy, the Guidelines and the Accreditation Agreement require Accredited Registrars to notify registrants how their information would be used, consistent with Administration policy calling for self-regulation to ensure effective privacy protection on the Internet.<sup>14</sup>

ICANN received comments from over 50 individuals and entities, and devoted a portion of its open meeting on March 3, 1999, to the guidelines. The guidelines were revised and adopted by ICANN on the basis of this public input.<sup>15</sup>

On April 21, 1999, ICANN selected five Accredited Registrars to participate in Phase I testing of the SRS (the Testbed). Fifty-two additional registrars have been approved for accreditation by ICANN to compete once the Testbed phase is completed, currently scheduled for July 16, 1999.<sup>16</sup> NSI agreed in April to permit post-testbed registrars to receive SRS software in order to begin work prior to the completion of the testbed. The Department of Commerce has communicated extensively and directly with registrars accredited by ICANN.

**b. *NSI's Development of the SRS and its Interim Licensing Agreement***

Pursuant to Amendment 11 of the Cooperative Agreement, NSI developed the SRS software to carry out its functions as registry for .com, .net and .org. The SRS allows multiple registrars to submit domain name registrations to the registry for the .com, .net and .org domains.

On April 21, 1999, the Department of Commerce approved NSI's License and Agreement with Accredited Registrars for use during the Testbed period.<sup>17</sup> This agreement established a Testbed price cap for registry services (the price charged by NSI to registrars) of \$18 for a two-year registration.

NSI and the Department of Commerce continue to discuss the terms of the post-testbed NSI License and Agreement with Accredited Registrars. The open issues are discussed in greater detail below.

**c. *Testing of the SRS is Underway***

Following ICANN's designation of the Testbed Registrars on April 21, 1999, progress in testing the SRS was slow. Some of the delay is attributable to implementation glitches, design problems, and other problems that seem to be inevitable in this business.<sup>18</sup> We continue to monitor the situation and believe that progress is being made on system testing. At this point, three of the Testbed Accredited Registrars are performing live registrations, but only one has been doing so for more than a week. In order to subject the SRS to vigorous testing, therefore, it will be necessary to extend the Testbed period.

**2. Important Remaining Tasks**

Significant work remains to create an environment that permits full and fair competition among registrars in .com, .net and .org.

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<sup>14</sup> The Guidelines also provided for the \$1 fee, discussed above.

<sup>15</sup> Tab 7.

<sup>16</sup> Tab 8.

<sup>17</sup> Tab 9.

<sup>18</sup> Tab 10.

a. *NSI and ICANN must reach agreement on the terms under which NSI fulfills its obligation to recognize ICANN*

NSI specifically agreed in Amendment 11 to the Cooperative Agreement to enter into a contract with the not-for-profit corporation recognized by the United States Government pursuant to the White Paper, and agreed that the corporation would have the authority to carry out its responsibilities under the White Paper. The purpose of the recognition requirement in Amendment 11 is twofold: first to obligate NSI to follow through on its public commitment to cooperate with and participate in the implementation of the White Paper; and second, to ensure that NSI's activities as a registry and as registrar would be subject to rules emerging from the consensus based, bottom-up process spelled out in the White Paper.

It is worth briefly summarizing the relevant provisions of Amendment 11. Network Solutions agreed to recognize NewCo "when recognized by the USG in accordance with the provisions of the Statement of Policy." (Purpose clause). Network Solutions further committed to enter into a contract with NewCo, and acknowledged "that NewCo will have the authority, consistent with the provisions of the Statement of Policy and the agreement between the USG and NewCo, to carry out NewCo's Responsibilities." (NewCo Clause). Under Amendment 11, NewCo's Responsibilities specifically include the establishment and implementation of DNS policy and the terms, including licensing terms, applicable to new and existing gTLDs and registries under which registries, registrars and gTLDs are permitted to operate." (Assistance to NewCo clause and "Transition" Section of White Paper.)

The key question, of course, is what the terms of the NSI-ICANN agreement should be.

With respect to NSI's provision of registry services – as to which an unsupervised NSI would be able to exercise market power today and for the foreseeable future – we believe the agreement must assure reasonable supervision (similar to that under the Cooperative Agreement) to prevent the exercise of that market power in a way that injures consumers. After all, the whole purpose of the introduction of competition is to provide lower prices and greater choice for consumers. Based on the principles of the White Paper and Amendment 11 spell out the relevant principles. For example:

- The operations of a registry and of a registrar, if conducted by the same entity, should be separated so revenues and assets of the registry are not utilized to financially advantage registrar activities to the detriment of other registrars.
- The price to be paid by registrars for each domain name registration to the registry should reflect demonstrated costs and a reasonable rate of return.
- Access to the registry should be provided on a non-discriminatory basis.

With respect to NSI's provision of registrar services, robust competition in the provision of registrar services – and the lower prices and greater choice that attend such competition – cannot occur until all purveyors of those services abide by the same rules.<sup>19</sup>

We believe that the appropriate rules for registrars are embodied in the ICANN Accreditation Agreement. Of course, there is always room for improvement and a number of stakeholders have made good suggestions for fine-tuning the Accreditation Agreement, which we continue to consider

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<sup>19</sup> The basic set of uniform rules for registrars necessary to ensure the stability and smooth operation of the Internet, the components of which were articulated in the White Paper, include:

1. Registrar commitment to gather and provide public access to specified, accurate and up-to-date information from domain name registrants;
2. Registrar commitment to escrow that data in order to ensure that domain name registrants can continue to be serviced in the event that the registrar becomes unable to do so;

and discuss with ICANN as they are received. For example, in response to a comment from the intellectual property community that the Accreditation Agreement should require registrars to conduct a reasonable degree of screening of registration data, to bolster the quality of data in WHOIS, ICANN revised the Accreditation Agreement to require registrars to abide by any later-adopted policies related to the verification of contact information.<sup>20</sup>

NSI has not, to date, executed an Accreditation Agreement nor agreed to provide registrar services in accordance with the substantive provisions of that agreement. We understand that NSI's objections fall into three categories: first, NSI asserts that ICANN has not been "recognized" by the Commerce Department and thus NSI is not obligated under Amendment 11 to execute any agreement with ICANN; second, NSI believes that ICANN Accreditation should be limited to an evaluation of the business and financial capacity of an applicant to be a registrar; and third, NSI objects to specific terms in the Accreditation Agreement.

With respect to the first objection, NSI has asserted that the MOU did not constitute "recognition" of ICANN. As we understand it, NSI's position appears to be that such recognition will not take place until the Department of Commerce transfers authority (as opposed to operational responsibility) over the root server system to ICANN. The White Paper contemplated a gradual transition to private sector management to ensure stability, and transfer of authority over the root would necessarily come at the end of any transition. Moreover, the transition described in the White Paper necessarily depends on NSI's early cooperation. To clear up any misunderstanding, the Department subsequently issued a letter to NSI specifically recognizing ICANN for purposes of Amendment 11.<sup>21</sup>

NSI has stated repeatedly that the ICANN Accreditation Agreement should be limited to an evaluation of the business and financial capacity of a would-be registrar. Indeed, previous Department efforts to facilitate a contractual agreement between NSI and ICANN were unsuccessful in late March of 1999 because NSI insisted that it would not enter into any contract with ICANN that did not specifically preclude the existence of separate contracts between ICANN and the Accredited Registrars. NSI proposed, instead, that ICANN should enter into a contract with NSI as registry, in which NSI would agree to "flow through" the substantive provisions of the Accreditation Agreement to Accredited Registrars. We understand NSI's position to be that this architecture reflects a more orderly contract hierarchy and avoids the possibility of conflicts between the terms of NSI's relationship with Accredited Registrars and the terms of ICANN's relationship with Accredited Registrars.

We agree that the "flow through" of terms from ICANN to NSI as registry and then to Accredited Registrars might, in some sense, be perceived to be more orderly. However, the architecture proposed by NSI undermines the fundamental premise of the White Paper -- that the DNS should be

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3. Registrar commitment not to activate a domain name registration unless and until it has received a reasonable assurance of payment for the registration;
  4. Registrar commitment to bind registrants by contract to provide specified, accurate and up-to-date contact information, to participate in alternative dispute resolution mechanisms, and to submit to the jurisdiction of specified courts of law;
  5. Registrar commitment to comply with minimal fair information practices related to notice, choice and access to personal information;
  6. Registrar commitment to abide by a code of conduct and uniform dispute resolution mechanisms if adopted by ICANN consensus in accordance with articulated procedural safeguards including transparency; and
  7. Registrar commitment to pay specified user fees adopted by ICANN consensus in accordance with articulated procedural safeguards.

<sup>20</sup> WHOIS is the database of domain name registrant and registration information.

<sup>21</sup> Tab 11.

managed by the private sector based on voluntary contractual undertakings among interested stakeholders. In addition, this architecture interposes NSI between ICANN and the Accredited Registrars affected by ICANN policy development, in effect giving NSI a veto over any ICANN developed policy relating to registrars in .com, .net and .org. If, for example, ICANN were to promulgate a policy supported by consensus and developed in accordance with transparent and fair processes, as required by the ICANN bylaws, meaningful implementation of that policy would be entirely up to NSI. The absence of contracts between ICANN and its Accredited Registrars also removes any mechanism whereby ICANN and Accredited Registrars could provide for the payment of registrar user fees. Presumably such fees would instead come from the registry, giving NSI considerable leverage over ICANN's finances. Nothing in the White Paper or Cooperative Agreement contemplates that NSI is to have such control.

We understand that NSI's objections to specific provisions of the Accreditation Agreement flow from a concern about creeping regulatory authority. We note that the scope of ICANN's authority is bounded by its bylaws, which set out the purpose of the corporation, the processes it must follow when pursuing these goals, and the need for consensus on the specific approach adopted to pursue these goals. We also believe that antitrust law also constrains ICANN policy development to that which is reasonably necessary to achieve the legitimate goals of the corporation, in a manner that is no broader than necessary to achieve those goals.

Nonetheless, we believe it would be constructive to have a clearer articulation of the limits of ICANN's authority. For these reasons we have urged the Board to assure registrars and registries, including NSI, through contract, that ICANN will restrict its policy development to matters that are reasonably necessary to achieve the goals specified in the White Paper, in accordance with the principles of fairness, transparency and bottom-up decision making articulated in the White Paper. This commitment would, in effect, give all who enter into agreements with ICANN a contractual right to enforce safeguards that are now contained in the ICANN bylaws and in the antitrust laws of the United States.

We are also prepared to discuss any other concerns that NSI has with the terms of the existing Accreditation Agreement.

NSI has also publicly stated that ICANN's rules should apply to all similarly situated top level domains – which is to say ccTLDs that do not require a meaningful connection to the jurisdiction associated with the TLD or the registrant's agreement to submit to and be bound by the courts of that jurisdiction (so-called "Open ccTLDs"). There may be some merit to this view, and it deserves further consideration. Open ccTLDs potentially provide competition for .com, .net and .org and thus their coverage could become a basic fairness issue at some point, although currently registrations in .com, .net and .org dwarf registrations in even the most popular ccTLDs, whether open or closed. Moreover, we believe that the smooth operation of the Internet will be enhanced by greater clarity about what rules apply in a given situation. The White Paper strongly endorsed the principle, however, that national governments should continue to have policy authority over their ccTLDs. Thus, the United States has initiated discussions within the ICANN Governmental Advisory Committee (GAC) in an effort to secure international, governmental support for the proposition that Open ccTLDs should be subject to the same rules applicable to gTLDs. This process will take time, however, and its outcome is not under ICANN's control. It therefore provides no basis for an interim exemption of .com, .net, and .org from policies developed in accordance with the White Paper.

The hardest, and most important, task we face at this point is to create an atmosphere of greater trust and cooperation in implementation of the White Paper. The Department of Commerce believes that all interests will be served by eliminating the level of inflammatory rhetoric being currently displayed on all sides. The stakes here are too great – nothing less than allowing the Internet to realize its full potential as a vehicle for comment, education, and commerce. We all must put aside parochial concerns and work toward that end.

We have been able to reach agreement with NSI in the past each time it has been necessary to do so in order to enable the DNS process to move forward. There is no reason to believe that agreement cannot be reached on the remaining questions. Our discussions with NSI are ongoing, and we are hopeful that they will advance to a satisfactory resolution on a timely basis.

What if an agreement cannot be reached?

NSI's view is very clear. Its position is that when the Cooperative Agreement terminated, whether prematurely or upon its expiration on September 30, 2000, NSI will be free to operate these domains without any supervision by the Government:

- to charge whatever registration fee it wishes
- to discontinue accepting registrations from competing registrars
- to decide whether, and on what terms, to make WHOIS and zone file data available to intellectual property owners seeking to fight piracy, and to anyone else
- to decide whether or not to provide a dispute resolution system for trademark infringement
- to unilaterally determine how the .com, .net, and .org functions are managed globally
- to decide whether or not registrants should pay for a domain name before it is activated
- to decide whether domain names are registered on a first-come, first-served basis, or on some other basis<sup>22</sup>

The Commerce Department believes just as strongly that NSI does not have the legal right to operate these domains as it wishes in the authoritative root in perpetuity. We believe that the functions now performed by NSI under the Cooperative Agreement could be reassigned through a recompetition of those tasks. Upon such reassignment, NSI would cease to have any legal right to provide either registry or registrar services in the authoritative root, unless it won the competition – and provided those services under the terms of the new agreement – or provides registration services through an agreement with ICANN.

More fundamentally, from a policy perspective, NSI's position has disturbing implications for the future of the Internet:

- a. Will companies be willing to continue to invest in new Internet applications if entry to the only commercially relevant domains is under the unsupervised control of one company?
- b. Will intellectual property firms be willing to digitize their content and distribute it over the Internet if their ability to combat piracy depends on the unsupervised decision of one company about whether to make available information about the location and ownership of web sites?
- c. Will companies be willing to invest in new trademarks, or bring existing marks to the Internet if their ability to effectively enforce their trademark rights rests in the unsupervised discretion of one company?
- d. Will companies be willing to invest in new technology that could enhance the Internet if the decision to deploy such technology rests in the unsupervised discretion of one company?

Even if the Department of Commerce did not intervene to prevent this result, we believe it is very clear that other countries would step in to impose limitations on NSI. During the comment process that culminated in the issuance of the White Paper, other governments were very forceful with respect to the need to introduce real competition and impose constraints on NSI. Without an appropriate outcome in the present negotiations, we believe NSI would quickly become a target of action by other countries in order to protect consumers against the exercise of monopoly power.

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<sup>22</sup> Of course, NSI's conduct would be subject to the Federal antitrust laws. But antitrust actions are complex and expensive and offer an uncertain outcome, often after lengthy delay. Here, where the risk of harm to consumers is great, we should not – and we will not – pass up the opportunity to ensure through these negotiations that consumers are able to reap the full benefits of robust competition.

For these reasons, we think it clear that – one way or the other – NSI’s provision of registry and registrar services will eventually be subject to reasonable standards, spelled out in the White Paper and in Amendment 11, to ensure the full and fair competition that will lead to lower prices and greater consumer choice. Obviously, failure to reach agreement with ICANN, recompetition of the Cooperative Agreement, and the likely results that would follow, together with action by other governments, will be extremely destabilizing for the Internet and therefore quite harmful to its development. We therefore believe that it is in everyone’s interest – the Internet community, NSI, ICANN, and the United States to resolve these issues amicably, reasonably, and in a manner that promotes the consensus policy goals of the White Paper. We plan to do everything we can to reach that result.

**b. *The Commerce Department and NSI must agree on a post-Testbed license for use of the SRS by Accredited Registrars***

As discussed above, the Commerce Department and NSI have not yet reached agreement on a post-Testbed license for use of the SRS. Following are the principal issues under discussion:

- The SRS requires all registrants in .com, .net and .org to register a domain name for an initial two-year term. The Department of Commerce believes that, at a minimum, NSI should provide a one-year registration option to allow registrars to compete for business on the basis of different term lengths.
- Under the SRS, transfer of a domain name from one registrar to another has the effect of terminating the remainder of an existing registration, and requiring registrants to pay for a new two year term. Thus, if a consumer elects to change registrars six months into an existing registration contract, he or she gets no credit for the remaining 18 months of the existing registry entry, despite his or her previous payment for a full two-year term. Rather, a new two year fee must be paid to NSI upon transfer. We are very concerned that imposing this monetary penalty on transfers of existing registrations among registrars creates a barrier to robust competition. The Department believes transferring registrants should not be required to forfeit their existing term, but rather should pay a transfer fee. Such a fee, in our opinion, should be cost based and should be low enough to facilitate growth of robust competition without encouraging “slamming.”<sup>23</sup>
- NSI and the Department have not agreed on a registration price that reflects NSI’s costs and a reasonable return on investment, as called for in Amendment 11. These discussions are continuing.
- Registrars accredited for the Testbed and for the post-Testbed period have indicated that the current transfer procedures are cumbersome and will discourage consumer choice. Procedures must be developed that facilitate consumer choice and competition without creating “slamming” problems.
- The requirement of a performance bond in the amount of \$100,000 has presented problems for registrars based outside the United States and for registrars with non-traditional business models. We are exploring with NSI flexible alternatives to the performance bond that provide adequate financial assurances to back up the indemnification provisions in NSI’s License and Agreement with Accredited Registrars.

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<sup>23</sup> For purposes of this discussion, “slamming” is the transfer of a domain name registration from one registrar to another without the authorization of the registrant.

- Accredited Registrars have expressed concern about NSI's assertion of rights under the Non-Disclosure Agreement (NDA) in the NSI License and Agreement. That NDA contains a standard exclusionary clause for, among other things, information in the public domain, prior known information, and independently developed information. Notwithstanding this exclusion, NSI has informed Testbed Registrars participating in a Registry Testbed Mail List that "all information included in [postings to the list] is subject to the Confidentiality Agreement . . . and may not be sent to any third party . . . without the express prior written consent of Network Solutions."<sup>24</sup>
- NSI has indicated that in the post-Testbed period, personnel resource limitations will permit the company to support the addition of new registrars at the rate of only five per month. We are concerned that this pace will delay the onset of full competition.<sup>25</sup>
- The Testbed period is providing important information about the competitive implications of NSI's continued participation in the system as both an exclusive provider of registry services and as a competing registrar in .com, .net and .org. For example, NSI's public affairs office (which serves both the registry and the registrar) announced the volume of registration activities conducted by one of the Accredited Registrars participating in the Testbed. NSI agrees that it should not have announced the business information of another party without its permission, and has taken steps to correct the problem, but this action raised questions about how to assure that information held by the registry is not shared with NSI as registrar to the detriment of fair and open competition.

### c. *Data and Competition Issues*

In February and March of this year, NSI implemented certain substantive changes in its provision of registration services. These actions, which have competitive implications, have not been resolved on a permanent basis.

- First, NSI denied bulk access to information in the .com, .net and .org zone files for any purpose other than caching. (NSI later agreed to permit bulk downloads for trademark searches.)
- Second, NSI blocked the date creation field in the WHOIS database and attempted to make access to all information in the WHOIS database subject to a license prohibiting any commercial use of the data.

These actions were taken without the consent of the Department of Commerce.<sup>26</sup> Zone file and WHOIS data had been freely available to the Internet community for years. Numerous people have built legitimate businesses that enhance the Internet using WHOIS and zone file data, which was compiled by NSI while it operated under the authority of the United States Government, through the Cooperative Agreement, as the exclusive provider of registry and registrar services in the .com, .net and .org gTLDs. The White Paper specifically endorsed the continued availability of that data to "anyone who has access to the Internet."

- Third, NSI directed all traffic addressed to [www.InterNic.net](http://www.InterNic.net) to its own registration page at [www.networksolutions.com](http://www.networksolutions.com). Again, this was done without notice to or the authorization of the Department of Commerce. Internic is a registered servicemark of the U.S. Government. Its operation is at the heart of the Cooperative Agreement. NSI's decision to direct would-be domain name registrants directly to its own web page, one month before competition was to be introduced, was extremely troubling to the Department.

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<sup>24</sup> Tab 12.

<sup>25</sup> Tab 13.

<sup>26</sup> This action prompted a Congressional inquiry. Tab 14.



The Department and NSI have reached temporary resolutions of some of these issues.<sup>27</sup> NSI restored the date creation field of WHOIS, pending further dialogue on "privacy considerations and operational risks associated with the display of a registrar's record creation date." We have yet to receive requested information on the operational risks that are the basis of NSI's concerns. Most troubling was NSI's statement that it wanted specifically to block competing registrars access to the date creation field to prevent "harassment" of registrants; that information obviously would be useful to new entrants seeking registration renewal business from the more than five million existing registrations. NSI's commitment to display the date creation field expired on May 1. NSI has assured us only that it would not change the present functionality of WHOIS without informing us. NSI continues to assert a right to limit commercial use of the WHOIS data, over the Department's objections.

NSI agreed to provide free bulk access to zone file data until July 23, 1999, under the terms of a Department of Commerce-approved agreement that would prohibit objectionable uses such as spamming but would allow all other lawful uses. The Department has asked the root server operators not to make this data available during the study period, and all of the operators have agreed.<sup>28</sup> The Department of Commerce has not received information requested on the operational risks that form a basis for NSI's concerns about access to zone file data.

NSI has now sought the Department's approval to effectively segregate zone file data for .com, .net and .org from the root servers and to house it on servers exclusively within NSI's control. The proposal is now under careful review. The NSI proposal has not been accompanied by any commitment to continue to make zone file data readily available to those with legitimate uses, including the Department of Commerce under the Cooperative Agreement, or a commitment regarding Department of Commerce supervision of the zone files pursuant to the Cooperative Agreement.

Finally, NSI agreed to create a page at [www.internic.net](http://www.internic.net) containing information explaining that competition among registrars in .com, .net and .org was coming. We were rather disappointed that NSI's implementation of this agreement involved a page that dissolved, in short order, to the NSI homepage. We expected a distinct web page with a link to NSI's homepage. Now that competing registrars are online, we have reiterated our view that a query to [www.internic.net](http://www.internic.net) should resolve to a page at a separate website with hot links to competing registrars, and we have offered to operate that page. For this change to be fully implemented, NSI may have to rewrite some registration templates used by some of its bulk resellers. Nonetheless, we think that InterNIC is, and should remain, a neutral designation and should be used to educate the public about the introduction of competition in domain name registration. It should not be used to point registration requests to one registrar on a preferential basis. In addition, the Department of Commerce believes that further consideration should be given to use of the InterNIC site to provide access to a comprehensive WHOIS database.

#### D. Domain Names and Trademarks

The White Paper included a lengthy discussion of what was referred to as the "trademark dilemma." The White Paper concluded, on the basis of substantial public input, that the smooth running of the DNS system and continued growth of the Internet required the development of systems to provide trademark holders with the same rights they have in the physical world, to ensure transparency, and to guarantee efficient dispute resolution mechanisms for certain categories of disputes. The specific policies recommended in connection with intellectual property/DNS conflicts include:

- that specific, up-to-date information, be collected from domain name registrants and be made available to anyone with access to the Internet.
- that domain name registrants pay registration fees at the time of registration or renewal and agree to submit to the authority of a court of law in specified jurisdictions.

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<sup>27</sup> Tab 15. Notwithstanding these agreements, however, the Department believes that the original changes, and any future changes, require the authorization of the Department under the Cooperative Agreement.

<sup>28</sup> Tab 16.

- that domain name registrants agree, at the time of registration or renewal, to submit to and be bound by alternative dispute resolutions systems in cases involving cybersquating or cybersquatting.
- that domain name registrants agree, at the time of registration or renewal, to abide by processes designed to prevent certain famous trademarks from being used as domain names by anyone other than the holder of that famous mark.

The White Paper also indicated that the U.S. Government would seek international support to call upon the World Intellectual Property Organization (WIPO) to initiate a balanced and transparent process to develop recommendations for reducing and resolving trademark/domain name disputes.

The WIPO report issued in April 1999, is the product of nearly a full year of work involving public meetings in fourteen different countries, based on input from 344 commenters.<sup>29</sup> It also draws on extensive work done by WIPO prior to June 1998, as well as consensus reflected in the White Paper.

ICANN anticipated a substantial portion of the WIPO recommendations related to pre-payment and the need for up-to-date registrant contact information (most of which were identified in the White Paper as well), and addressed these recommendations in the Accreditation Guidelines, which, as previously mentioned, were the subject of public consultation by ICANN in February of this year. ICANN acted on the remainder of the WIPO recommendations by (1) embracing the concept of a uniform administrative dispute resolution procedure for cybersquatting (a concept that was specifically recommended in the White Paper) and calling on the DNSO to report on implementation of these recommendations in advance of the August Board meeting, and (2) referring the WIPO recommendations on protections for famous marks to the DNSO for further study.

The referral to the DNSO is appropriate under the ICANN Bylaws, which require policy consensus development to be conducted on a bottom-up basis. We note, however, that both the White Paper process and the WIPO process demonstrated nearly universal support for a uniform dispute resolution policy for cybersquatting. Inasmuch as competing registrars are already entering the system, such procedures must be developed quickly. We are thus especially pleased that a group of ICANN Accredited Registrars are working together on their own to develop a uniform dispute resolution policy that will incorporate the WIPO recommendations.

#### E. Management of the Root Server System

The first principle of the White Paper, stability, requires the U.S. Government to transition the management of the Internet name and number addressing system in a manner that insures the stability of the Internet. We are committed to introducing new private sector management without disrupting current operations or splitting the Internet through creation of competing root systems. The White Paper called for the United States to undertake, in cooperation with IANA, NSI, the Internet Architecture Board and other relevant organizations from the public and private sector, a review of the root server system to recommend means to increase the security and professional management of the system.

Many are concerned that as the Internet has grown, operation of the root server system has remained *ad hoc*, in that it continues to be administered by "volunteers" who are not bound by any legal obligation to work together. We note that the so-called "volunteers" are, in fact, extremely reputable and highly skilled networking specialists who have, over the years, demonstrated an ability to work cooperatively and under tremendous pressure to ensure the stability of the root server system.

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<sup>29</sup> The WIPO report is available on the Internet at [www.wipo.int](http://www.wipo.int).

The Department of Commerce and ICANN have entered into a Cooperative Research and Development Agreement (CRADA) to fulfill the White Paper mandate and carry out one of the objectives in the MOU with ICANN – to increase the security and professional management of the system.<sup>30</sup> We also note the creation within the IETF of a working group on this matter. To this end, we are collaborating on the development of written technical procedures for operation of the primary root server and for making the root server system more robust and secure. This initiative represents an important first step in the creation of formalized relationships for administration of the Internet root system.

Currently, NSI manages the authoritative or “A” root server at the direction of the Department of Commerce. The Cooperative Agreement provides that (1) all changes to the “A” root must be approved by the Department and (2) NSI will transfer management of the root to ICANN or an alternative entity upon receipt of written instructions.

The White Paper and the MOU also specifically contemplate transfer of root administration to ICANN. The Department and ICANN are discussing transfer of operational responsibility (but not policy authority) for the “A” or authoritative root server to ICANN. These discussions are informed on an ongoing basis by input from ICANN’s Root Server Advisory Committee, in which NSI participates.

We stress that these conversations are preliminary. The prerequisites for any such transfer include (1) the existence of a technical management plan that ensures the secure and stable operation of the authoritative root and (2) a binding contractual obligation on the part of ICANN to operate the authoritative root server at the direction of the United States government. ICANN is currently developing a technical management plan. In May 1999, ICANN drafted a “Root Zone Management Agreement” for discussion purposes. To the extent that it is consistent with the security and stability of the Internet, the Department will seek private sector input on the plan, when developed.

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For ease of reference, the questions contained in your June 22 letter appear in italics, and the responses in plain text below. Pursuant to an agreement with the Committee’s staff, requested documents will be provided under separate cover on July 12, 1999.

*1. As stated above, it has been reported that during the most recent ICANN board meeting in Berlin last month, the interim board threatened to terminate the authority of NSI to continue registering domain names if NSI fails to enter into a registrar accreditation agreement with ICANN by June 25, 1999. Regarding this reported exchange during ICANN’s board meeting:*

- a. Did a member of ICANN’s interim board threaten to terminate the authority of NSI to continue registering domain names if NSI fails to enter into a registrar accreditation agreement with ICANN by June 25, 1999? If so, please identify the interim board member in question.*
- b. Why did the NTLA official present at the meeting fail to discourage such a drastic measure by ICANN?*
- c. Does ICANN currently possess the authority to terminate the authority of NSI to register domain names?*

Mr. George Conrades did ask a Network Solutions representative, David Johnson, if he had stated that Network Solutions “would never” sign an accreditation agreement, as several participants in the registrar constituency meeting had reported. Following Mr. Johnson’s response, which was contested by several participants, Mr. Conrades indicated that if Network Solutions did not sign an accreditation agreement it would not be a registrar. ICANN does not have the authority to terminate NSI’s “authority” to continue registering domain names, and Mr. Conrades did not assert that

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<sup>30</sup> Tab 17.

ICANN had such authority. We believe that this exchange reflects the frustration and lack of trust described above. We have urged ICANN to avoid further exchanges of this sort.

Representatives of the National Telecommunications and Information Administration (NTIA) and the Patent and Trademark Office (PTO) attended the ICANN open meeting in Berlin on May 25-27, 1999. The United States Government's participation in these meetings is generally limited to observing, in keeping with our commitment to private, bottom-up decision-making. Becky Burr, Acting Associate Administrator for International Affairs, NTIA, responded to a specific question on this topic from Mr. Conrades, declining to comment on his views, but indicating that Amendment 11 clearly contemplates that Network Solutions will need to be accredited at some date in the future and that signing an accreditation agreement with ICANN is at present the only way to become an Accredited Registrar. She made no statement about what would happen if Network Solutions refused to enter into a contract with ICANN. In subsequent public meetings, Ms. Burr has indicated that ICANN has no authority to limit NSI's registration activities. It should be noted that ICANN staff and Board members have also affirmatively indicated that they do not possess such authority.

ICANN does not possess the authority to terminate the authority of NSI to register domain names. NSI provides DNS registration services pursuant to a Cooperative Agreement with the United States Department of Commerce. In that Agreement, NSI agreed to recognize ICANN's authority and to become accredited pursuant to a contract with ICANN.

NSI has indicated during discussions with the Commerce Department that it believes that the United States Government does not have the authority to terminate Network Solutions' ability to register domain names. The Commerce Department believes that it does have the legal authority to terminate provision of registrar and/or registry services in the authoritative root by NSI by recompeting the relevant portions of the Cooperative Agreement. These services then would be provided by the winner of the competition (which could be NSI, if it were the winner and were willing to comply with the provisions of the revised Cooperative Agreement). Network Solutions' contrary view, of course, would mean that Network Solutions could manage the .com, .net, and .org domains in perpetuity without any oversight or supervision by the US Government.

2. a. *Did ICANN consult with the Department of Commerce regarding ICANN's decision to impose a \$1 per domain registration fee?*
- b. *Did the Department of Commerce conduct any legal analysis relating to ICANN's authority to impose a \$1 per domain name fee? If the Department of Commerce did conduct such a legal analysis, please provide all records relating to the aforementioned legal analysis. If the Department of Commerce did not conduct such a legal analysis, please provide a detailed legal analysis of ICANN's authority to impose a \$1 per domain name fee, including but not limited to the following questions:*
  - i. *Is it the legal opinion of the Department of Commerce that ICANN is legally empowered to impose such a fee?*
  - ii. *If so, does ICANN derive the authority to impose a \$1 per domain name fee from its MOU with the Department of Commerce?*
- c. *Does the Department of Commerce approve of ICANN imposing such a fee?*

The Department of Commerce received advance copies of the Registrar Accreditation Guidelines, posted for comment by ICANN on February 8, 1999, and discussed them with ICANN counsel. Department staff asked ICANN counsel how both the fixed and variable portions of the fees were derived, and how those fees related to ICANN's overall budget process, described in the bylaws. We were informed that ICANN intended to establish fees using the budget process, and to collect such fees via contractual arrangements with registrars, registries and others, as appropriate.

The Department of Commerce did not conduct a detailed legal analysis of ICANN's authority to impose the \$1 fee as such fee was not designed to collect funds for government use. As discussed above, Commerce Department staff did direct certain inquiries to ICANN's counsel regarding the fees.

It is, however, the Department of Commerce's view that ICANN is legally empowered to impose such a fee. OMB Circular A-25, ICANN recognizes that ICANN, as a project partner with the Department of Commerce, can recover its cost of participating in a joint project, but only the actual costs associated with its participation in the joint project. Thus, the Department has no objection to ICANN's recovery of costs associated with the joint project, provided that only joint project expenses are recovered and no profits obtained.

The Department also believes that such a fee would be consistent with the White Paper and the MOU between the Department and ICANN. The White Paper called upon the private sector to create a new, not-for-profit corporation, funded "by domain name registries, regional IP registries, or other entities identified by the Board." Under the MOU between the Department and ICANN, ICANN is required to defray its own expenses. The ICANN bylaws require the Board to set fees and charges, subject to rigorous procedural safeguards also set out in the bylaws, "with the goal of fully recovering the reasonable costs of the operation of the Corporation and establishing reasonable reserves and contingencies reasonably related to the legitimate activities of the Corporation. Such fees and charges shall be fair and equitable, and once adopted shall be published on the Web Site in a sufficiently detailed manner so as to be readily accessible." (Bylaws, Section 4.(b)).

Nonetheless, as indicated above, we believe that ICANN should eliminate this fee until the election of board members from the SOs. Our recommendation in this regard reflects the practical judgment that this important decision should not be made until elected members are present on the Board. It does not reflect a legal judgment that the fee is unauthorized or unlawful.

### 3. A detailed legal analysis of:

- a. *The Department of Commerce's authority to empower ICANN;*
- b. *The nature and scope of oversight authority available to the Department of Commerce under its MOU with ICANN; and*
- c. *Whether the Department of Commerce's cooperative agreement with NSI requires NSI to sign a registrar accreditation agreement with ICANN.*

The Department has authorized ICANN to participate in DNS management activities in two separate agreements. On November 25, 1998, following consultation with the private sector and with other governments, the Department of Commerce entered into a joint project agreement with ICANN. Under the agreement, ICANN and the Department are collaborating to design, develop and test mechanisms for private sector management of DNS. To enter into this agreement, each party identified its mission authority to participate in these activities. Just as the Department has statutory authorization to accomplish this mission, ICANN is also chartered in its articles of incorporation and bylaws to pursue DNS management activities.

Most of the Department's work with ICANN falls under the joint project agreement. As discussed below, however, the Department has entered a CRADA with ICANN and intends to enter into a separate contract whereby ICANN will perform key Internet technical coordinating functions (collectively known as the Internet Assigned Numbers Authority (IANA) functions), currently performed under a contract between the Defense Advanced Research Projects Agency (DARPA) and the University of Southern California (USC). Pursuant to these agreements, ICANN is authorized to participate in the Government's DNS management activities.

DARPA and NSF, as well as other Federal agencies, in accordance with their missions, have all participated and maintained a central role in the development and management of the DNS. Through contracts, cooperative agreements, and other transactions, the United States Government has conducted research, development, and technical management of the DNS. The White Paper sets forth the principles that govern the exercise of the U.S. Government involvement in this area. As set forth in the White Paper, the Department of Commerce is continuing this management role by entering into agreements with ICANN.

The Department of Commerce has broad authority to foster, promote and develop foreign and domestic commerce. 15 U.S.C. § 1512. Moreover, the National Telecommunications and Information Administration is specifically authorized to coordinate the telecommunications activities of the Executive Branch and assist in the formulation of standards and policies for these

activities, including, but not limited to, considerations of interoperability, privacy, security, spectrum use and emergency readiness. 47 U.S.C. § 902 (b)(2)(H).

The Department's Joint Project Authority, 15 U.S.C. § 1525, permits the Secretary of Commerce to enter into agreements with research organizations, non-profit entities and public agencies to conduct joint projects on matters of mutual interests, provided that the costs are equitably apportioned. The Department sought, and has achieved, a relationship whereby the joint project partner can test the mechanisms for private sector management of the DNS, including those addressed in the White Paper.

ICANN's responsibility under the joint project agreement is to act as the not-for-profit entity contemplated in the White Paper, and to demonstrate whether such an entity can implement the goals of the White Paper. If it cannot, Government involvement in DNS management would likely need to be extended until such time as a reliable mechanism can be established to meet those goals. The Department does not oversee ICANN's daily operations. The Department's general oversight authority is broad, and, if necessary, the Department could terminate the agreement and ICANN's role in this aspect of DNS management with 120 days notice.

The White Paper stated that the private sector come together to create a non-profit corporation to ultimately manage the DNS functions. Despite press reports to the contrary, the Department did not create, and does not control ICANN. The Department did not draft corporate by-laws for ICANN nor select members of its board of directors. The Department did suggest that ICANN work with the Internet community to resolve concerns raised by ICANN's initial proposal to the Department in response to the White Paper. The Department has been careful not to interfere in the internal affairs of ICANN. The Department's general oversight under the joint project is limited to ensuring that ICANN's activities are in accordance with the joint project MOU, which in turn requires ICANN to perform its MOU tasks in accordance with the White Paper.

At the time that the Department and Network Solutions entered into Amendment 11 of the Cooperative Agreement, the Department had not recognized the new, not-for-profit corporation called for in the White Paper. For this reason, the Amendment refers to "NewCo" as the "not-for-profit corporation described in the Statement of Policy and recognized by the USG in accordance with the provisions of the Statement of Policy for so long as the USG continues its recognition of NewCo." (General Definition of NewCo clause.)

Network Solutions agreed, in Amendment 11, to recognize NewCo "when recognized by the USG in accordance with the provisions of the Statement of Policy." (Purpose clause.) Network Solutions further committed to enter into a contract with NewCo, and acknowledged "that NewCo will have the authority, consistent with the provisions of the Statement of Policy and the agreement between the USG and NewCo, to carry out NewCo's Responsibilities." (NewCo Clause.) Under Amendment 11, NewCo's Responsibilities specifically include the establishment and implementation of DNS policy and the terms, including licensing terms, applicable to new and existing gTLDs and registries under which registries, registrars and gTLDs are permitted to operate." (Assistance to NewCo clause and "Transition" Section of White Paper.)

Network Solutions has indicated that it is not obligated to enter into a contract with ICANN because the Department of Commerce has not "recognized" ICANN by transferring authority over the authoritative root system to it. We find no merit in this argument. The Department of Commerce entered into a Memorandum of Understanding with ICANN on November 25, 1998. That MOU constitutes the Government's "recognition" of ICANN. We reiterated this point in a letter to Network Solutions on February 26, 1999. When Network Solutions signed Amendment 11 on October 7, 1998, no one contemplated that either "operational responsibility" (let alone "authority") over the Internet root would be transferred outside the United States Government in the short term. Under the White Paper, the Government proposed to "gradually transfer these (coordination) functions to the new corporation . . . with the goal of having the new corporation carry out operational responsibility by October 1998." (White Paper Section 4.) Moreover, in Amendment 11, NSI agreed "to continue to function as the administrator for the primary root server for the root server system and as a root zone administrator until such time as the USG instructs NSI in writing to transfer either or both of these functions to NewCo or a specified alternate entity." (Root Servers

Clause) This administrative function specifically provided "NSI to process any such changes (additions or deletions to the root zone file) directed by NewCo when submitted to NSI in conformity with written procedures established by NewCo and recognized by the USG." (Same)

Amendment 11 unambiguously contemplates a contract between NSI and ICANN under which NSI will recognize that ICANN has the authority to carry out its responsibilities under the White Paper and ICANN will accredit NSI as a registrar and registry. These parties have not yet reached agreement on the terms of that contract. As we have discussed, we believe it is clear that the terms must be consistent with the policies set forth in the White Paper and, in particular, with the policy mandating robust competition in the provision of registrar services.

As discussed above, we have every hope that these parties will be able to reach agreement. We plan to do everything we can to facilitate such an agreement.

*4. Records of all communications (whether written, electronic or oral) between the Department of Commerce (or its agents or representatives) and ICANN (or its agent or representatives), including but not limited to all records relating to such communications, regarding:*

- a. Negotiations or other discussions regarding the transfer of control of the root system to ICANN or an ICANN-affiliated entity*
- b. Negotiations or other discussions regarding future agreements relating to the DNS between ICANN and the Department of Commerce) excluding records of communications provided in response to request 4.a. above)*
- c. The terms of ICANN's registrar accreditation agreement, including but not limited to the imposition of the \$1 per domain name registration fee*
- d. Termination or alteration of the Department of Commerce's cooperative agreement with NSI; and*
- e. Attempts to persuade or force NSI into entering a registrar accreditation agreement with ICANN, or NSI's refusal to enter into the aforementioned agreement.*

The Department of Commerce has no intention of transferring control over the root system to ICANN at this time. We have had preliminary conversations relating to ICANN's operation of the authoritative root under terms and conditions similar to those by which the A root is operated by NSI currently.

The MOU and the CRADA constitute the only existing agreements between ICANN and the Department of Commerce.

With respect to future agreements, two are currently contemplated:

The Department has developed a sole source contract/request for proposal <sup>31</sup> for ICANN's provisions of a limited number of purely technical services, previously provided under a contract between DARPA and the University of Southern California's Information Sciences Institute (ISI). An initial notice was posted in *Commerce Business Daily* on January 4, 1999, as required under 41 U.S.C. 253 (Federal Procurement Regulations). In response to public input, the CBD notice was revised and reposted on February 9, 1999. The proposed contract does not authorize ICANN to make any substantive changes in existing policy associated with the performance of the IANA functions. No protests or expressions of interest were received in response to the revised CBD Notice. We are currently awaiting a technical and business proposal from ICANN as well as various representations and certifications required under federal procurement statutes and regulations.

If and when the Department of Commerce transfers operational responsibility for the authoritative root server for the root server system to ICANN, an separate contract would be required to obligate ICANN to operate the authoritative root under the direction of the United States government. As discussed above, these obligations would mirror the obligations under which NSI currently operates the A root server.

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<sup>31</sup> Tab 18.


As discussed above, Department staff reviewed and commented on advance copies of the Registrar Accreditation Guidelines. Department staff suggested certain changes in the guidelines, and urged ICANN to include a series of questions designed to elicit public input on the matters addressed. ICANN staff implemented this and other suggestions. Department staff also facilitated a meeting between ICANN and NSI to discuss NSI's objections to the terms of the Accreditation Guidelines and the Accreditation Agreement. The Department also received, and conveyed to ICANN, input from members of the intellectual property community with respect to the Agreement. In both cases, ICANN revised its Accreditation Agreement based on the input received.

In February and March of this year, Commerce Department staff attempted to facilitate the NSI and ICANN contract negotiations. These discussions focused on two agreements, one relating to NSI's registrar activities, and one relating to NSI's activities as the registry for .com, .net and .org. Although some progress was made in the course of these informal discussions, NSI's refusal to consider any arrangement that permitted the existence of a contractual relationship between ICANN and ICANN Accredited Registrars effectively ended the effort at that time. NSI and Department staff are currently engaged in intensive discussions on the subject of the ICANN/NSI relationship.

5. *All records relating to the proceedings of the Government Advisory Committee to ICANN*

Responsive records will be provided under separate cover.

Sincerely,



Andrew J. Fincus

cc: The Honorable John D. Dingell  
Ranking Member

Mr. UPTON. Thank you very much.

I would note for all witnesses that your full statement is made a part of the record. If you could limit your remarks, as you did, to about 5 minutes, that would be terrific. We have this fancy Internet time clock available for all. Ms. Dyson.

#### TESTIMONY OF ESTHER DYSON

Ms. DYSON. Thank you very much, Mr. Chairman.

I welcome the opportunity to appear here today on behalf of the many people around the world working together to create the global, non-profit consensus development body called the Internet Corporation For Assigned Names and Numbers. Like everybody else, I am going to try and just give an opening statement, and then address specific questions later.

As you know, ICANN was formed by the Internet community in response to a challenge set forth by the U.S. Government in the so-called White Paper issued in June of last year. Global consensus is an illusive goal, especially when it must be generated entirely within the private sector with only the encouragement, but not the money or the power of the world's governments.

Nonetheless, the various communities around the world that make up and depend on the Internet have taken up the challenge, and ICANN is the result; a work still in progress but substantially underway. Thus, the fundamental issue here is not ICANN and its admitted imperfections, which we are continuing to try to correct.



The real issue is whether the coordination of these important technical aspects of the Internet will be done by the world's governments, or by private companies pursuing private economic interests, or by the Internet community as a whole, which includes of course governments and private economic interests, but also many individuals and technical people, all of whom increasingly rely on the Internet for information, communication, and commerce.

ICANN is a vehicle for these various communities to carry out the coordination tasks. It has no will of its own, but the fact that these hearings are taking place today under this title is evidence that this issue, how it should be done, is still in doubt. The ultimate resolution of this question is very important to the future of the Internet, which owes its development in large part to the non-neglect from governments and from big business.

The Internet is in fact the world's most successful, voluntary, cooperative effort based on consensus about technical standards and the naming system, which allow it to function so well. It has earned legitimacy because it has worked well and served its users. People can rely on it. They are not told to rely on it. They can.

The Internet community's creation of ICANN is a continuation of that approach, even as the Internet becomes ever more complex, more important for commerce, and more ubiquitous. ICANN thus replaces a highly informal, unstructured system where very few individuals make key decisions about the future and direction of the Internet.

Those individuals were remarkably wise and unselfish, which is why everybody went along with their decisions. The vast majority of those decisions were in the public interest as is proved by the success of the Internet. As the net grows, however, we need more permanent, more explicit, and more accountable structures to continue this tradition of consensus.

ICANN is, itself, the product of what Internet engineers call "rough consensus." Its sole objective is to encourage the continued coordination of some key technical and policy details of Internet management, through the development of community-wide consensus, and then implementation of those policies by contract. These are the key words: consensus and contract.

As I have noted, developing such consensus is not an easy task. It inevitably involves contention and disagreement, followed by compromise among people of good faith. As those of us involved have seen, feelings can run deep and debates can be intense. Right now, this difficult task is being made even more difficult by the fact that one of ICANN's first tasks is to manage the transition from a monopoly to competition for a very visible and significant activity, and a lucrative one: the registration of domain names.

Transitions from monopoly to competition are difficult and messy under the best of circumstances, as this committee fully knows from its oversight over the telecommunications industry, and as I personally know from my experiences in Eastern Europe. In telecommunications, the transition is being managed by Federal, State, and local governments which ultimately can rely on the course of power only governments possess.

Here, by contrast, the transition is happening even as the government's supervisory power over its contractor is being replaced

with a newly created process for implementing consensus. Mr. Chairman, we need to be clear about this. There is no issue about ICANN being out of control or off-track. ICANN is nothing more or less than the embodiment of the consensus of the Internet community as a whole.

Consensus does not always mean unanimity. The disagreements you see are evidence of this process. They are not problems with it. Therefore, I have submitted a lengthier text with various attachments that I hope will be included. I welcome the opportunity to answer any questions you may have.

Thank you very much.

[The prepared statement of Esther Dyson follows:]

PREPARED STATEMENT OF ESTHER DYSON, INTERIM CHAIRMAN OF THE BOARD OF DIRECTORS, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Mr. Chairman and Members of the Subcommittee: I welcome the opportunity to appear here today on behalf of the many, many people around the world who are working together to create the global, non-profit, consensus-development body called the Internet Corporation for Assigned Names and Numbers (ICANN).

*I. Introduction: The Challenge of Creating a Private Sector, Consensus-Based Organization*

As you know, ICANN was formed by the Internet community in response to the challenge set forth by the United States Government in its June 1998 Statement of Policy on the Management of Internet Domain Names and Addresses, commonly known as the White Paper. The White Paper called upon the global Internet community to create "a new, not-for-profit corporation formed by private sector Internet stakeholders to administer policy for the Internet name and address system," 63 Fed. Reg. 31749, and specified that the new corporation should be dedicated to community consensus and to promoting the stability of the Internet; competition and market mechanisms; private sector bottom-up, coordination; and functional and geographic representation.

ICANN is working hard to fulfill the mandate of the White Paper. Developing global consensus is an elusive goal, especially when it must be generated entirely within the private sector, with only the encouragement—but none of the money or power—of the world's governments. Nevertheless, the various communities around the world that make up and depend on the Internet have taken up the challenge, and ICANN is the result: a work still in progress but substantially underway.

Mr. Chairman, I regret that the title of today's hearing ("Is ICANN Out of Control?") conveys an erroneous impression about what ICANN is and what it is doing. Even more seriously, the title of the hearing tends to distract attention from the truly fundamental issue before this Subcommittee: How will the Internet's plumbing be managed? More to the point, will the coordination of the Internet's key technical functions be administered (1) by the world's governments and bureaucrats, (2) by a private company pursuing its own private economic interests, or (3) by the global Internet community as a whole? ICANN represents a strong endorsement of option (3), a consensus-based private-sector vehicle through which the Internet community—engineers and entrepreneurs, businesses and academics, non-profits and individuals alike—will coordinate Internet names and numbers. The fact that these hearings are taking place today under this title, however, is stark evidence that this issue—how will the Internet's plumbing be managed?—is still in doubt.

The ultimate resolution of this issue is very important to the future of the Internet, which owes its successful development in large part to a lack of control by governments or private concerns. The Internet is perhaps the world's most successful voluntary cooperative effort. It has developed based on a voluntary consensus about the technical standards and naming system which allow it to function, fostered by the unusual willingness of governments (especially the United States Government) to leave it alone. It earned legitimacy because it worked well and served its users. This voluntary cooperative environment has produced a truly wonderful global resource, and the Internet community's creation of ICANN is intended to allow that basic approach to continue, even as the Internet becomes ever more complex, more important for commerce and society, and more ubiquitous.

Because nothing like ICANN has ever been attempted before, its success is not assured, but because it seeks to embrace and build on the consensus tradition of

the Internet, it has at least a chance to succeed. ICANN is intended to replace a highly informal, unstructured system where a very few individuals made key decisions about the future and direction of the Internet. Those individuals were remarkably wise and unselfish, and the fact that the vast majority of their decisions were in the public interest is evidenced by the very success and growth of the Internet itself. But individuals are not immortal, as we are so frequently reminded, and thus we need more permanent structures if we are to continue this tradition of consensus.

ICANN is itself the product of what the Internet engineers call "rough consensus," and its sole objective is to encourage the continued coordination of some key technical and policy details of Internet management through the development and implementation of community-wide consensus. As I have noted, developing this consensus is not an easy task, and is inevitably accompanied by contention and disagreement. Consensus, after all, is a result of disagreement and debate followed by compromise among people of good faith. As those of us intimately involved in this process have certainly seen, feelings can run deep and the debates can be intense. But this already difficult task has been made even more difficult by the fact that the creation of ICANN is happening simultaneously with the transition from a monopoly to a competitive environment for the activity most widely associated with the Internet's plumbing, the registration of domain names.

Transitions from monopoly to competition are difficult and messy under the best of circumstances, as this Committee is fully aware given its oversight over the telecommunications industry. But in that industry, the transition is being managed by federal, state and local governments, which ultimately can rely on the coercive power only governments possess. Here, by contrast, the transition from monopoly to competition is being attempted at the same time that the United States Government's supervisory power over its contractors is being replaced with a newly-created process for developing community-wide consensus through a private-sector, non-profit entity.

I would like to speak directly to the issues relating to ICANN's relationship with the current monopoly government contractor in this area, Network Solutions, Inc. Network Solutions is an important member of the Internet community, and participated very significantly in the process of forming ICANN and in its consensus-development efforts to date. It has important management responsibilities for the domain name system today, and has contributed to its growth over the last several years. It is a voice that needs to be heard. But it is not the only voice, nor can or should it be the decisive voice. Network Solutions was hired by the United States Government to do a job, and in large part it appears to have done it well. It has much experience and knowledge to offer.

Nevertheless, as Network Solutions's Senior Vice President for Internet Relations noted recently (Inter@ctive Week, July 19, 1999), it has a "fiduciary duty to [its] shareholders," and not to the global Internet community as a whole. Its primary responsibility is to "make a reasonable profit," not to develop and follow the community's consensus. Thus, while it should be an important participant in the debates, and, one hopes, a constructive contributor to the creation of consensus, it should not be permitted to unilaterally determine how this important global resource will be managed.

Mr. Chairman, we need to be clear about this: there is no issue about ICANN being "out of control." ICANN is nothing more or less than the embodiment of the Internet community as a whole. It reflects the participation of a large and growing number of technical, business, public-interest, academic, and other segments of the Internet community. It is this collection of diverse interests and experiences that produces ICANN policies and decisions, as a statement of the consensus of the participants.

But consensus does not always or necessarily mean unanimity, and there are certainly those in the community who disagree, for various reasons, with particular consensus positions produced by this process. Some disagreements are philosophical; some are cultural; some are economic. This is inevitable given the diversity of interests involved and the cultural, political and economic issues implicated by the matters that ICANN has dealt with. The fact of those disagreements, however, is evidence of the process itself, not of any problems with it.

## *II. Open Meetings, Board Elections, and the "Domain Name Tax"*

Mr. Chairman, in your letter of June 22, 1999, you posed a series of questions relating to ICANN's formation, its structure and policies. ICANN's response, transmitted on July 8, 1999, encompassed forty-six pages and nine attachments. Rather than repeat the extensive information detailed in our responses (attached as Exhibit

A), let me briefly address the four key issues that have attracted the most attention and controversy in recent weeks:

- *Closed Board meetings* (or, "Is ICANN making secretive decisions in the shadows?");
- *Elected Board members* (or, "When will the mysteriously chosen Initial Board give up the reins of ICANN to Board members properly elected by the Internet community?");
- *A permanent cost-recovery structure* (or, "How dare ICANN try to impose a Domain Name Tax?"); and
- *Constraints on ICANN's authority* (or, "Is ICANN a new Internet regulatory agency? What's to stop ICANN from taking away my domain name or censoring my web site?").

These four areas of concern have been raised by a number of parties, including you, Mr. Chairman, in your letter of June 22, and the U.S. Department of Commerce in its letter of July 8, 1999. In response to specific suggestions made by the Department of Commerce, the ICANN Board has agreed upon steps to address those concerns.

*Closed Board meetings.* The Department of Commerce suggested that ICANN open its Initial Board meetings to the public. In response, ICANN's Initial Board has decided to hold the Santiago Board meeting as a public meeting, and to deal with all pending issues publicly (except for personnel or legal matters, if any, that might require an executive session).

Following Santiago, nine elected Board members will join the current complement, and we will defer to that full Board any decisions on future meeting procedures, since the experience in Santiago will then be available to inform their decisions. ICANN's bylaws provide that the Annual Meeting (which will be held in Los Angeles in November) must be a public meeting.

I should note that the Initial Board believes very strongly that it has carried out its responsibilities openly and transparently, recognizing community consensus when it exists and encouraging its development when it does not, and all in full view of the global public. The agendas of all ICANN Initial Board meetings are posted in advance of each meeting; at each quarterly meeting, the agenda is open for full public discussion in advance; any resolutions adopted by the Board or decisions taken are announced and released immediately following those decisions; and the full minutes of every Board meeting are posted for public review. The Board takes care to engage in public discussions of its efforts; it both encourages and considers public input, and fully discloses its own decision-making criteria. All public comments, Advisory Committee recommendations, and staff proposals have been posted on the ICANN web site well in advance of Board meetings. The only Board activity that has not (until now) been fully public is interaction between it and its staff, and discussion among the Board members of staff recommendations, at the exact time that they happen. Full minutes of decisions taken and the reasons for them (including any formal actions of the Board), of course, are posted publicly shortly after they occur. In short, the Board has made all the inputs and outputs of its decision making process fully available to the world at large.

In any event, the Initial Board has decided to open its next meeting, in Santiago, to public observation.

*Elected Board members.* ICANN's elected Directors will join the Board in two waves: the first wave will consist of nine Directors chosen by ICANN's Supporting Organizations; the second wave will be elected by an At-Large membership consisting of individual Internet users. The Board expects the first wave to be completed by November 1999, and the second wave as soon as possible following that. In any event, the process of creating a fully elected Board must be completed by September 2000.

As to the first wave of elected Board members, ICANN expects that the nine Directors to be elected by its three Supporting Organizations (the Domain Name Supporting Organization, the Address Supporting Organization, and the Protocol Supporting Organization) will be selected and seated in time for ICANN's annual meeting in November in Los Angeles.

As to the second wave, it is ICANN's highest priority to complete the work necessary to implement a workable At-Large membership structure and to conduct elections for the nine At-Large Directors that must be chosen by the membership. ICANN has been working diligently to accomplish this objective as soon as possible. The Initial Board has received a comprehensive set of recommendations from ICANN's Membership Advisory Committee, and expects to begin the implementation process at its August meeting in Santiago. ICANN's goal is to replace each and every one of the current Initial Board members as soon as possible, consistent with

creating a process that minimizes the risk of capture or election fraud, and that will lead to a truly representative Board.

*Permanent cost-recovery structure.* ICANN has decided to defer the implementation of its volume-based cost-recovery registrar fee (mischaracterized by some as a "Domain Name Tax"), and to convene a task force to study available funding options and recommend to ICANN and the Internet community a fair and workable allocation of the funding required to cover ICANN's costs.

The task force will include representatives of the key entities involved in the DNS infrastructure: the domain name registries, address registries, and domain name registrars that have (or are likely to have) contractual relationships with ICANN. Charged with reviewing the options for fair and workable cost-recovery mechanisms, the task force will be asked to make its recommendations by October 1, 1999, with an interim report (if possible) prior to the Santiago meeting in late August. ICANN will, of course, post those recommendations for public comment, so that the Board (which will then consist of a full complement of 19) will be able to consider those recommendations at its November Annual Meeting.

Nevertheless, let me say a few words about ICANN's now-deferred cost-recovery structure. The volume-based user fee that has been mischaracterized as a "Domain Name Tax"—in which the competing registrars contribute to ICANN's cost-recovery budget based on the volume of their registrations—seemed to be a fair and workable way to spread the costs among the companies and organizations that benefit from ICANN's DNS coordination and pro-competition activities. The registry fee was adopted following a thorough process of public notice and comment, and was broadly supported by an apparent consensus of the community. For example, the Coalition of Domain Name Registrars, a group consisting of most of the registrars that would actually be responsible for paying those fees, has written to Congress indicating that they have no objections to paying their fair share of ICANN's costs in this way. I understand that the Subcommittee will have an opportunity to hear from three of the competing registrars later today.

In sum, we continue to believe that a volume-based fee is a fair and appropriate way to spread ICANN's cost-recovery needs. Indeed, in its response to the Chairman's questions, the Department of Commerce (which was fully apprised of the process that produced this consensus position) agreed that this was a rational and appropriate approach that (1) was the result of full notice and comment, (2) was consistent with the White Paper, and (3) was fully authorized by ICANN's Memorandum of Understanding with the DoC. Nevertheless, the DoC suggested that, because it has become controversial, ICANN should suspend this approach until there are elected Board members. ICANN has agreed to do so, pending the recommendations of the new task force on funding options.

Obviously, ICANN must have a stable source of income adequate to cover the costs of its technical coordination and consensus-based policy development functions. The United States Government has asked ICANN to do an important job, but it has not provided the means by which to carry it out, leaving the job of providing funds to the Internet community itself. To date, ICANN has relied on voluntary donations, and a number of people and organizations have been very generous. But this is neither an equitable way to allocate the recovery of costs nor a means to assure stability over the long term. Thus, if ICANN is to continue, it is simply not possible to abandon the cost-recovery mechanism that has been produced by the consensus-development process and replace it with nothing.

ICANN's goal is simple: to establish a funding structure for the technical coordination of the Internet that is stable, effective, and equitable. Any proposed method that would meet this goal will receive serious attention from ICANN and the Internet community at large. If the members of this Committee have thoughts about how ICANN should be funded, we would be pleased to hear them.

*Constraints on ICANN's authority.* The ability of ICANN to make policy is very carefully cabined, both by its bylaws and by the terms of the White Paper. Nevertheless, as the Department of Commerce has noted, there remain concerns about the effectiveness of existing restrictions and limitations on the authority of the ICANN Board.

On this point, we certainly understand the concern, but it seems misplaced, given the clear limitations in ICANN's bylaws and articles of incorporation on the scope of its permissible activities. Nevertheless, ICANN is entirely willing to incorporate in its contracts with registries and registrars (or perhaps in its Memorandum of Understanding with the U.S. Government) language that says that no ICANN policy is being agreed to in those contracts that is not fully consistent with, and reasonably related to, the goals of ICANN as set forth in the White Paper, which are replicated in ICANN's bylaws. Such language would fully reflect both the original concepts that gave birth to ICANN and this Board's understanding of ICANN's proper role.

### *III. Network Solutions, Inc., and the Transition to Competition*

I have already spoken directly about ICANN's relations with Network Solutions, Inc. I will try to address in some detail a few of the more serious erroneous contentions that Network Solutions has advanced with respect to ICANN.

Network Solutions has asserted in a number of forums that ICANN intends to terminate Network Solutions as a registrar of .com, .net, and .org domain names. Network Solutions has also claimed that ICANN's registrar accreditation agreements (which registrars must sign to become accredited for the .com, .net, and .org domains) grant ICANN the unrestrained authority to terminate a registrar on 15 days' notice. Both contentions are unequivocally wrong.

ICANN has no statutory or regulatory "authority" of any kind. It has only the power of the consensus that it represents, and the willingness of members of the Internet community to participate in and abide by the consensus development process that is at the heart of ICANN.

As you know, Network Solutions has held a government-granted monopoly in the market for domain name registration services in the .com, .net, and .org domains. In its October 1998 agreement with the Department of Commerce (Amendment 11), Network Solutions agreed that, once a competitive registrar system was introduced, a level playing field would be established for all registrars and that only properly accredited registrars would be permitted to provide domain name services to the public. When Network Solutions becomes an accredited registrar, it will continue to be able to offer domain name services as a competitor in a fair and open market; if it refuses to become accredited, as it has to date, its agreement with the US Government will prohibit it from offering domain name services in the .com, .net, and .org domains. When Network Solutions applies for accreditation from ICANN, ICANN will treat the application in the same manner as it would any other application, as required by its bylaws.

If the Committee has been told that ICANN has the power to terminate Network Solutions' authority to register domain names, or has asserted that it does, the Committee has been misinformed. To clarify this point, the following description of the process for accrediting registrars may be helpful:

- From January 1, 1993, until early June 1999, domain names in the .com, .net, and .org top-level domains were registered exclusively by Network Solutions under a Cooperative Agreement between it and the U.S. Government. As noted in the White Paper, public comments showed "widespread dissatisfaction about the absence of competition in domain name registration." Accordingly, in its June 1998 White Paper, the U.S. Government stated its intention to "ramp down [its] cooperative agreement with Network Solutions [then scheduled to expire September 30, 1998] with the objective of introducing competition into the domain name space."
- To implement the "ramp down," Network Solutions and the U.S. Government negotiated Amendment 11 to Network Solutions' cooperative agreement, by which Network Solutions and the U.S. Government agreed to extend Network Solutions' registry monopoly for a two-year period (until September 30, 2000), during which Network Solutions must create a Shared Registry System to allow competing companies to register domain names in .com, .net, and .org. Since Network Solutions was going to continue to be the sole administrator of the registries for .com, .net, and .org for at least two years, while simultaneously acting as one of the competitors marketing name registration services in those domains, Amendment 11 stated that a neutral body to be formed by the Internet community ("NewCo," subsequently designated by the U.S. Government as ICANN) would carry out the coordinating functions required to ensure a freely competitive registration market. In Amendment 11, Network Solutions expressly acknowledged that NewCo "will have the authority, consistent with the provisions of the Statement of Policy and the agreement between the USG and NewCo, to carry out NewCo's responsibilities." On November 25, 1998, the Department of Commerce recognized ICANN as the NewCo entity referred to in Amendment 11; this was specifically reiterated to Network Solutions by letter on February 26, 1999.
- To achieve the White Paper's "objective of introducing competition into the domain name space," Amendment 11 provided that Network Solutions would implement a "Shared Registration System" to "create an environment conducive to the development of robust competition among domain name registrars." The schedule agreed to by Network Solutions and the USG provided for several phases, beginning with a "test bed" in which Network Solutions agreed to "establish a test bed supporting actual registrations in .com, .net and .org by 5 registrars accredited by NewCo (Accredited Registrars)" and ending with a re-

engineering of the overall system to "assure that Network Solutions, acting as registry, shall give all licensed Accredited Registrars (including Network Solutions acting as registrar) equivalent access ("equal access") to registry services through the Shared Registration System."

Thus, Network Solutions agreed in Amendment 11 that, after the introduction of competition into the registrar business, it would operate the registry to give access to, and only to, ICANN-accredited registrars (including Network Solutions). In this way, the level playing field necessary for effective competition in a shared registry environment would be established.

In sum, ICANN neither has nor claims any "authority to terminate Network Solutions' authority to register domain names." Instead, the requirement that Network Solutions must be accredited by ICANN to act as a registrar after the introduction of competition, so that it operates to the extent possible (given its continuing operation of the registries for .com, .net, and .org) under the same conditions as all other competing registrars, flows directly from Network Solutions' own agreement with the USG.

To date, Network Solutions has not requested to be accredited by ICANN, and certain individuals purporting to speak for Network Solutions have publicly stated that it does not intend to be accredited. ICANN has received no official communication on this issue from Network Solutions, and stands ready to treat an accreditation application from Network Solutions in exactly the same way it has responded to similar applications by others.

In fact, in the event Network Solutions chooses to seek accreditation, ICANN is required by its agreement with the U.S. Government to perform its accreditation function fairly, having specifically agreed in the MOU not to "act unjustifiably or arbitrarily to injure particular persons or entities or particular categories of persons or entities." This fairness provision, which parallels provisions in Amendment 11, ICANN's registrar accreditation policy, and ICANN's own bylaws, appropriately and effectively ensures against arbitrary denial of accreditation to Network Solutions or any other registrar.

Likewise, the registrar accreditation agreement is a contract between ICANN and its accredited registrars that provides a strong set of protections for accredited registrars. First, the registrar accreditation agreement spells out that ICANN can terminate accreditation only on the basis of a defined set of causes—for example, bankruptcy of the registrar or uncured breach of the registrar accreditation agreement. Second, the agreement provides for automatic renewal of accreditation: an accredited registrar (such as Network Solutions) "shall be entitled to renewal provided it meets the accreditation requirements then in effect." ICANN Registrar Accreditation Agreement, Sec. III(B)(i). In the event of an unresolved dispute over any company's renewal of accreditation, the accredited registrar is entitled to fifteen days' notice and the right to invoke neutral arbitration that will be binding on ICANN. Together, the rights to automatic renewal and arbitration afford registrars (including Network Solutions) the predictability that is needed for sensible business planning, and the assurance that ICANN cannot treat a given registrar arbitrarily.

#### *IV. Conclusion*

Mr. Chairman, let me conclude by noting that ICANN's July 8, 1999, response to Chairman Bliley touches on a number of questions and issues that I do not have the time to address in my opening statement, including the process by which ICANN's Initial Board was selected, ICANN's relationships with country code top-level domain managers, intellectual property rights in registry databases, and ICANN's Transition Budget. Accordingly, I would ask that ICANN's response, along with the exhibits, be made a part of the record of today's hearing.

I thank the Committee for the opportunity to testify, and I look forward to answering your questions.



July 8, 1999

The Honorable Thomas J. Bliley, Jr.  
Chairman  
The House Committee on Commerce  
2125 Rayburn House Office Building  
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the Internet Corporation for Assigned Names and Numbers ("ICANN"), please find enclosed responses to the questions set forth in your letter of June 22, 1999, along with various supporting materials.

The issues raised by your letter are matters of genuine public interest that deserve the attention of this Committee. I hope that your inquiry will serve to educate and inform a broader public than is now aware of the complexities of the privatization process of which ICANN is an integral part. Unfortunately, the subject matter involved, the Domain Name System ("DNS"), is not easy for the general public to understand. As a result, the debates and discussions surrounding the attempt to create a private, non-profit entity to replace the management and funding of the DNS historically provided by the United States Government ("USG") have largely been confined to a small circle of already knowledgeable persons, many with very specific interests. Given the significance of this effort, it deserves more attention by a broader audience.

As described in more detail below, the attempt to create a global private-sector entity to serve as a vehicle for determining consensus across the Internet community, and then to manage the implementation of that consensus, is an extremely difficult task. There are no clear models to follow; global organizations today tend to be either private organizations with no requirement to produce consensus, or intergovernmental organizations formed by treaty or international agreement. ICANN, by contrast, is intended to be a non-governmental body, but also to be a vehicle that would reflect international consensus about the management of an important component of a truly global resource -- the Internet.

Thus, to a significant extent, ICANN is a great experiment, and like all experiments, it will go through a period of trial and error. ICANN is now a little over six months old, and we have already experienced both. Thus, we welcome the opportunity to share our experiences with the Committee and with the American public, in the hope that this discussion will help to make this effort more successful more quickly.





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Ultimately, ICANN's value to the Internet community lies both in what it does (that is, substance) and how it does it (process). As to substance, if it is successful in developing and implementing consensus on DNS operational and policy issues, ICANN will help ensure the smooth and stable operation and growth of the Internet by providing a workable mechanism for oversight of a select set of key technical administrative functions: the management of the domain name and root server systems; the allocation of IP addresses; and the coordination of technical standards. In addition, there is a clear consensus in the Internet community favoring the prompt introduction and promotion of competition in the delivery of domain name services, and ICANN is charged by the Internet community with accomplishing that goal as well.

As to process, ICANN represents a new approach: non-governmental, private-sector policy-making that is open and transparent, bottom-up, consensus-based, and global in scope. This is difficult enough, but it is taking place in an environment in which the use and importance of the Internet for both personal and business use is growing exponentially. Under these circumstances, and because by definition this process is intended to move forward only on the basis of a global consensus, it is, to put it simply, a tough job. Still, despite the complexity of the task, there has been significant progress, but there are clearly substantial problems left to deal with; your inquiry provides a very helpful opportunity to describe both the progress and the problems for the benefit of the Committee and the entire Internet community.

In addition to responding to the specific questions in your letter, I thought it would be useful to describe, as a common starting point, the context in which ICANN was formed and in which it operates. There is a considerable amount of misinformation out and about, which may have generated some of the questions that the Committee has asked about our progress.

**ICANN is a Consensus-Driven Organization.** Most importantly, ICANN is a voluntary, consensus organization; it has no statutory authority, and no power at all that is not derivative of the level of Internet community consensus that its policies and procedures represent. It is governed by its bylaws, which were themselves developed over several months of discussion by the Internet community and represent, as the USG determined in recognizing ICANN as the privatization vehicle it had called upon the community to create, the consensus of that community. Thus, ICANN has no power or authority to impose anything on anyone, and it has not attempted to do so. ICANN is nothing more than a vehicle or forum for the development and implementation of global consensus on various policy issues related to the DNS.



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Because there were at the time of ICANN's formation and remain today critics of either its bylaws or particular actions taken since its creation, it is useful to define what we mean when we use the word "consensus." It obviously does not mean "unanimous," nor is it intended to reflect some precise counting of heads pro or con on a particular subject, since in this environment that is simply not possible. What it does mean is that, on any particular issue, proposed policies are generated from public input and published to the world at large, comments are received and publicly discussed, and an attempt is made, from the entirety of that process, to articulate the consensus position as best it can be perceived.

Obviously, to the extent any individual or group undertakes to articulate a consensus of the overall community, its work is useful only to the extent it accurately reflects the consensus. ICANN is no exception to this rule. Unfortunately, there is no litmus test that can objectively render a judgment as to whether this standard has been met in any particular situation. Perhaps the best test is whether the community at large is comfortable with the process and the results, and the best gauge of that is probably the level of continuing participation in the process, and voluntary compliance with the policies produced by that process.

This is, necessarily, a more ambiguous standard than counting votes or some other objectively measurable criteria, and it inevitably means less efficient, more messy, less linear movement, as the perceived community consensus shifts and adapts to change, or as perceptions of that consensus themselves are refined or change. Such a process is easily subject to criticism and attack by those not satisfied with the process or the results; after all, in the absence of some objective determination, it is impossible to definitively refute claims that the consensus has been misread, and loud noise can sometimes be mistaken for broad support for any proposition advanced.

Certainly there are those who do not accept that particular ICANN policies or decisions to date accurately reflect the community consensus, and there are some who are not comfortable with the process that has been employed to determine the community consensus. No doubt reasonable people can differ on both policy and process, and certainly there are many opinions about practically everything on which ICANN has acted. Still, it appears that the process has actually worked remarkably well considering the difficulty of the task, as measured by the fact



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that most of the global Internet communities continue to participate in this consensus development process.<sup>1</sup>

If ICANN were not reasonably successful as a consensus development vehicle, it would simply disappear; since it relies for its existence on voluntary compliance and cooperation by diverse parties around the world, ICANN cannot survive without broad support throughout the global Internet community. The fact that the privatization process of which ICANN is such an integral part continues to move forward, and that most of the constituent elements of the relevant community appear to support continued progress, is strong evidence that, despite the inherent ambiguity and messiness of the process, it is basically moving in the right direction.

This is certainly not to say that these efforts could not be improved; we are all learning as

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<sup>1</sup> It would take too much space to list the hundreds of individual members of the Internet community who are actively participating in the ICANN process. However, a very limited and non-exhaustive list of some of the groups and companies that have been constructively participating in the ICANN consensus-formation process demonstrates the breadth of the Internet community's involvement and commitment to make the ICANN process a success: Acend Communications; AFNIC; Afrinic; America Online; the American Intellectual Property Law Association; the American Internet Registrants Association; Asia & Pacific Internet Association; APNIC; Association of European Brand Owners (MARQUES); Council of the Asia Pacific country code Top Level Domains (APTLD); the American Registry for Internet Numbers (ARIN); the Association for Computing Machinery (ACM); the Association of Internet Professionals; AT&T; Bell Atlantic; the Berkman Center for Internet & Society at Harvard Law School; British Telecommunications; the Center for Democracy and Technology; the Center for Global Communications (GLOCOM); Centraal Corp.; Cisco Systems; the Commercial Internet Exchange (CIX); Compaq Computer Corp.; Concentric Network Corp.; the Council of European National Top Level Domain Registries (CENTR); Deutsche Telekom; the Domain Name Rights Coalition; Dun & Bradstreet; EDUCAUSE; Electronic Commerce Europe; the Electronic Frontier Foundation; the Latin America and Caribbean Federation for Internet and Electronic Commerce (eCOM-LAC); European ISP Association (EuroISPA); European Telecommunications Standards Institute (ETSI); Foro Latinoamericano de Redes (ENRED); France Telecom; Fujitsu; Fundacion Airtel; GTE Internetworking; IBM; the Information Technology Association of America (ITAA); the International Chamber of Commerce; the International Trademark Association; the Internet Council of Registrars (CORE); the Internet Engineering Task Force (IETF); the Internet Society (ISOC); KPN; MCI Worldcom; Microsoft Corporation; the Motion Picture Association of America (MPAA); Netscape Communications Corp.; Novell; Oracle Corporation; the Organization for Economic Co-operation and Development (OECD); PSINet; RIPE; Sun Microsystems; Symantec; UUNET; Verio; World Information Technology and Services Alliance (WITSA); the World Intellectual Property Organization (WIPO); the World Wide Web Consortium (W3C).



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we go. Everyone involved in this effort has made mistakes, and will probably make more as we move along. The future will hopefully be smoother than the past, but we should all realize that in this effort, as in many other difficult enterprises, the perfect is the enemy of the good.

All those involved in the management of ICANN, from the Directors to the volunteers working in its constituent bodies to its very hard-working staff, remain open to suggestions for improvement. Hopefully, the Committee's efforts and the resulting public attention that will be drawn to this complicated but exciting process will help to identify ways that this difficult job can be done better in the future.

**ICANN is the Result of a Comprehensive USG Policy Development Process.** In January 1998, the USG issued the "Green Paper," which was a preliminary draft of a plan for transferring management of the domain name system from the USG to the private sector. It recommended that the global Internet community create a United States-based, but globally-representative, non-profit corporation to manage the DNS. The Green Paper also outlined several other proposals, including the creation of new generic top-level domains ("gTLDs") and a competitive system of registries and registrars.

After receiving extensive comments from a wide variety of sources, ranging from individuals to foreign governments, from commercial entities to non-profit organizations, the USG issued the "White Paper," which responded to those comments by eliminating many of the suggestions relating to continued USG involvement that had been part of the Green Paper. The White Paper did, however, continue to urge the private-sector Internet community to form a global, consensus-driven, non-profit corporation to carry out DNS management and related policy functions. The White Paper outlined four guiding principles that the USG would follow, and to which the new corporation should be committed -- **stability** (to maintain and improve the impressive record of Internet stability), **competition** (to encourage innovation, consumer choice and satisfaction, and lower costs), **private sector, bottom-up coordination** (to ensure flexibility and reflect the Internet's bottom-up traditions), and **representation** (to reflect the functional and geographic diversity of the Internet and its users, and to ensure international participation in decision-making processes).

The White Paper suggested that the new global consensus corporation it envisioned should be structured "to equitably represent the interests of IP number registries, domain name registries, domain name registrars, the technical community, Internet service providers (ISPs), and Internet users (commercial, not-for-profit, and individuals) from around the world." Finally, it suggested that it take several early actions, including: (1) "appoint, on an interim basis, an



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initial Board of Directors," which would serve "until the Board of Directors is elected and installed;" (2) "establish a system for electing a Board of Directors . . . that insures that the new corporation's Board of Directors reflects the geographical and functional diversity of the Internet, and is sufficiently flexible to permit evolution to reflect changes in the constituency of Internet stakeholders;" (3) "develop policies for the addition of TLDs, and establish the qualifications for domain name registries and domain name registrars within the system;" and (4) "restrict official government representation on the Board of Directors without precluding governments from participating as Internet users or in a non-voting advisory capacity."

The White Paper also committed the USG to take certain steps to "accomplish the objectives" set forth in the White Paper. These included (1) "ramp down the cooperative agreement with NSI with the objective of introducing competition into the domain name space"; (2) "enter into agreement[s] with the new corporation under which it assumes responsibility for management of the domain name space"; (3) ask the World Intellectual Property Organization (WIPO) to "convene an international process. . . to develop a set of recommendations for trademark/domain name dispute resolutions and other issues to be presented to the Interim Board for its consideration as soon as possible"; (4) "consult with the international community, including other interested governments"; and (5) "undertake . . . a review of the root server system to recommend means to increase the security and professional management of the system."

**ICANN is a Product of Internet Community Consensus.** After the issuance of the White Paper, the Internet community began discussions about the shape and nature of this new not-for-profit corporation that would manage the DNS and related functions. As this process was described in the most recent issue of the *Harvard Law Review*, "In the bottom-up, consensus-building tradition of the Internet, a broad-based coalition of Internet associations, including NSI [Network Solutions, Inc.] and the ISOC [The Internet Society], initiated a worldwide forum, the International Forum on the White Paper (IFWP), to discuss the various implementation issues left unresolved by the White Paper."<sup>2</sup> The IFWP held a series of worldwide meetings that the *Harvard Law Review* called "akin to a series of traveling constitutional conventions;" these were held in Reston (Virginia), Geneva, Singapore, and Buenos Aires. At the Geneva meeting, "a consensus emerged that distinguished individuals should govern the new corporation, and interest groups should participate in councils [now called Supporting Organizations] addressing specific issues."

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<sup>2</sup> *Developments — The Law of Cyberspace*, 112 Harv. L. Rev. 1574, 1671-72 (1999).



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By the end of summer 1998, the various Internet communities had come to a consensus on the structure of the new global, consensus, Internet corporation. In fact, NSI and the Internet Assigned Numbers Authority (IANA), the two USG contractors that had historically been responsible for the DNS management functions that were to be transferred to the new corporation, jointly published for public comment draft bylaws for the global consensus corporation that eventually became ICANN. Those bylaws, with minor changes, ultimately became the basis of the proposal submitted to the USG in October 1998 as the Internet community consensus response to the White Paper's challenge. Following another public notice and comment period and some modifications designed to further increase the transparency of ICANN's operations, the ICANN proposal was accepted by the USG through the signing of a Memorandum of Understanding ("MOU") with ICANN.

Simultaneously, the USG agreed (in what is known as Amendment No. 11 to its Cooperative Agreement with NSI) to extend its contractual relationship with NSI from September 30, 1998, to September 30, 2000. This extension was granted to NSI on the condition that NSI cooperate with what became ICANN, and that it begin development of a system to support new competitive registrars, separate its registry operations from its registrar operations (so as to insure that its registrar business would not have an unfair competitive advantage in interacting with its own monopoly registry business), create a searchable domain-name database, and provide technical assistance to ICANN. This approach -- to extend the existing NSI agreement -- was intended to smooth the transition to ICANN of the USG's management responsibilities. It anticipated further negotiations between NSI and the USG on various terms of the transition to competition, including the price and other terms by which all registrars would have access to the monopoly registries still operated by NSI.

The MOU between the USG and ICANN recognized ICANN as the global, not-for-profit consensus organization that the USG had, in the White Paper, called upon the Internet community to create. It also set forth a process for the anticipated transition from government to private-sector DNS management, and it restated that it expected this transition to be completed no later (and hopefully sooner) than October 1, 2000. It set forth the various areas in which the USG and ICANN would jointly work to accomplish the transition, including most importantly (1) "establishment of policy for and direction of the allocation of IP number blocks"; (2) "oversight of the operation of the authoritative root server system"; (3) "oversight of the policy for determining the circumstances under which new top level domains would be added to the root system"; and (4) "coordination of the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet." The MOU, which noted that the parties would "abide by" the four motivating principles set forth in the White Paper, was based



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on the USG's finding (set forth in the MOU) that ICANN was "the organization that best demonstrated that it can accommodate the broad and diverse interest groups that make up the Internet community."

**ICANN is Not a "Regulator."** As this history establishes, and its bylaws make clear, ICANN is a creation of the Internet community itself; perhaps the best analogy, although not perfect, is a private standards-setting body. It has no statutory authority, and never will; its influence derives solely from the willingness of the various participants in the Internet -- both governmental and non-governmental -- to participate in the development of its policies and abide by the results of that consensus-development process. The global Internet is a voluntary network of (mostly private) networks, and it works in large part because the participants choose to work together to make it work.

There have been, of course, a variety of governmental participants in various aspects of DNS management. For example, the initial assignment of IP addresses -- the essential building-blocks of the DNS -- was carried out by ICANN's predecessor organization IANA, along with various other technical tasks. Historically, this has been done pursuant to contracts with the USG; now that the IANA staff have been absorbed into the ICANN structure, that responsibility is ICANN's -- but without any funding support from the USG.

The management of the various global top-level domains ("gTLDs") is undertaken by various USG entities or contractors; the most relevant to this discussion is the cooperative agreement between the USG and NSI that allows NSI to operate the registries for .com, .net., .org and .edu. While this function was originally funded by the USG, for several years it has been funded by simply allowing NSI to charge the general public a fee for every domain name registered anywhere in the world; currently, that fee is a minimum of \$70 per registration, and new registrations are now being created at a rate of approximately 4 million a year -- and growing rapidly.

Finally, national governments have a wide range of roles in the operation of the country-code top level domains ("ccTLDs"); for example, the .us domain is currently operated by the University of Southern California's Information Sciences Institute ("ISI") (as a subcontractor to NSI) under the direction of the USG. Thus, there are various governmental interests in the DNS, but in general, the DNS functions today as a voluntary cooperative effort of a large number of mostly private entities without significant direct USG funding.



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This is why the clear consensus of those filing comments with the USG in its policy development proceedings leading up to the White Paper was that no government should attempt to control or regulate the DNS, but instead a private-sector, voluntary management organization should be constructed. The only realistic alternative to such a private-sector approach, with something like ICANN as the consensus development and implementation vehicle, is much broader governmental involvement than now exists. Given the global character and importance of the Internet, this would almost inevitably take the form of some type of multinational governmental entity.

The process that has produced ICANN, and is now moving forward toward the completion of the ICANN structure and processes, is designed to make that multinational governmental approach unnecessary. Once fully functional, ICANN will operate along the lines of how the Internet has always functioned -- through the voluntary cooperation of large numbers of participants -- with the exception that the very informal arrangements of the past will likely be replaced with a series of consistent contractual relationships with the various relevant DNS entities: name registries and registrars, address registries, root-server operators, standards bodies, and (at least for the immediate future) the USG.

If they come into existence, these contracts will be the product of voluntary agreements; since ICANN has no governmental power, and indeed no existence outside the context of community consensus, it cannot coerce cooperation. If such a series of contracts is created, that will be both evidence of the success of this consensus-development process and a strong incentive for those who wish to benefit from connection to this network of networks to comply with ICANN policies -- which will by definition be nothing more than a reflection of community consensus. Indeed, this is the entire objective of the privatization process: to replace a mixed governmental/private informal system of management with a wholly private, global consensus management system reflected in more formal agreements between ICANN and the various DNS infrastructure and other participants.

Thus, ICANN will never be a "regulator." If it is successful in encouraging and accurately recognizing consensus, it will attract the participation of people and entities that want to see the DNS process continue to function effectively, efficiently, and fairly. The more successful this process is, the more influence ICANN's policies will have. But that is as it should be; the broader the consensus, the more powerful the influence and the more attractive the processes and organizations (like ICANN) that are part of that consensus. Thus, the only "authority" that ICANN will ever have is its attractiveness to members of the Internet community as a device for development, articulation and implementation of community consensus. Any





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"power" that ICANN ever achieves will flow solely from the fact that it reflects the consensus views of the Internet community -- a highly desirable result, and the sole objective of those currently involved in ICANN.

I apologize for the length of this overview, but I hope it will serve as useful context in your evaluation of the progress to date in this ambitious and complex global privatization initiative. The responses to your specific questions are enclosed. Please let me know if we can provide any additional information.

Sincerely,

Esther Dyson  
Interim Chairman of the Board  
ICANN

Enclosures

**RESPONSE OF THE INTERNET CORPORATION  
FOR ASSIGNED NAMES AND NUMBERS  
TO QUESTIONS CONTAINED IN JUNE 22, 1999 LETTER  
FROM CHAIRMAN TOM BLILEY TO ESTHER DYSON**

The Internet Corporation for Assigned Names and Numbers ("ICANN") is a private, non-profit corporation formed by the global Internet community to facilitate the transfer of various DNS management responsibilities from the United States Government to the private sector. It has no permanent staff, and to date has relied primarily on private donations for partial recovery of its costs. These constraints have made responding in the manner and time required by the Committee a serious challenge. Nevertheless, ICANN believes that the information and material provided here is responsive to, and fully answers, the questions posed by the Committee. All source materials referenced herein can be found at ICANN's website, [www.icann.org](http://www.icann.org), and are attached as Attachments 1-8 for the Committee's convenience.

The Committee's questions, along with ICANN's response, are set forth below in the order in which they were set out in the Committee's letter of June 22, with each question and response beginning on a separate page. Specific questions and responses can be found at the following pages of this Response:

<u>Question</u>	<u>Page</u>
1(a).	2
1(b).	12
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**1(a). Before imposing a \$1 per domain name registration fee, did ICANN conduct, or have conducted on its behalf, a legal analysis of its authority to impose such a fee? If ICANN did conduct such a legal analysis, please provide all records related to the aforementioned legal analysis. If ICANN has not conducted such a legal analysis, please provide a detailed legal analysis of the source and limits of ICANN's authority to impose a \$1 per domain name registration fee.**

ICANN has not "imposed" any fee; it has entered into contracts with the registrars it has accredited (as required by its Memorandum of Understanding ("MOU") with the United States Government ("USG")) for a volume-based payment designed to partially recover its costs. This may well not be the optimal procedure for ICANN cost recovery in the future, but for the reasons set forth below, it appears to be the most effective and equitable method available at this time.

Obviously, ICANN, like any non-profit body, must have a way to recover its costs. For ICANN, those costs include (1) the functions that have historically been carried out under, and funded by, USG contracts and grants, and (2) the additional costs necessary to carry out its additional responsibilities of encouraging competition, formalizing previously informal arrangements through the negotiation of contracts, and creating the global consensus-development process itself. Global outreach, contracting with diverse parties, the promotion of competition, and creation of the processes necessary to promote and encourage global consensus policies are labor-intensive and complex undertakings, and ICANN's efforts to carry out those responsibilities have incurred significant costs.

The current situation -- where ICANN incurs considerable costs but has minimal sources for recovery of those costs -- is obviously not viable over the long term. It results from a failed expectation: that all the major participants in the global Internet community would rapidly come together to make ICANN an effective vehicle for global consensus development, and to equitably share the costs of that effort. This expectation clearly underlies Amendment 11 to the Cooperative Agreement between Network Solutions, Inc. ("NSI") and the USG<sup>2</sup>, which makes sense only on the assumption that NSI -- the dominant economic entity in the DNS -- quickly joins the rest of the global Internet community in sharing the costs of ICANN.<sup>3</sup> ICANN has never had any government funding, and in fact it has assumed responsibilities historically funded by the USG (such as the IANA functions) without any commitment by the USG to

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<sup>1</sup> Attachment 1.

<sup>2</sup> Attachment 2.

<sup>3</sup> In fact, in Amendment 11, NSI agreed to support the transition of USG DNS responsibilities to "NewCo," (now ICANN), agreed to "recognize NewCo pursuant to a contract between NSI and NewCo, and agreed that ICANN would have "the authority . . . to carry out [ICANN's] responsibilities."

continue that funding. It did so because both it and the USG assumed that a permanent cost recovery mechanism, to which all the relevant DNS participants (including importantly NSI) would contribute, would quickly be put in place.

Notwithstanding the fact that such a cost recovery mechanism has yet to be created, ICANN has nevertheless attempted to carry out its global outreach responsibilities – including meetings in Singapore and Berlin, and the next two scheduled in Santiago and Los Angeles. In addition, it has aggressively carried out the organizational and policy tasks required of it under the MOU – encouraging and facilitating the creation of its Supporting Organizations, creating various Advisory Committees, and seeking to facilitate the development of consensus on such subjects as the introduction of competition in the .com, .net, and .org domains and various intellectual property issues through publication of proposals for public comment and discussions at open meetings. None of these activities have been supported by funds from the USG or any other government.

The USG assumed that some temporary private "bridge" funding for ICANN might be necessary, but that ICANN would be able to reach quick agreements with the major participants in the DNS community, including most importantly NSI – the only significant revenue-generating participant in the DNS as a result of its position as the only entity authorized to provide domain name services in the .com domain – that would provide a stable source of cost recovery for ICANN. This has not happened. The Committee is free to form its own opinions as to why it has not happened, but the result is inarguable: ICANN is struggling to carry out its responsibilities without as yet any institutionalized method of cost recovery.

As a temporary solution to this problem, ICANN has relied on private donations from companies and individuals, and the willingness of many of its creditors to accept delayed collection of money due. Still, the goal should be to develop a stable funding structure which fairly and equitably distributes the costs of ICANN's consensus development and implementation activities among the various entities and segments of the Internet community that benefit from its technical coordination services.

With this background, the following describes the ICANN cost recovery structure that has just become effective on July 1. It begins with a description of the historical way in which ICANN functions provided in the past were funded and a description of the additional functions that ICANN has been required to absorb. It concludes with a discussion of the cost-recovery mechanisms currently contemplated by ICANN and the alternatives that might exist.

#### **A. The IANA Function**

ICANN has assumed financial and administrative responsibility for the Internet Assigned Numbers Authority (IANA) and its staff in Marina del Rey, California. In the earliest days of the Internet, the IANA maintained the authoritative lists of assigned domain names and numbers, under research contracts with the Defense Advanced Research Projects Agency (DARPA), a part of the U.S. Department of Defense. As the

Internet evolved and grew, the IANA continued its role as a coordinating entity, responsible for coordinating the domain name system (DNS) and the assignment of IP addresses. In addition, the IANA worked with the Internet's standards bodies and protocol developers to coordinate the assignment and publication of the Internet's technical standards.

The IANA also administers the delegation of country-code top-level domains to local managers, communicates with TLD managers on a range of issues, and supervises the resolution of disputes over delegations of registration authority when they arise. In addition, the IANA manages the .int domain, which is exclusively reserved for international treaty organizations, such as NATO.

The IANA also assigns large blocks of IP addresses to the regional IP address registries, which in turn allocate IP addresses to Internet Service Providers and others for distribution to end-users. There are currently three regional IP address registries: APNIC for the Asia-Pacific region; RIPE-NCC for Europe and North Africa; and ARIN for North and South America and sub-Saharan Africa.

The DARPA research contracts paid for the full direct and indirect costs of the IANA, including staff salaries and wages, office facilities and rent, computer equipment and network connectivity, ISI's institutional overhead, and telephone and travel expenses. These costs were assumed by ICANN as of January 1, 1999, and ICANN has received no USG funding support since that time.

## **B. Creation of a Competitive gTLD Registry-Registrar System**

Consistent with the clear consensus of the global Internet community, and its mandate from the USG in both the White Paper and the MOU, ICANN has begun the process of determining and implementing community consensus views on how to introduce competition into the market for domain name registration services in the .com, .net, and .org generic top-level domains (gTLDs). Those services are currently provided by NSI under an exclusive Cooperative Agreement with the USG. Specifically, NSI performs two functions for those generic top-level domains: the registry and the registrar. As registry operator, NSI maintains the authoritative database of registered domain names and the IP addresses to which they correspond. As registrar, NSI interacts with customers, taking registration orders and placing registration information into the registry (the central database).

These functions in recent years<sup>4</sup> have been funded by a annual fee levied by NSI on every registered domain name. NSI charges a minimum of \$70 (\$35 per year)<sup>5</sup> for

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<sup>4</sup> Prior to the current arrangement, the services were funded by the USG and free to all users wherever located.

<sup>5</sup> To obtain the \$70 fee, registrants must supply various technical information that  
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each registration, which are required to cover an initial registration period of two years. Thereafter, NSI charges a \$35 fee for each one-year renewal of each registered domain name, even though the actual costs of renewal are obviously significantly lower than the actual costs of an original registration. These mandatory fees exceed the actual costs of providing those services; they produced revenue of almost \$100 million for NSI in 1998 (nearly a 100% increase over 1997), and profits of \$11 million (an increase of 175% over the preceding year). This performance has been rewarded by a market valuation for NSI of over \$2.5 billion at this writing. Community unhappiness with the level of these fees, and the lack of choice in the services offered by NSI, have been significant elements in the creation of nearly universal demand for the introduction of competition in the provision of name registration services.

The introduction of competition into the market for registrar services will undoubtedly reduce (probably quite significantly) the cost to consumers of registering a domain name, improve customer service and generate diverse new options for Internet users. At the current level of name registrations, even just a \$2 reduction in the average cost of an annual name registration would save consumers approximately than \$20 million annually, and the value of improved service and increased flexibility is obviously significant. Unfortunately, the costs of implementing the transition from sole provider to competition are not trivial.

ICANN is required, pursuant to its MOU with the USG (as contemplated in Amendment 11 of the Cooperative Agreement between NSI and the USG) to accredit companies that wish to become competitive registrars in the .com, .net, and .org top-level domains. Accordingly, ICANN staff were (and are) required to draft application guidelines, review public comments and make appropriate revisions, receive and review applications on an ongoing basis, verify application information, communicate with applicants, draft and sign accreditation agreements, and assist successfully accredited applicants with what has proven to be the unexpectedly difficult process of gaining workable access to NSI's Shared Registry System. Because of the inherently legal nature of the accreditation process, ICANN's outside legal counsel is also necessarily heavily involved in this process. This process has resulted in the accreditation of five test bed registrars, and the subsequent accreditation of 52 additional registrars who are slated to begin competing in this space at the end of the test bed phase, now scheduled for July 16, 1999. The complete list of accredited registrars, which includes such organizations as AT&T, AOL, PSINet, RCN and Verio, can be found at [www.icann.org](http://www.icann.org) and is attached at Attachment 3.

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<sup>5</sup> (...continued)  
 many non-commercial (and probably many commercial) registrants would not likely have available. If that information is not available to the registrant, it would have to choose the alternative fee of \$119, for which NSI obtains the necessary technical information. It is likely that a large portion of those registering names with NSI choose the \$119 alternative; NSI does not release a breakdown that would confirm this assumption.

The transition to a competitive registration system also requires the execution of a set of technical functions. Foremost among these is the design and management of a registration data escrow function. In order to assure the stability and uninterrupted functioning of the Internet upon the technical or business failure of a registrar, it is essential that accredited registrars escrow their essential registration data daily in a way immediately accessible to ICANN, thus allowing the data to be easily transferred or reconstructed if necessary. This backup function has historically been performed by NSI and funded through its mandatory \$35/year registration fee; the similar function in a competitive environment is clearly more complex than it has been in the past, where NSI was both the registry operator and the sole registrar.

ICANN has also been working with the five accredited test bed registrars to develop a robust and reliable WHOIS service (which allows users to look up domain name registration data) for the new competitive environment with its multiple registrars. The WHOIS service was historically provided by NSI as part of its registry function, funded through its \$35/year registration fee. Once it was clear that there would be movement to a competitive registrar environment, NSI decided to eliminate that service from its registry function, thus eliminating a centralized WHOIS service and creating an additional cost both for new registrars and for the consumers and business entities that had relied on that service. Today, in the absence of a centralized WHOIS service, anyone seeking contact information for a domain name must first determine which registrar has registered the name, and then seek contact information from that registrar. Since a comprehensive and complete WHOIS service is such a valuable resource for the Internet community, ICANN is working to replace that service now that it is no longer provided by NSI.

In sum, NSI's current mandatory registration fee of \$35/year has historically funded NSI's registry and registrar operations, including data backup and WHOIS services. Accredited post-test bed registrars will have to similarly have to fund their operations (including data backup and WHOIS services) from whatever registration fee the market will bear, which is highly likely to be \$35 or (more probably) less. In addition, they will pay NSI some fee for every domain name registered<sup>6</sup> that is approved by the

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<sup>6</sup> Amendment 11 requires NSI to charge a registry fee that is no more than its "costs and a reasonable return on its investment." Since NSI and the USG have been unable to come to an agreement on what that fee should be, they have temporarily agreed that NSI may charge a fee of \$9 per annual registration. Since NSI has refused to accept any registrations from other registrars that are not for a period of at least two years, each registration by a competing registrar produces a payment of \$18 to NSI. Noting several solicitations for the operation of these registries that have recently been submitted to the U.S. Department of Commerce, some observers have estimated that the actual cost of operating the .com, .net, and .org registries is likely to be no more than \$2/year for each domain name registered. Even assuming that estimate is low by as much as 100%, it seems reasonable to expect that the fee that NSI will eventually be  
(continued...)

USG for registry access, and provide their share of ICANN cost recovery at the rate of no more than \$1 per domain name registered.

Even with the relatively limited amount of competition that has begun for name registrations, no accredited registrar has yet to offer services at a rate higher than the \$35 charged by NSI, and thus both NSI's \$9 registry fee and the \$1 cost recovery fee due to ICANN are being absorbed by the registrars, not paid by users, and presumably being reflected in lower operating margins than might otherwise exist. In this sense, at least, even the minimal competition that has been introduced into the registration services market is already having a positive impact, although since NSI is not paying either fee it continues to enjoy a significant and unfair competitive advantage over all other name registration providers.

Thus, the likely result of the replacement of a situation where there is a single monopoly registrar with one where there are more than 50 competitive registrars offering name registration services will be to reduce the cost to consumers of domain name registration services, and to produce a profit margin for all registrars (including NSI) which is lower than that enjoyed today by NSI. This expected drop in registration fees itself appears likely to translate into millions of dollars of savings for Internet users, and to be far greater in the aggregate than the administrative and technical expenses incurred by ICANN in carrying out its role in helping to introduce and sustain a competitive market in registration services. In any event, those expenses will certainly be far less than the cost imposed on consumers for those services in the past, and will far exceed the contractual cost recovery fee paid by accredited registrars to ICANN.

### C. Coordination of the Root Server System

As called for in the U.S. Government's White Paper on "The Management of Internet Names and Addresses," ICANN has entered into a Cooperative Research and Development Agreement with the USG to develop and implement improvements in the management of the root server system.<sup>7</sup> The root server system is a set of thirteen file servers, which each contain authoritative databases listing all TLDs. Currently, NSI operates the primary root server, which maintains the authoritative root database and replicates changes to the other root servers on a daily basis, under a contract with and the control of the USG. Different organizations around the world, including NSI and ICANN, operate the other 12 root servers.

To carry out its responsibilities under the CRADA, ICANN has established a Root Server System Advisory Committee chaired by Prof. Jun Murai, an ICANN director and the operator of the "M" root server in Japan. Though populated by volunteers, including

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<sup>6</sup> (...continued)  
permitted to charge for accessing the registries that it operates will be significantly lower than the \$9 temporary charge that is now permitted.

<sup>7</sup> Attachment 4.



the operators of all 13 root servers, the Committee's work will entail some staff costs and expenses to be funded by ICANN. ICANN is also working with the existing root server operators on plans to enhance the already-impressive security of the present root server system, with the goal of reducing even further the risk of disruption or outside corruption of this important directory information. These various efforts, which include consideration of the structure of the root server system, the location and operation of the primary root server, and related issues, have generated ICANN staff and equipment costs, and will likely require additional costs in the future.

#### **D. Operation of the "L" Root Server**

ICANN has recently assumed responsibility (but has received no government funding) for the "L" root server, formerly operated by the University of Southern California's Information Sciences Institute ("ISI"), and previously funded by the USG through a contract with ISI. It has received no government funding for this.

#### **E. The Process of Consensus Development and Implementation**

While the substantive functions being assumed by ICANN all have roots and antecedents in the Internet's technical administrative structures, the process that ICANN was established to facilitate constitutes an unprecedented experiment in private sector consensus decision-making on a global scale. Global consensus is a difficult goal to achieve in the best of circumstances; in the contentious atmosphere that exists today, where the transition of important management responsibilities from government to private-sector mechanisms has been combined with a simultaneous effort to move from a single monopoly provider of services to a competitive market, that task is extremely complicated. To achieve a policy-making process that is open and transparent, based on Internet community consensus, bottom-up in its orientation, and globally representative has required the establishment and operation of a number of bodies, organizations, and committees through which this process can occur.

**Board of Directors.** ICANN's Board of Directors currently consists of ten individuals, and will be expanding in the very near future to nineteen. Though unpaid volunteers, future Directors will be entitled to reimbursement of their ICANN-related expenses, such as travel, lodging, and other costs related to attending ICANN meetings.<sup>8</sup> Board expenses also include the costs of teleconferences, written briefing materials, and staff support.

**ICANN Staff.** In addition to the IANA and technical staff discussed above, ICANN plans to hire a small executive staff to handle legal and policy matters, provide

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<sup>8</sup> Current Directors should also receive similar reimbursement, but in the absence of a permanent cost recovery mechanism, most of those expenses have not in fact been reimbursed (and in many cases, reimbursement has not yet been requested).

support to the President and Board of Directors, manage internal networks and systems, handle the corporation's financial affairs, organize meetings, foster communications with and discussions among the global Internet community, and support advisory committees and supporting organizations, as appropriate. ICANN also contemplates hiring outside consultants on specific technical and policy matters from time to time, as needed. To the extent these expenses relate to the IANA staff (such as financial accounting, payroll administration, network services, fringe benefits, employment taxes, and legal support), they represent a transfer of financial responsibility from ISI, which formerly funded this overhead through DARPA research contracts. The remainder are the additional resources needed to undertake the very significant new responsibilities required of ICANN if this experiment in private sector management is to be successful – including global consensus development and the introduction and promotion of competition.

**ICANN Meetings.** If ICANN is to truly function as a global consensus-development entity, it and its processes must be accessible to the entire global Internet community. To help meet this objective, ICANN holds its periodic meetings in different regions of the world. While this is a important contribution to global access to consensus policy development, it is a significant expense to plan, organize and hold each year four three-day sequences of Board, Committee, and Supporting Organization meetings in different cities around the world, including meeting room rental and travel and lodging expenses. In a further effort to make its processes available to as much of the global Internet community as possible, ICANN provides real-time broadcasts of its meetings over the Internet, including video and audio and the ability to send real-time comments and questions from anywhere in the world visible to those in the meeting room. This obviously requires significant technical facilities, which limits the number and type of meeting facilities available. In addition, enabling real-time broadcasts and online participation requires at least \$25,000 per meeting for the needed equipment, high-bandwidth net connectivity, and technical staff. In addition, ICANN provides real-time scribing of its meetings projected onto large screens, to assist non-native English speakers to understand what is being said.

**Advisory Committees and Supporting Organizations.** ICANN has established four Advisory Committees to provide focused input: the Root Server System Advisory Committee; the Independent Review Advisory Committee; the Membership Advisory Committee (now disbanded following the production of a set of principles to guide the establishment of a membership); and the Governmental Advisory Committee. Each of these committees is populated by volunteers, but requires staff support and entails some expenses relating to teleconferences and face-to-face meetings, when necessary. ICANN's three Supporting Organizations are intended to be self-funding, but the process of establishing them has required substantial staff time.

**Corporate and Office Expenses.** In addition to the direct staff costs identified above, ICANN is a start-up corporation that must pay for all the usual expenses of a small business: rent, insurance, office equipment, network services, accounting, and basic legal services.

## F. Possible Cost Recovery Mechanisms

As a non-profit, ICANN is required to cover its costs, but to take in no more money than is necessary to fund necessary costs and establish reasonable reserves for future expenses. The White Paper assumed that these funds would come from "domain name registries, regional IP registries, or other entities identified by the Board." Unfortunately, in a circumstance where the most significant name registry is refusing to fully participate in the development of community consensus through ICANN and indeed has now become loudly critical of ICANN's very existence after publicly supporting the creation of ICANN throughout the USG policy development process, the simplest approach -- to allocate ICANN's costs to the various registries in some appropriate way -- is not feasible.

The ICANN Board continues to believe that it is highly desirable for the name and address registries<sup>9</sup> to participate in the funding of the costs of consensus policy development, as part of a stable cost-recovery structure that is fair and equitable to all concerned. Nevertheless, given the current circumstances, it was clear that some alternative mechanism would need to be developed, at least for the immediate future.

As an initial matter, the largest portion of the time and energy in consensus development today is directed toward introducing and sustaining registrar competition in the .com, .net, and .org top-level domains (which are by far the largest and most profitable of the approximately 250 top-level domains, accounting for 75% of all domain name registrations). Since NSI and ICANN have been unable to reach an agreement on a contractual relationship, relying on the NSI-operated registry was not a practical option. The next best alternative source of funds was the registrars that interact with that registry.

For any funding from registries, the simplest way to allocate cost recovery would seem to be by volume. Because domain name registrations will be marketed by registrars in the first instance, ICANN proposed that these costs could be borne by the registrars directly, thus eliminating the registry as a conduit (and possible bottleneck) for the recovery of costs. Assuming a competitive market, the volume of registrations is some measure of the benefits that consensus coordination are providing to an individual registrar (and ultimately to users). Based on this principle, ICANN proposed that its first-year transition funding be structured on the basis of a fee to be paid by each registrar, calculated by multiplying the number of registered domain names by a variable fee equal to no more than \$1 per domain per year. Because ICANN is a cost-

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<sup>9</sup> The IP Address Registries are in the process of forming the Address Supporting Organization, which (as is the case with each of ICANN's three Supporting Organizations) will elect three members of the ICANN Board once it is in existence. The three regional address registries have all indicated a willingness and intention to contract with ICANN and to provide an equitable portion of the funds needed for the recovery of ICANN's costs once the ASO is formally recognized.

recovery non-profit entity, this variable would likely decrease over time as either or all of three likely events occurs: (i) reduction of overall costs as startup tasks are completed; (ii) the addition of new funding sources, and/or (iii) a continued increase in the number of registered domain names. In order to ensure an ongoing source of operating revenue, ICANN proposed that the fee be transmitted from the registrar on a monthly basis.

This proposed formula was posted for public comment earlier this year; it generated very little comment, and even less opposition, either in principle or on the details. Indeed, the domain name and address registry communities have expressed broad support for the principle of a fair and equitable distribution of ICANN's costs among all registries with access to the root, taking into account the variations in usage and ability to pay. Thus, it seems clear that this approach, which seems to fairly allocate the costs of consensus policy development, enjoys broad support from the Internet community, notwithstanding rhetorical attacks from some quarters.

Nevertheless, the approach described above is explicitly designed for the first full fiscal-year budget cycle of ICANN (July 1, 1999 - June 30, 2000), which takes place during the continuing organizational efforts of ICANN and during the transitional period set forth by the USG for this privatization effort. Thus, it includes some significant one-time expenses associated with that initial organizational effort, including costs that result from the inability to structure an appropriate contractual relationship with NSI. These costs will presumably not continue into the future, and thus at least to that extent ICANN's costs for consensus development should go down. In addition, if NSI were to finally decide to fully participate in the consensus-development process through ICANN, that would affect the practical options available for cost recovery. In any event, this particular cost-recovery mechanism is obviously subject to improvement or change at any time that an alternative captures consensus support. ICANN certainly welcomes any comments or suggestions on future cost-recovery mechanisms based on the principle of fair and open distribution of costs among the registries that make up the DNS.

**1(b). Has ICANN conducted, or had conducted on its behalf, a legal analysis of its authority to terminate NSI's authority to register domain names? If ICANN has conducted such a legal analysis, please provide all records related to the aforementioned legal analysis. If ICANN has not conducted such a legal analysis, please provide a detailed legal analysis of the source and limits of ICANN's authority to terminate NSI's authority to register domain names.**

ICANN has no statutory or regulatory "authority" of any kind. It has only the power of the consensus that it represents, and the willingness of members of the Internet community to participate in and abide by the consensus development process that is at the heart of ICANN. It is required under the MOU with the USG to accredit competitive registrars before they may access the .com, .org, and .net registries, but the effect of this accreditation is governed by Amendment 11 of the Cooperative Agreement between NSI and the USG and the USG's inherent control over the operation of these registries.

Given these facts, ICANN has undertaken no such legal analysis, nor has it had any reason to create one. If the Committee has been told that ICANN has the power to terminate NSI's authority to register domain names, or has asserted that it does, the Committee has been misinformed. To clarify this point, the following description of the process for accrediting registrars may be helpful.

From January 1, 1993, until early June 1999, domain names in the .com, .net, and .org top-level domains were registered exclusively by NSI under a Cooperative Agreement between it and the USG. As noted in the June 1998 Statement of Policy (White Paper)<sup>10</sup>, public comments showed "widespread dissatisfaction about the absence of competition in domain name registration." Accordingly, in the White Paper the USG stated its intention to enter a "ramp down [of its] cooperative agreement with NSI [then scheduled to expire September 30, 1998] with the objective of introducing competition into the domain name space."

To implement the "ramp down," NSI and the USG negotiated Amendment 11 to NSI's cooperative agreement, by which NSI and the USG agreed to extend the agreement for a two-year period (until September 30, 2000), during which NSI agreed to revise the system for registrations in .com, .net, and .org to allow competition for registrar services. Since NSI was going to continue to be the sole administrator of the registries for .com, .net, and .org for at least two years, while simultaneously acting as one of the competitors marketing name registration services in those domains, Amendment 11 provided that a neutral body to be formed by the Internet community ("NewCo," subsequently designated by the USG as ICANN) would carry out the coordinating functions required to ensure a freely competitive registration market. In Amendment 11, NSI expressly acknowledged that NewCo "will have the authority, consistent with the provisions of the Statement of Policy and the agreement between

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<sup>10</sup> Attachment 5.

the USG and NewCo, to carry out NewCo's responsibilities." On November 25, 1998, the Department of Commerce recognized ICANN as the NewCo entity referred to in Amendment 11, and this was specifically reiterated to NSI by letter on February 26, 1999.

To achieve the White Paper's "objective of introducing competition into the domain name space," Amendment 11 provided that NSI would implement a "Shared Registration System" to "create an environment conducive to the development of robust competition among domain name registrars." The schedule agreed to by NSI and the USG provided for several phases, beginning with a "test bed" in which NSI agreed to "establish a test bed supporting actual registrations in .com, .net and .org by 5 registrars accredited by NewCo (Accredited Registrars)" and ending with a reengineering of the overall system to "assure that NSI, acting as registry, shall give all licensed Accredited Registrars (including NSI acting as registrar) equivalent access ('equal access') to registry services through the Shared Registration System."

Thus, NSI agreed in Amendment 11 that, after the introduction of competition into the registrar business, it would operate the registry to give access to, and only to, ICANN-accredited registrars (including NSI). In this way, the level playing field necessary for effective competition in a shared registry environment would be established.

In sum, ICANN neither has nor claims any "authority to terminate NSI's authority to register domain names." Instead, the requirement that NSI must be accredited by ICANN to act as a registrar after the introduction of competition, so that it operates to the extent possible (given its continuing operation of the registries for .com, .net, and .org) under the same conditions as all other competing registrars, flows directly from NSI's own agreement with the USG.

To date, NSI has not requested to be accredited by ICANN, and certain individuals purporting to speak for NSI have publicly stated that it does not intend to be accredited. ICANN has received no official communication on this issue from NSI, and stands ready to treat an accreditation application from NSI in exactly the same way it has responded to similar applications by others.

In fact, in the event NSI chooses to seek accreditation, ICANN is required by its agreement with the USG to perform its accreditation function fairly, having specifically agreed in the MOU not to "act unjustifiably or arbitrarily to injure particular persons or entities or particular categories of persons or entities." This fairness provision, which parallels provisions in Amendment 11, in ICANN's registrar accreditation policy,<sup>11</sup> and ICANN's own bylaws,<sup>12</sup> appropriately and effectively ensures against arbitrary denial of accreditation to NSI or any other registrar.

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<sup>11</sup> Section III.0, Attachment 6.

<sup>12</sup> ICANN Bylaws, Art. IV, sec. 1(c), Attachment 7.

Finally, as a practical matter it is important that NSI, the most significant current provider of domain name services in the most widely used domains and the registry operator for those domains, be an active participant and contributor to the consensus development process that is ICANN. Its refusal to date to be a positive contributor to that process has increased the cost of the transition from USG to private sector management, reduced the speed with which important issues can be decided, and has made it much more difficult to move forward with what is already an extremely difficult task. No responsible participant in these processes wants to see NSI excluded from the ongoing efforts, and thus it is important to the success of this privatization effort that NSI quickly take up its appropriate role as an important contributor to the creation of community consensus.

**1(c). Has ICANN conducted, or had conducted on its behalf, a legal analysis of its authority to retain intellectual property rights over registrar data? If ICANN has conducted such a legal analysis, please provide all records related to the aforementioned legal analysis. If ICANN has not conducted such a legal analysis, please provide a detailed legal analysis of the source and limits of ICANN's authority to retain intellectual property rights over registrar data.**

ICANN has not sought to "retain intellectual property rights over registrar data," and thus has not had occasion to conduct a legal analysis concerning its ability to do so. ICANN's Statement of Registrar Accreditation Policy (adopted on March 4, 1999 after extensive public comment) provides that ownership of intellectual property rights in registrar data, to the extent those rights exist under law, is not "retained" by ICANN, but instead may be claimed by the registrars themselves. This treatment of intellectual property is reflected in the provisions of the accreditation agreements ICANN has entered, and stands ready to enter, with all accredited registrars.

During the process of domain-name registration, registrars collect various data typed in by registrants. This data includes the domain name itself, identifying information about the registrant, the registrant's designation of administrative, technical, zone, and billing contacts for the domain name, and technical information concerning the Internet "nameservers" that are associated with the domain name. Historically, this data has been freely available to those operating and using the Internet on a query basis through a service known as "WHOIS," to assist them in resolving problems that may arise with domain names.

Under current United States law, it is highly doubtful that collection by registrars of this factual information gives rise to any enforceable intellectual property rights. Under *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1997), copyright may not be claimed in factual information itself, but only in the selection, coordination, or arrangement of the information in a sufficiently original way. It therefore violates no copyright for others to use the registrar data for their own purposes according to their own selection, coordination, and arrangement. Similarly, because the registrar data has long been available to the public for the asking, both by Internet tradition and by U.S. Government requirements, it would not seem to be subject to legitimate claims of trade-secret rights.

Although not giving rise to intellectual-property rights under current U.S. law, registrar data may be subject to claims of intellectual property rights under the laws of other countries, or under future laws that may be enacted in this country at the state or federal level. Claims under such laws, if not accommodated to the Internet's needs, could complicate the efforts of the technical community to ensure stable and reliable operation of the Internet and the legitimate needs of the Internet user community for information about domain names. Pending proposals for extending U.S. intellectual-property law to cover databases, fortunately, take into account these special operational needs of the Internet. For example, H.R. 1858 (the Consumer and Investor Access to Information Act of 1999), which protects publishers from others who seek to compete



unfairly by copying and selling the publishers' databases, specifically excludes coverage of databases "incorporating information collected or organized . . . to perform the function of addressing, routing, transmitting, or storing Internet communications . . . ."

The accreditation agreements entered by registrars with ICANN include provisions addressing these stability concerns. Although registrars are permitted by their agreements to claim any applicable intellectual-property rights in most types of registrar data, they provide two licenses to the data to accommodate the needs of the broader Internet community: (1) a non-exclusive worldwide license to use of the data for or on behalf of ICANN for its Internet-management purposes, such as to permit a substitute registrar to support the customer in case the original registrar goes out of business, and (2) a non-exclusive license to use the data in WHOIS services. Registrars also disclaim rights in a limited core of routing data that must be broadly copied and distributed throughout the Internet to permit the domain-name system to function properly. These limited contractual provisions ensure that the data that accredited registrars collect will be available in specific limited ways necessary to ensure the Internet's continued stable and convenient operation, but otherwise leave with the registrar any intellectual property rights that it may be able to claim in any particular jurisdiction.

**1(d). Are any ICANN interim board members compensated by ICANN? For every interim board member who is compensated, please identify the interim board member in question and indicate the amount of compensation.**

None of the original Initial Board Members are compensated by ICANN. Under the ICANN bylaws, the President and Chief Executive Officer of the Corporation is an *ex officio* member of the Board; because of this provision, the Interim President and CEO, Michael M. Roberts, sits on the Initial Board. Mr. Roberts is a principal with The Darwin Group, Inc., a consulting firm in which his family has a majority ownership interest. ICANN has contracted with The Darwin Group for the full-time services of Mr. Roberts and for support of the Office of the ICANN Interim President/CEO on a month-to-month basis at the rate of \$18,000 per month.

In fact, far from being compensated, the members of the ICANN Initial Board (including Mr. Roberts for the last several months) are actually paying for the privilege of volunteering their services. Because the transition process has gone more slowly than expected, ICANN has until very recently had to rely on private donations as its only source of funds. Since these revenues have been far short of ICANN's actual expenses, the Initial Board members have to date forgone almost all expense reimbursement in order to leave ICANN's limited funds to pay employees and outside vendors. Many of those expenses have not even been submitted for reimbursement; as a result, the Initial Board members have been, as a practical matter, one of the important sources of funds for ICANN to date, along with donors and certain outside vendors.

**1(e). Regarding ICANN's "Transition Budget for Fiscal Year 1999-2000:"**

- i. **Who drafted this budget?**
- ii. **How did ICANN arrive at funding levels in this budget? Please provide an explanation of the underlying rationales that served as the basis for the budget's funding levels.**

The budget was prepared following the process outlined in ICANN's bylaws, which provides that the President will propose a budget to the Board for its approval. The budget was posted for public comment prior to the ICANN meetings in Berlin, and was described in detail at ICANN's public meeting on May 26, which was also webcast to a global Internet audience. No substantive recommendations for changes to the budget were received. Subsequently, the Board adopted the budget by resolution at its meeting on May 27, 1999. The full text of the budget and of the budget resolution are posted on the ICANN website, and included at Attachment 8.

Since ICANN is still completing many of its organizational steps as detailed above, and is still operating under its transition agreement with the Department of Commerce, the number of uncertainties surrounding the revenue and expenditure levels contained in the budget is higher than normal. As the budget document states:

"Given the uncertain nature and outcome of many of the year's transition activities, the proposed budget is intended to provide flexible resources for staff employees, consultants and other sources of assistance. Following direction from the ICANN Board at the Singapore meeting, the budget provides for an initial contribution of \$1.6 million to an operating reserve, which is intended to stabilize in the future at a minimum of one year's operating expenditures. It is likely that an operating loss will be realized at the end of the startup period in June, 1999, which will reduce the total available for the reserve. To the extent that savings are realized in any budget category in the course of the fiscal year, such amounts will be added to the reserve category at year end, thus reducing the amounts required for the reserve in future fiscal years."

The budget is designed to enable ICANN to complete the activities and tasks outlined for ICANN by the White Paper and the MOU. These are summarized in the budget as follows:

- completion of ICANN organizational arrangements, such as the seating of the permanent members of the Board of Directors and recruiting of a permanent President and Chief Executive Officer.
- completion of contractual arrangements with registry administrators
- continuing accreditation of registrars for the .com, .net and .org domains

- study, recommendations and implementation of policy decisions concerning domain names and trademarks resulting from the WIPO study
- study, recommendations and implementation of policy decisions concerning expansion of the Top Level Domain (TLD) name space
- study, recommendations and implementation of updated arrangements for Internet root servers
- review and adoption, after public comment and possible revision, of recommendations received from ICANN Support Organizations and Committees

The expenditure levels in the budget are derived from the corporation's program requirements, and include:

- Capital equipment purchases and Reserve contribution amounting to \$5.9 million for the fiscal year, of which \$4.2 million is expenditures. Within that category, the total for Executive and Staff Compensation is \$1.6 million, which is composed of \$1.235 million in salaries and wages and \$365,000 in employment taxes and fringe benefits. The anticipated full time equivalent staffing level for the fiscal year is 14.0.
- Costs of professional and technical services agreements are projected at \$1.0 million for the year, or approximately \$85,000 per month, which is in line with recent experience. The largest single expense within this category is for legal services. Technical services, which currently exceed \$20,000 per month, are expected to decline during the year as permanent staff additions are made.
- Estimated costs of four three-day Board of Directors meetings, plus bimonthly telephone conference meetings, total \$850,000. The Board, which will expand during the year to its full complement of nineteen Directors from the current ten, will continue to meet in major regions of the world in order to enable its constituents to have an opportunity to physically participate in board public forums and committee meetings. Board public forums will continue to feature video and voice distribution over the Internet.
- Staff and committee travel and meeting expenses are estimated at \$450,000, including reimbursed amounts for Supporting Organizations, etc.
- Administration expense is projected at \$300,000 which includes office rental and related support costs, insurance, taxes, amortization of previously purchased capital equipment, computer and network operating costs and maintenance, etc.

- Provision for purchase of \$100,000 of computing equipment and software to support Phase 2 of the planned computing capability for the corporation is included in this budget proposal. This amount may be adjusted upward or downward as more detailed planning proceeds based on Board decisions made during the course of the fiscal year.
- Contingency amounts, provision for a prior year operating loss and a reserve contribution totaling \$1.6 million are included in the proposed budget. Contingencies include programs not currently anticipated in the budget, as well as uncertainties in specific budget categories, especially legal services, due to the transition nature of ICANN's programs. It is the intention of the ICANN Board to create a reserve account of at least one year's operating expenditures, to be funded over several fiscal years.

Revenue sources that are projected to support ICANN projected expenditures and reserve requirements in the next fiscal year include:

- Total revenue for the fiscal year is budgeted at \$5.9 million. Of this amount, a total of \$5.0 million is projected from payments to ICANN from Registries and Registrars. An initial registrar fee schedule of \$5,000 per year plus \$1 per year per assigned name was adopted by the ICANN Board as part of its public comment and decision process in establishing registrar accreditation guidelines for the .com, .net and .org domains in March, 1999. This schedule will be used in FY 99-00, subject to revision based on over- or under recovery of the budgeted revenue amount in this category.
- Registrar accreditation activities in the .com, .net and .org domains are assumed to continue in the next fiscal year and are estimated to produce \$100,000 in revenue, based on the current fee schedule of \$1000 per application for accreditation.
- A total of \$700,000 is anticipated from grants and contributions. Some of this amount reflects receipt of funds pledged during ICANN's startup period. It is also anticipated that one or more governments will make grants to ICANN to assist in support of the transition program, and a total of \$400,000 has been budgeted from this source.
- The Other category includes \$100,000 as an estimate of amounts received to reimburse ICANN for meeting and travel expenses incurred for Supporting Organizations and other similar activities undertaken as part of ICANN programs.

It should be noted that revenues from accreditation agreement fees will clearly not reach the projected total of \$5.0 million without the participation of all registrars operating in the .com, .org and .net domains. Thus, the budget assumes the timely conclusion of current negotiations between the USG and NSI with regard to the fulfillment of the terms of Amendment 11 of the Cooperative Agreement.

**1(f). What are the circumstances under which ICANN's interim board will be replaced by an elected board? Please provide a reasonable estimate of when it is anticipated that this event will take place.**

The ICANN bylaws provide that its Board will consist of 19 members, from five different sources: nine At Large directors elected by a membership that is in the process of being created; three each from each of the three Supporting Organizations; and the President and CEO of ICANN, sitting *ex officio*. For the necessary elections to take place, the constituent bodies must be in existence and functioning, and most of ICANN's efforts to date have been aimed at helping to facilitate the establishment of these organizations.

We currently hope (and expect) that all of the nine Directors elected by the Supporting Organizations will be in place before the first annual meeting of ICANN on November 2-4, 1999, in Los Angeles. If this in fact takes place, half of ICANN's Board at that time will consist of Directors elected by constituent bodies of ICANN. The other half of the elected Board, which represents the At Large Directors, is currently expected to be in place no later than (and hopefully before) the second annual meeting of ICANN, which will take place in the fall of 2000. Pursuant to the White Paper and the MOU, the transition process is scheduled to be completed no later than October 1, 2000, and the Initial Directors must all have ended their service by that time.

Each of the Supporting Organizations, in the tradition of bottom-up processes, is a self-organizing entity. Since it took six months after the publication of the White Paper to organize ICANN to the point that it was recognized by the USG as the appropriate privatization vehicle, it is not surprising that it has taken about the same amount of time for the Supporting Organizations to organize themselves so that they can be officially recognized by the ICANN Board as representing community consensus and begin to function.

The Domain Names Supporting Organization ("DNSO") has been formally recognized by the ICANN Board, and is now functioning with a provisional Names Council managing its processes. Six of the seven separate constituency organizations that make up the Names Council have also been provisionally recognized, with the seventh expected soon and final recognition awaiting final proposals consistent with the principles established through the ICANN process.

The Protocol Supporting Organization ("PSO") has been provisionally recognized, with a final formal recognition awaiting a formal proposal, expected to come following the Internet Engineering Task Force meeting this month in Oslo.

The Address Supporting Organization ("ASO") has posted a draft proposal for comment, and anticipates filing a formal proposal for recognition within the very near future.

Thus, the entities that are responsible for the election of half of ICANN's Board are well along in their self-organizing efforts. There is no group of individuals more

anxious for them to complete these efforts and produce elected Board members than the current members of the Initial Board, who look forward with great eagerness to having others share with them the management challenges of a global consensus development process. The Initial Board has urged all of the SO organizers to do everything possible to complete their formation and elect the Directors for which they are responsible in time for those Directors to be seated and to participate at ICANN's first annual meeting in Los Angeles in early November.

The effort to implement the direction in the bylaws to establish an electorate to select nine At Large Directors for the ICANN Board has proved to be more difficult. One of the earliest actions of the Interim Board, on November 25, 1998, was to ask for volunteers from the community at large to participate in the Membership Advisory Committee ("MAC") mandated by the ICANN bylaws. Over 80 expressions of interest were received, and 10 volunteers were selected, with special attention being given to ensure geographical diversity and a range of practical experience. The membership consisted of the following people:

Izumi Aizu (Asia Network Research; Asia & Pacific Internet Association; Malaysia/Japan);  
 Diane Cabell (Fausett, Gaeta & Lund, LLP; United States);  
 George Conrades, Chairman (ICANN; United States);  
 Greg Crew (ICANN; Australia);  
 Pavan Duggal (Cyberlaw Consultant; India);  
 Kanchana Kanchanasut (Asian Institute of Technology; Thailand);  
 Daniel Kaplan (Consultant; Internet Society France; France);  
 Siegfried Langenbach (CSL GmbH; Germany);  
 Nii Quaynor (Network Computer Systems; Ghana);  
 Oscar Robles Garay (Latin American & Caribbean Networks Forum/ENRED; Mexico);  
 Dan Steinberg (Open Root Server Confederation; Canada); and  
 Tadao Takahashi (Internet Society Brazil; Brazil).

In addition, Jonathan Zittrain served as non-voting liaison to the Berkman Center membership study that was conducted at the request of the ICANN Board for the benefit of the MAC in its deliberations.

The MAC undertook to come up with recommendations to the Interim Board on the establishment of the necessary electorate. It worked intensely for several months, with most of its deliberations and meetings fully available to the public, and it received and evaluated a great number of recommendations from a variety of sources. Finally, on May 5, 1999, it provided its report to the Board, consisting of 17 principles that it thought should guide the establishment of the At Large electorate. Those principles were immediately published for public comment, and subsequently discussed at ICANN's open meeting in Berlin on May 26. The Board then accepted, with gratitude for its hard work, the output of the MAC, and instructed staff and counsel to evaluate how an At Large electorate could best be implemented. The staff advice will be

published in time for public comment prior to the next scheduled Board meeting in late August.

As the MAC recognized, the establishment of a representative global electorate to produce half the Directors of an entity that is responsible for the consensus management of important global resources requiring both technical and policy coordination is a very complex task. If the appropriate universe of persons is considered to be all those who might be directly affected by the results of the ICANN consensus development process, this may include several hundred million people. If, on the other hand, the appropriate universe is only those persons who are knowledgeable and sufficiently interested to actively participate and stay informed on the issues with which ICANN is involved, this is likely to be a very small group of people that may not be at all representative of Internet users as a group, and who may well have private agendas that are at least partially responsible for their willingness to stay involved. The former group is clearly too large to operate as an effective electorate in this context, and the latter presents special risks of capture of half the ICANN Board by a determined minority – whether it be of commercial interests, political interests, or for that matter any cohesive group. It certainly is not out of the question that a particular religious or ethnic minority, for example, might see the potential capture of a controlling (or at least blocking) position in an entity that has global responsibilities over an important part of the Internet as an attractive proposition worth pursuing.

Thus, the MAC struggled with how to balance the various elements of creating such an electorate – the desire to empower as many interested and affected people as possible, with due regard to cultural, geographic and economic diversity – with the risks that the electorate might not accomplish its stated purpose: to provide a voice for the users of the DNS in the consensus development activities of ICANN that might not be available in any other way. It ultimately concluded that the risks of error were so significant here, and the difficulty of recovery from a mistaken approach so great – after all, is it likely that any group that successfully captured a significant number of At Large Director's seats would voluntarily give them up? – that the At Large elections should be preceded by an outreach effort in an attempt to produce an electorate that at least minimized the possibility of capture by a determined minority. The consensus of the MAC was that an electorate of 5,000, while not eliminating that risk, would at least ameliorate it, and was not so large that it was an impractical goal. Indeed, if 5,000 persons interested in participating in the election of half the ICANN Board cannot be located from around the world, that fact would at least raise some questions about the workability of this particular mechanism for user input.

In addition, the MAC recommended that the election of At Large Directors be undertaken in at least two tranches, so that the experience of the first effort could be used to adjust the process for the remaining elections to the extent necessary to increase the odds of a broadly representative electorate. Finally, the MAC recommended a variety of steps to minimize the risk of outright fraud.

The Board largely accepted these recommendations, and referred them to staff and counsel for advice on how such a process could best be implemented. However, it



is obvious that there is one severe impediment to proceeding as the MAC has recommended – the lack of funds to undertake either the outreach probably necessary to produce 5,000 members of an electorate, or the election itself, if it is to be anything more than a simple counting of unconfirmed e-mail ballots. Any efforts to minimize fraud will result in costs that ICANN currently has no ability to pay. Thus, while the Board expects to receive reports from its staff in time for public comment prior to the meeting in Santiago in late August, unless and until additional funding sources are forthcoming it will be difficult to implement any such program for At Large elections.

If funds do become available, it seems likely that the Board will accept the MAC's recommendation to hold these elections in at least two tranches, with a number of Initial Board members equal to those elected leaving the Board upon those elections. The first election could conceivably begin soon, depending on the requirements for the size of the electorate prior to any elections and the success of any necessary outreach effort.

The Board continues to feel that it should move cautiously on this issue, given the very important consequences for the future success of the consensus development process through ICANN. Users of the DNS should obviously have a way to participate in the ICANN processes, but it would be inconsistent with the goal of those processes to create a system where those claiming to represent users could carry out private agendas that might be intentionally adverse to the creation of a true consensus.

There are obviously individuals and groups in the world whose goal is to disrupt the orderly operation of systems like the DNS; the recent hacker attack on an NSI server is a good example. It would be a total abdication of the responsibility that the Initial Board has accepted, and clearly not consistent with any consensus position of the Internet community, to create an At Large Director electorate that does not actually represent the legitimate interests of the users of the DNS. Those who have been critical of the speed at which this extremely difficult task has been undertaken do not, with all due respect, appear to appreciate either the complexities or the long-term importance to the consensus development process of this effort.

In sum, the efforts to produce a fully-elected ICANN Board have moved forward as expeditiously as could reasonably be expected. By the time of its first annual meeting, half of the elected Board members should be seated and active, and we currently anticipate that the other half will be seated and active no later than the end of the transition process contemplated by the White Paper. Given the difficulties involved, and the critical importance of getting it right, this seems to be an acceptable pace. It is ICANN's impression that the majority of the Internet community agrees with both this analysis and the conclusions that flow from it, but the Committee can obviously test this impression by seeking input from the full range of participants.

**2. A detailed explanation of ICANN's decision to deny the general public access to portions of its meetings and the meetings of its supporting organizations.**

In fact, all of the results of the ICANN decision-making process, and much of the actual decision-making, are fully accessible to the general public. No significant policy matter can be considered by the Board without prior public notice and consideration of public comments. The Board has in its first two quarterly meetings (in Singapore and Berlin) divided its three-day meetings into a public discussion of the Board agenda, complete with reports from staff and others on the matters scheduled for discussion and the opportunity for public comment and Board interaction; a subsequent private Board discussion of those same agenda items; and a public press conference, open to all, where the Board explains its decisions and answers questions. Thus, the only activities that have not been fully available to the general public have been those Board meetings, in person and telephonically, when staff is providing advice to the Board and responding to its questions; any actions taken on those occasions are immediately made public, along with the underlying rationale for the decision.

The criticism from some that ICANN is not sufficiently accountable because its Board and staff engage in non-public conversations, therefore, seems vastly overblown. The notion that there should not be any private interaction between a decision-making body and its staff, which is what this criticism amounts to, would surprise most observers, probably including this Committee and its staff. Obviously, like most public bodies, the Congress operates in a highly visible mode, but this does not preclude the private interaction between committees and their staff which is necessary to effective operations. Similar private interaction between the ICANN Board and its staff likewise does not mean that the ICANN process is not an open one, as the combination of required public notice and comment before any action and immediate announcement of actions and their rationale demonstrates. Indeed, since ICANN "decisions" are nothing more than the recognition of community consensus, and require voluntary compliance by a large number of independent actors to have any effect at all, the notion that there is some "secret" process that has any significance simply makes no sense in this context.

Still, this issue clearly is important – probably as much to many of the critics as a matter of principle as for its practical implications – to a certain portion of the Internet community. The Board would obviously like to take whatever reasonable steps it could to allow the finite energy of the Board and all the other participants in this process to concentrate on consensus policy development, rather than this issue. Therefore, it will continue to experiment with different combinations of public and private sessions in its next meeting in Santiago, with the goal of trying to properly balance the desire for full transparency with the need to continue to move forward effectively with the complex coordination tasks it has been handed.

**3. A detailed explanation of ICANN's decision to seek authority solely over generic Top Level Domains ("TLDs"), and not over country code TLDs, many of which are commercial in nature and accept registration by all individuals.**

ICANN has made no such decision. In fact, outside of various preliminary discussions with NSI that have not proven fruitful, ICANN has not engaged in any meaningful discussions or negotiations with any TLD registries, whether gTLDs or ccTLDs. The only actions that ICANN has undertaken to date are those which are specified in the White Paper and the MOU, and specifically those designed to introduce and facilitate competition for registration services in the .com, .net and .org domains, which are by far the most significant commercial domains.

It would obviously be desirable at some point to have contractual relationships with both gTLD and ccTLD registries, but given ICANN's extremely limited resources, that issue is on the "to do" list, not the "front burner" list. Of course, if and when ICANN is able to turn to the issue of contracts with the registries, any such relationships will only result from the voluntary agreement of the registry operators to participate in and abide by the consensus development process that is ICANN.

In response to a NSI suggestion, and because the Board viewed it as an idea that had some merit, ICANN did post for comments the question of whether, instead of DNSO constituencies for "gTLDs" and "ccTLDs," there should instead be constituencies for "open" TLDs (those allowing registrations by anyone) and "closed" TLDs (those placing geographic or other restrictions on who could register a name in those registries). The clear consensus of the responses was that this was not a desirable approach at this time, and the Board has taken no further action on this issue. It is an issue that is under consideration by the Government Advisory Committee. Given that fact, and given ICANN's extremely limited resources, it has focused on the specific immediate tasks set forth in the White Paper and MOU, and will return to this issue at some appropriate time in the future.

**4. A detailed summary from each ICANN interim board member recounting the sequence of events that preceded the person's acceptance of membership on ICANN's interim board. This summary should include, but not be limited to, answers to the following questions:**

- a. **Who contacted the interim board member regarding the possibility of serving on ICANN's interim board?**
- b. **Who extended the invitation for membership on the interim board to the interim board member in question?**
- c. **To whom did the interim board member report his or her acceptance of the aforementioned invitation?**
- d. **Please provide all records related to the consideration and selection of each interim board member.**

The details of the contacts with each Director are summarized below. To provide some context: As part of the creation of the consensus structure that eventually became ICANN, there was considerable discussion about how this new entity would be managed. Since it was, by definition, intended to be a global consensus entity, it was understood by all that its management should be globally diverse. While there was considerable discussion about how the permanent Board should be constituted, it was generally understood that the Initial Board members would have to be produced by the same consensus process that was to create the new entity itself.

In fact, that is what happened. Simultaneously with the effort to develop a consensus organization, the entire Internet community was invited to propose people who would be suitable as Initial Board members. At first, the general view seemed to be that the Initial Board should represent the various stakeholders in the process — those groups or coalitions that were separately identified and had a specific interest to advance. It quickly became clear that it was not going to be easy — and perhaps impossible — to come to a consensus using this approach, in part because the various stakeholders showed no propensity for coming to consensus on their particular representative, and in part because it was difficult to perceive a consensus on which stakeholder groups should be represented on the Initial Board. The focus then changed to finding what were referred to as "luminaries" — people of outstanding credentials and reputations who had not been engaged in the debates and whom the Internet community would recognize and support as both qualified and neutral.

The Initial Board as it now stands is the result of that latter effort, which was engaged in by numerous people around the world. In addition to volunteered proposals, Jon Postel and IANA affirmatively sought out recommendations from the full range of participants in the debate, including NSI. A number of people who seemed to be attractive candidates were approached in various ways and declined to be considered; others who were recommended seemed inappropriate for a variety of reasons. After considerable discussion, the current roster of Initial Board members was finally reached. The original suggestions of those people who ultimately came to serve on the Initial Board came from private individuals, business organizations, trade

associations, and officials of various governmental organizations. The final decisions on who would be invited were made by Jon Postel, after considering all the advice and recommendations received and coming to a judgment that this group of individuals was likely to receive consensus support from the Internet community. The official invitations were issued on behalf of Dr. Postel by his counsel.

With that preamble, the following summarizes the details of the contacts that each individual director experienced:

### **1. Geraldine Capdeboscq**

Ms. Capdeboscq, who is the executive vice president of the Group Bull (a French computer company) in charge of its strategy, technology, and partnerships, was first contacted in September, 1998, by a representative of the French Ministry of Finance and Industry, asking whether she would be available to serve on the board of a new international corporation to oversee Internet addresses.

She indicated that, while she was an Internet user, she had not been following or even aware of the discussions on the creation of such a corporation. She was told the objective for the Initial Board was to find qualified individuals who had not previously been actively involved, but were interested, in Internet development. She indicated her willingness to participate in principle, and was then contacted by an official of the European Commission, who asked her to indicate her willingness to be considered to Jon Postel (through his counsel), which she did. She understood that it was not clear that she would in fact be formally asked to participate, since the consideration of the structure of the Initial Board was still in process.

She became aware that she had been chosen as a member of the Initial Board when she was contacted by Jon Postel's counsel to arrange the details of a meeting of proposed Initial Board members near New York City, during which meeting the Initial Board was first constituted.

### **2. George H. Conrades**

Sometime last fall, Mr. Conrades received a call on his car phone from John Patrick, whom he knew from working together at IBM. Mr. Patrick asked him if he was familiar with IANA and the effort to form a new private sector entity to take over those responsibilities. Mr. Conrades said he was aware of the effort. Mr. Patrick then told him that his name had been suggested as a possible initial director of the entity, and asked if he would be interested; Mr. Patrick said that the Global Internet Project was supporting this effort, and that Mr. Conrades' background and experience in the industry, combined with the fact that he was no longer associated with any company, made him a particularly good choice as a knowledgeable but neutral candidate. He then suggested that Mr. Conrades call Roger Cochetti for more details, which he did, and he subsequently agreed to let his name be submitted to the USG. He then received a call from the counsel to Jon Postel, who confirmed that his name would be submitted and discussed dates for an initial meeting, which was held in October.

### 3. Gregory L. Crew

Mr. Crew is the Chairman of the Australian Communications Industry Forum (ACIF), an industry body established to manage the process of industry self-regulation through the development of appropriate codes and standards. At some point in the Green Paper/White Paper process, he was contacted by a representative of the Australian National Office for the Information Economy (NOIE), who sought his advice on ACIF's processes as a potential guide to the structure and processes of the new body (NewCo) being discussed to serve as a private sector substitute for the historical government management of various functions. In addition, he was asked if he would be prepared to stand as an initial director of NewCo should it be established. He agreed in principle, subject to further details.

Mr. Crew's name had been submitted as a possible candidate for an ICANN Director by both the NOIE and at least one Australian private sector member, based on personal contact with him in his role as Chairman of ACIF. In September 1998, he was contacted by counsel to Jon Postel, by telephone, to confirm his willingness to stand as a director of ICANN, and he agreed to do so. Subsequently, he was invited, and during October attended, a meeting of proposed initial directors of ICANN near New York City.

### 4. Esther Dyson, Interim Chairman

Ms. Dyson originally discussed this subject separately with Ira Magaziner and Roger Cochetti in late summer 1998. Both told her of the impending formation of a new organization to manage certain aspects of domain name policy, and asked her if she would have any interest in serving on the board of such an entity. She said she would be interested. In mid-September, she received an e-mail from counsel for Jon Postel, asking her to serve on the board; since she did not know this person, she contacted Roger Cochetti to ask him if this was legitimate. He told her it was, and she subsequently agreed to be included on the list of proposed board members submitted to the USG. She then attended a meeting in October, at which the Board was officially constituted and she was elected Interim Chairman.

### 5. Frank Fitzsimmons

Mr. Fitzsimmons was first contacted by another Dun & Bradstreet employee, who told him about the effort to create a private sector organization to assume certain Internet management functions. He was told that his background and experience on Internet and electronic commerce issues made him a potentially attractive candidate for the initial board of this new entity. He suggested that other D&B personnel working for him might be more knowledgeable, but was told that senior-level people were being sought. It was suggested that Mr. Fitzsimmons call the counsel for Jon Postel to get more information, which he did. After learning more about the effort, he agreed to be considered, and after clearing this with his senior management and legal staff, agreed to have his name included in the proposal to be submitted to the Commerce Department.

## 6. Hans Kraaijenbrink

Sometime in mid-1998, he received a telephone call from an official of the European Commission, asking whether he would be available to serve on the Board of a new international corporation to oversee certain parameters of the Internet. The fact that he had not previously been involved in these issues was explained to him as a positive instead of a negative point, since it meant that he would approach the issues with an open mind. He was also told that his experience as the Chair of the Executive Board of the Association of the European Telecommunications Network Operators (ETNO) was one of the reasons that he had been approached, since it demonstrated his capacity to serve effectively on the board of international organizations.

After consultation with and approval by the Executive Board of ETNO and his employer Royal KPN N.V., he indicated his willingness to be considered. He was subsequently contacted by counsel for Jon Postel to inform him of his selection to the Initial Board and to arrange the practical details of a meeting of all such Initial Board members, which took place in the New York area in late October, 1998.

## 7. Jun Murai

Mr. Murai was contacted by Jon Postel at either an IETF or ISOC meeting, who asked him if he would have any interest in serving on the initial board of the private sector successor to IANA. He then received either a phone call or an email from Jon Postel's counsel asking him if he was agreeable to having his name submitted to the Department of Commerce. He agreed.

## 8. Eugenio Triana

Mr. Triana was originally suggested as a possible candidate by various Europeans who were aware that he would, on September 1, 1998, be leaving his post with the European Commission. Sometime after that time, he was asked by various people who participate in European and Spanish associations dealing with information technology and telecommunications whether he would be interested in serving on the board of a new non-profit organization intended to have some Internet management responsibilities. He agreed to be considered. Sometime after that, toward the end of September, he received a communication from counsel to Jon Postel, providing further information and asking if he would agree to be proposed as part of the Initial Board, which he did. He subsequently attended the organizational meeting of the Initial Board in October.

## 9. Linda S. Wilson

Ms. Wilson was first contacted by Professor Larry Landwebber of the University of Wisconsin. He informed her of the planning underway to create a non-profit organization to manage various technical aspects of the Internet, and told her that exploration had begun for potential candidates to serve on an initial board that would serve for a short period of time to get the process started. He said that her name had

surfaced from several sources as someone who might be interested and willing, and that the President of the University of Wisconsin (where Ms. Wilson received her PhD) has encouraged him to contact her. She was interested because of prior experience in shaping new and reinvented organizations, because of interest in the Internet, and because it seemed to be a valuable public service. She did indicate, however, that she had a complex year ahead of her in her role as President of Radcliffe College, and that the timing and commitment would be very relevant factors.

She was contacted again (she believes in early September) by either Landwebber or Mike Roberts, who told her that progress was being made, and asked again if she would be willing to serve. She said she was interested but still concerned about the level of commitment required given her other obligations. Subsequently, she was contacted by counsel for Jon Postel, who asked for a current resume. Finally, Jon Postel's counsel contacted her once again, with a request that she allow her name to be formally proposed in a filing with the Department of Commerce. She agreed, with the understanding that she was agreeing to serve on the Board.

#### **10. Michael M. Roberts**

The other member of the Initial Board is Michael M. Roberts, ICANN's Interim President and Chief Executive Officer, who serves *ex officio*. Mr. Roberts was first contacted in the early fall by counsel to Jon Postel, who asked him if he would be willing to be considered for the post of the Interim CEO of ICANN. After some discussion of why he might be suited for that position -- including importantly his experience with the issues and his immediate availability -- and being told that it would probably be only a short-term assignment (perhaps a few months), Mr. Roberts agreed to be considered. He was then invited to attend a meeting of the Initial Board in October, where he was extensively interviewed by the Board and then excused from the room so his candidacy could be discussed. He was then told that the Board, after consideration of several alternatives, had voted to offer him the position, with the details of the employment arrangements to be negotiated between him and the Interim Chairman. He serves at the pleasure of the Board pursuant to a month-to-month contract.



**5. All executed registrar accreditation agreements and related records.**

Responsive materials will be submitted under separate cover.

**6. Records of all communications (whether written, electronic or oral) between ICANN (or its agents or representatives) and the Executive branch of the Federal government (or its agents or representatives, including but not limited to the Executive Office of the President), including but not limited to all records relating to such communications, regarding:**

- a. **Negotiations or other discussions regarding the transfer of control of the root system to ICANN or an ICANN-affiliated entity;**
- b. **Negotiations or other discussions regarding future agreements relating to the DNS between ICANN and the Department of Commerce (excluding records of communications provided in response to request 6.a. above);**
- c. **The terms of ICANN's registrar accreditation agreement, including but not limited to the imposition of the \$1 per domain name registration fee;**
- d. **Termination or alteration of the Department of Commerce's cooperative agreement with NSI; and**
- e. **Attempts to persuade or force NSI into entering a registrar accreditation agreement with ICANN, or NSI's refusal to enter into the aforementioned agreement.**

Responsive materials will be submitted under separate cover.

**7. All records relating to funding ICANN has solicited or received from:**

- a. For-profit entities;**
- b. Not-for-profit entities; and**
- c. Individuals.**

Responsive materials will be submitted under separate cover.

When ICANN was officially recognized by the USG (through the signing of the MOU) as the global, consensus, non-profit organization that the White Paper had called upon the Internet community to produce, both parties assumed that the organizational process could move ahead expeditiously, and that a permanent cost-recovery mechanism would be in place in the foreseeable future. In fact, the organizational process has been both more complex and slower than was anticipated, and a regularized cost-recovery funding mechanism has just this month become effective. Since the largest registrar has so far refused to become accredited, however, and thus is not yet participating in the cost recovery process, the current cost recovery program will not likely cover ICANN's ongoing costs.

In order to bridge the period between its creation and the operation of a regularized cost recovery mechanism, ICANN solicited, and various individuals and entities volunteered, donations that would be used to cover this transition period. The Global Internet Project undertook to lead a fund-raising effort on behalf of ICANN throughout the business community, and ICANN officers and Directors encouraged donations at every appropriate opportunity.

The result of all of these efforts was a total of \$421,510 in donations; the amount of each donation and the identity of the donor are recorded on Attachment 9 to this response.

Unfortunately, in significant part because of the longer time and greater costs of the transition period, as described elsewhere in this response, the amount of donations has not kept pace with expenses, so that ICANN is currently in a significant negative net worth position. Its total revenues are significantly exceeded by its total expenses; the accounts payable consist in significant part of professional services.

ICANN is now beginning to receive some funds for cost recovery from direct participants in the DNS. It has received approximately \$110,000 in application and accreditation fees from registrars, and beginning July 1, 1999, it is accruing fees from accredited registrars pursuant to the cost recovery funding mechanism described earlier in this response. Nevertheless, until a resolution of the current impasse with NSI, ICANN will continue to rely on donations and the willingness of its creditors to forego immediate payment for the bulk of its funding. This is obviously not a viable long-term situation; if the ICANN mechanism for consensus policy development is to be successful, it must begin to receive a more regular flow of funds to recover its continuing costs.

**8. All records relating to the proceedings of any meeting of ICANN's interim board, or any of ICANN's supporting organizations, to which the general public has been denied access.**

There have been 10 meetings of ICANN's Initial Board, and two meetings of its Executive Committee; the minutes of all of those meetings have been posted on the ICANN web site and will be provided under separate cover. There have only been two meetings of the provisional Names Council of the Domain Names Supporting Organization; the minutes and other documents relating to those materials are not in the physical possession of ICANN, but are available on the Names Council web site at [www.dnso.org](http://www.dnso.org) and have been reproduced from that site and provided with this response.

July 8, 1999

Mr. UPTON. Thank you. Mr. Rutt.

**TESTIMONY OF JIM RUTT**

Mr. RUTT. Good morning, Mr. Chairman and members of the subcommittee. My name is Jim Rutt. I have recently become the Chief Executive Officer of Network Solutions. While new to Network Solutions, for the last 19 years I have been involved in building Internet and other online businesses.

I come out of the Internet culture and cherish the delicate balance between freedom and voluntary cooperation that have allowed the Internet to flourish. Thank you for this opportunity to testify, and I might add further that this is the first time I have had the honor of testifying before the U.S. Congress. Again, I thank you for this opportunity.

NSI is a public company that registers domain names in the .com, .net, and .org domains. It is headquartered in Herndon, Virginia and has 500 employees. NSI got into this business in 1992 when it competed for and won a cooperative agreement, not a contract, with the National Science Foundation. The cooperative agreement was designed to encourage a private company to build a business that would handle domain name registrations.

When the Internet took off, the National Science Foundation asked NSI to make the tens of millions of dollars of private investment that became necessary to handle this growth. NSI's shareholders also took the risk and paid the very large costs of the litigation that were inevitable in the context of this unsettled yet important area.

We think NSI is a great Internet success story; a small company that took risks and, like many other Internet pioneers, has done very well; though it did not always do well. A little known fact: for the first 3 years, NSI lost money on its DNS management business. We took a risk to build a business.

We pledge we will continue to do everything we can to provide stable and reliable service to our current 5 million registrants who have legally binding contracts with NSI, and to help formulate practices that encourage continuing rapid growth of electronic commerce in this country and around the world.

This hearing asks whether ICANN is "out of control?" Perhaps a better way to put it is that ICANN is off-track. Let me give you

some examples of particular kinds of approaches and activities that do not fit with the original idea of ICANN as an open standard setting body.

First, ICANN took a request to provide simple accreditation for some new registrars and turned it into an opportunity to impose a mandatory tax of \$1 on every domain name every year, but only for the domain names in .com, .net, and .org, levied as a requirement for entry into the business.

Second, despite protests from the Internet community, ICANN has made its decisions in closed board meetings and has failed to engage in a deep and continuing basis with the industry and the stakeholders they purport to regulate.

Third, ICANN's proposed Registrar Accreditation Contract would grant ICANN the right to put registrars out of business on 15-days's notice.

Fourth, ICANN, without having even formed its policy developing apparatus, is attempting to regulate business arrangements between registrar and registry, and even to set detailed terms of end user contracts, interfering in matters that ought to be the subject of market competition.

Fifth, the ICANN Board proceeded to make critical policy before it was even composed of elected members, before the supporting organizations that are supposed to develop and demonstrate the existence of widespread agreement were fully formed.

An ICANN that operates this way is off-track. In short, ICANN should be in the business of setting standards by consensus, as originally envisioned in the White Paper, not attempting to evolve into a bureaucracy that interferes with the growth of the new economy.

We have been engaged constructively in this process for a long time. NSI has done everything required of it under the cooperative agreement, including those requirements set forth in Amendment 11 to open competition. NSI supports putting ICANN back on track and remains more than willing to work with ICANN, and to continue working with the Department of Commerce to bring this about.

First, we need to establish a fund-raising mechanism for ICANN that all agree is fair and reasonable. NSI will pay its fair share.

Second, ICANN needs to open its processes more fully and abide by its own bylaws.

Third, as the Department of Commerce recognizes in their response to this committee, we need to limit by contract the subject matters that may be addressed by ICANN policies.

Fourth, ICANN must become committed to equal treatment of all open registries that are in competition with one another, creating a level, global playing field.

Fifth, ICANN should be required, as a pre-condition for making policy, to demonstrate that there really is widespread support for its standards.

Let me thank this committee again for bringing sunlight to bear on a set of issues of great consequences for the growth and stability of electronic commerce. We believe there is need for continued Congressional oversight to ensure this transition process is a success.

No matter how intense the debate, there is no need for actions that threaten the stability of Internet operations. You have our commitment to work constructively to help create a private sector system consistent with good public policy in the interest of the American people and the people of the world, an ICANN that is on-track.

That would be an accomplishment which all of us, not least this committee, could be very proud of indeed. Thank you. I will be happy to answer any questions you may have.

[The prepared statement of Jim Rutt follows:]

PREPARED STATEMENT OF JIM RUTT, CEO, NETWORK SOLUTIONS, INC.

Good morning Mr. Chairman and Members of the Subcommittee. My name is Jim Rutt. I've recently become the CEO of Network Solutions, Inc. (NSI) Thank you for this opportunity to testify.

NSI is a public company that registers domain names in the com, org and net domains. It is headquartered in Herndon, Virginia, has 500 employees and is traded on the NASDAQ Exchange. NSI got into this business in 1992 when it competed for and won a Cooperative Agreement with the National Science Foundation. When the Cooperative Agreement first began, it was designed to encourage a private company to build a business that would handle domain name registrations. US Government funding was capped at \$1 million per year. When the exponential growth of registrations took off, NSF asked NSI to make the tens of millions of dollars of private investment that became necessary, on a continuing basis, to handle this volume. NSI's shareholders also took the risks and paid the very large costs of the litigation that were inevitable in the context of this unsettled yet important area.

We think NSI is a great internet success story—a small company that took risks and, admittedly, has done very well. In the context of that success, I hope you share my view that it is remarkable that NSI has agreed to build a Shared Registration System and to open up an opportunity for competition by a large number of new competitors. We pledge that we will continue to do everything we can to provide stable and reliable service to our current five million registrants, who have legally binding contracts with NSI—and to help formulate policies and practices that encourage continuing rapid growth of electronic commerce in this country and around the world.

We've all been discussing such policies for quite some time. NSI and many other parties provided comments over several years in the process that led to the Department of Commerce Statement of Policy (often called the "White Paper"). That key document called for a private not-for-profit entity that would facilitate open, transparent, bottom up, consensus-based standard setting for the domain name system. The choices Congress, the administration and the internet community make now with respect to ICANN will determine for a long time, if not forever, whether the domain name system will benefit from having such a body.

*Off Track*

This hearing asks whether ICANN is "out of control." My answer to that is that ICANN is off track. Let me give you some examples of the particular kinds of approaches and activities that don't fit with the original idea of ICANN as an open, standards setting body.

First, ICANN took a request to provide "accreditation" for some new registrars and turned it into an opportunity to seek to impose a mandatory tax of one dollar on every domain name, but only for names in the com, org and net domains, levied as a requirement for entry into the business. Even now, despite Department of Commerce recommendations to the contrary, ICANN has only agreed to "defer" this tax. NSI will agree to pay its fair share of the costs of a true standard setting body, but we think Congress should object to the idea that a private non-profit corporation can fund itself by requiring involuntary payments as a condition of being in a lawful business. ICANN's plans for its funding mechanisms have gone off track.

Second, despite widespread and continuing protests from the internet community, ICANN has made its decisions in closed board meetings and has failed to engage on a deep and continuing basis with the industry and stakeholders they purport to regulate. Again, even in response to Department of Commerce recommendations, they have declined to open their next scheduled telephonic board meeting (on July 26) to observers or to commit to amendment of their bylaws to require open board meetings on a continuing basis. A standard setting body, supporting organizations

and advisory boards must hold open meetings to create a record regarding what all stakeholders agree upon. Until there is a mechanism to open all of ICANN's deliberations to the net and to accurately test the views of all stakeholders—ICANN will remain off track.

Third, ICANN's proposed registrar accreditation contract purports to grant ICANN the right to put registrars out of business. As if the proposed contract did not adequately convey this notion, an ICANN Board member threatened that NSI would not be in business if it did not sign the mandatory accreditation agreement. An ICANN that makes such potentially destabilizing threats, which if implemented would derail a major portion of Internet infrastructure, is off track.

Fourth, ICANN, without having even formed its policy-development apparatus, is attempting to set detailed terms of end user contracts, interfering in matters that ought to be the subject of market competition among registries and registrars. It has intervened to regulate business models and to prevent the kind of diversity that made the Internet grow in the first place. An ICANN that micro-manages by imposing top down rules that reduce the breadth of service offerings is off track.

Fifth, the ICANN Board was not selected to *govern* the Internet but only to put in place the processes that will allow consensus policies to develop. The absence of widespread agreement about proposed standards should lead a standard setting body to make no rules—not to impose its own ungrounded conceptions of law. An ICANN Board that proceeds to make policy before it is even composed of elected members, before the supporting organizations that are supposed to develop and demonstrate the existence of widespread agreement are formed, is off track.

In short, ICANN should only be in the business of setting standards by consensus, as originally envisioned in the White Paper—not attempting to evolve into a bureaucracy that interferes with the growth of the “new economy.”

### *Solutions*

We have been engaged constructively in the process for a long time. NSI has commented extensively on every US Government policy paper on this topic. An NSI employee was even responsible for creating the name ICANN. We have suggested large portions of what became ICANN's bylaws, drafted structures for ICANN supporting organizations, commented on virtually all proposed ICANN policies, attended countless meetings all over the world and sought over the last six months on numerous occasions to enter into a reasonable contract with ICANN.

NSI has done everything required of it under the Cooperative Agreement, including those requirements set forth in Amendment 11, to open competition. In particular, we developed a Shared Registration System architecture which was approved by an industry technical advisory group under procedures designated by the Department of Commerce.

In implementing the Shared Registration System called for in Amendment 11, we have and will spend tens of millions of dollars. The Shared Registration System was deployed on schedule. Delays were necessitated by entirely predictable registrar development tasks coupled with designation of test bed registrars only five days before the test bed was to begin. NSI and the test bed registrars notified the Department of Commerce as far back as December 1998 that 60-90 days should be set aside to allow registrars to resolve interface and back office issues before the test bed activities began. So, it should come as no surprise that the test bed which was scheduled to run from March 21, 1999 through May 1, 1999 has been extended through August 6, 1999. What is disappointing is that ICANN, which did not identify the test bed registrars until five days before the test bed was to begin, would be blaming the delay on NSI.

Amendment 11 also required that “[f]ollowing the finalization of an agreement between the US Government and NewCo, NSI will recognize NewCo pursuant to a contract between NSI and NewCo.” While there is significant doubt as to whether the ICANN-USG agreement has been (or should be) finalized, I want to make it clear that NSI is willing to recognize ICANN as the NewCo if ICANN is required to operate in compliance with the original Statement of Policy. Indeed, we have proposed such terms on several occasions, asking (we think reasonably) that ICANN policies, to be binding, be based upon a true industry consensus and apply to all competing registries and registrars. ICANN has, unfortunately, refused to negotiate on the terms of any such contract and has insisted, instead, that we accept their “accreditation agreement,” which would require NSI to give ICANN the unilateral right to terminate our business with 15 days notice and take over the ownership of our intellectual property, substituting the unaccountable judgments of ICANN's unelected board for those of an NSI Board which owes fiduciary duties to some 20,000 investors and five million registrants.

NSI supports opening the Shared Registration System to additional competitors as rapidly as possible. NSI supports putting ICANN back on track—and we remain more than willing to work with ICANN and to continue our working with the Department of Commerce to bring this about. Let me provide you with some specific suggestions regarding how we can achieve the original goal of establishing an open standards setting process—and put ICANN back on track.

First, we need to establish fund raising mechanisms for ICANN that involve those who are asked to pay the bill in the establishment of any such fees. We need to allocate fees fairly among all those whose activities produce the costs ICANN incurs—namely everyone who registers names or numbers on the Internet. A standard setting body raises money from those who find its services valuable, not from those it can threaten to put out of business. NSI is prepared to do its fair share to support an ICANN that is on track.

Second, ICANN needs to open its processes more fully and abide by its own by-laws. Indeed, because a board can amend its own bylaws, it needs to promise in binding contracts to develop policies in an open manner and to take steps to prevent capture by special interests. If ICANN could only enforce policies that are developed in the open—because that is all its contracts would allow it to enforce—then it will have an incentive to remain open. This is just one of many areas in which sound contracts between ICANN and all registries can help put ICANN back on track.

Third, as the Department of Commerce itself seems to recognize, we need to limit by contract the subject matters that may be addressed by ICANN policies. No established business can or should agree to turn over control of its business practices to another board—and risk termination of its business if it fails to comply with any and all future policies that other board might one day adopt. But that is what the ICANN accreditation agreement now requires. In contrast, responsible domain name registries should be willing to commit by contract to adopt policies that have been demonstrated to have agreement from most other registries. Such policies should, of course, apply to all on a fair basis. They should deal only with issues the uniform resolution of which is necessary. That is the kind of contract an “on track” ICANN would ask for—and the kind of contract NSI has offered to sign.

Fourth, ICANN must become committed to equal treatment of all registries that are in competition with one another, creating an open and level global playing field. It is easy for others to envy US leadership in establishing the internet—and all too easy for ICANN to claim that it is “promoting competition” by singling out com, org and net as the target of regulatory rules that, if sound at all, ought to apply to all registries. A contract that allows enforcement of ICANN policies only if those policies apply to all registries would help to put ICANN back on track.

Fifth, ICANN should be required, as a pre-condition for enforcement of any of its policies, to demonstrate that there really is widespread support for these standards not just among some self-appointed group of “stakeholders” but also among those who are required to implement the policies. ICANN should be developing standards, not making laws or regulations. The goal is to make sure that ICANN has concrete procedures for testing the views of impacted parties—and, here is that concept again, that *contracts* with registries require compliance only when the procedures have developed demonstrable consensus support both among Internet stakeholders and among those who must implement the rules. Given such contracts, it wouldn’t be possible for an “off track” ICANN to simply declare itself the voice of internet consensus and, thereby, impose its will.

In short, the interim ICANN Board should return its attention to what should have been its main mission all along—getting a real board elected, which could then put in place the more permanent institutional mechanisms that would lead to the development of real (not just declared) consensus. NSI will cooperate with ICANN to achieve that goal.

### Conclusion

We should all always remember that the Internet is a network of networks—a collaboration among independent private parties who own their own equipment, make their own decisions, and are free to adopt their own policies to govern their operations. Most of the reliability, and value, and growth, of the network stems precisely from the fact that there is no one who owns it or governs it. Its success is vivid testimony to the genius of private sector innovation and entrepreneurship, following essential government research, development and nurturing. As the most successful registry among some 250 competitors, based on its significant investment and marketing efforts, NSI can nevertheless tell you that there is some need even for the most successful players for coordination to create an orderly, competitive playing field. But there is no need for a new global government for the Internet. As I’ve discussed, voluntary, standardized, *contracts* between all concerned, with consensus de-

velopment procedures and forcing mechanisms that prevent any holdouts from imposing costs on others, provide the best means to empower such coordination but also keep it under control.

Let me thank this Committee again for bringing sunlight to bear on a set of issues of great consequence for the growth and stability of electronic commerce. We believe there is a need for continued Congressional oversight to ensure this transition process is a success. No matter how intense the debate, there is no need for actions that threaten the stability of Internet operations. You have our commitment to work constructively to help create a private sector system consistent with good public policy and the interests of the American people, and the people of the world—an ICANN back on track. That would be an accomplishment of which all of us—and not the least this Committee—could be very proud indeed.

Mr. UPTON. For the first round of questions, I am going to recognize the chairman of the full committee, Mr. Bliley, for 5 minutes.

Chairman BLILEY. Ms. Burr, I expected that an administration that has devoted a significant amount of time and resources to this matter should have been better prepared to successfully address the challenges related to the privatization of the domain name system. However, we are confronted today with a situation that apparently does not reflect such thoughtful deliberation.

As I indicated in my opening statement, I question whether the administration anticipated and addressed issues, such as how ICANN is funded, whether an unelected board is credible, and whether there would be problems with Network Solutions and ICANN reaching agreement on critical issues.

Ms. Burr, when you were setting up this process, did you anticipate the problems we have today? If you did anticipate them, why have they not been better addressed?

Ms. BURR. Than you, Chairman Bliley.

I think the critical piece of the White Paper is our reliance on private sector leadership. When you move to private sector leadership, it is a new process. There are going to be some new things that need to be done. We did anticipate that ICANN would need to go to the private sector for bridge funding for its operations as it has done.

We also anticipated in the White Paper that ICANN funding would be based on fees, user fees, collected from registries and registrars. With respect to the issue of the board, we in fact specifically expected that there would need to be, at the beginning, an unelected board, but that one of the priorities of this unelected board would be to move toward creating the processes and election procedures to elect that board.

In order to move forward with competition, we also said however that the interim board should move forward in certain areas, certain specific areas, related to the introduction of competition. With respect to decisions that needed to be made in those areas, we had developed over the process of a year a very large record, over 1,000 comments, that formed the basis for the consensus that we thought was there.

We also anticipated the need for Network Solutions' cooperation. That was one of the reasons that Amendment 11 obligates. In Amendment 11, Network Solutions agreed to recognize this new corporation, once it was recognized by the United States.

Now, having anticipated all of those things, have they been perfectly executed? I am afraid not. I think we are moving forward to



getting them straight. I would like to ask Mr. Pincus if he has additional comments.

Mr. PINCUS. No.

Chairman BLILEY. Did ICANN consult with you, or the administration, or any other administration official regarding the advisability of imposing a \$1 fee?

Ms. BURR. As our responses to the chairman indicated, we did review and comment on a draft accreditation agreement, which included the notion that ICANN would charge up to \$1 per domain name registration. We discussed whether there were other ways of collecting funding from registrars. ICANN put that issue up for comment.

In fact, there were really very few comments, although I should note that Network Solutions did object at that point. Other than Network Solutions, there were not a lot of comments opposing that funding mechanism.

Chairman BLILEY. Mr. Chairman, I thank you. With your permission and with the cooperation of the witnesses, I would like to send some written questions to you that you can answer later.

Mr. UPTON. Without objection.

Mr. Klink.

Mr. KLINK. Thank you.

Mr. Rutt, I was taken by your optimism in coming before the subcommittee today. We do not usually have witnesses that are so happy to be here.

Mr. UPTON. If I might just interject, it was almost like that voice "You have mail."

Mr. KLINK. There you go. That was very nice. I hope that it is a good experience for you. It always is for us to be here. I do want to ask you though, to start off and I mention this in my opening statement. I was reading the Washington Post this morning. This was not in your testimony. This was attributed to you. I just wanted to find out if this was accurate.

It was talking about ICANN and whether or not you all are going to cooperate. It said, "Network Solutions has been unmoved; refusing to even recognize ICANN as a legitimate organization. They are not really necessary," said Jim Rutt, Network Solutions, Chief Executive. Are they quoting you or portraying your feelings accurately, Mr. Rutt?

Mr. RUTT. I am very glad you asked that question. I am sure that is not an experience that is unknown to some of the people on the panel. My quote was taken fairly severely out of context. Let me tell you what the context actually was. We had a pretty wide-ranging discussion about ICANN.

We said we thought that a good ICANN was a good thing, et cetera. Then we got into discussion of competition and about how we were introducing competition, going ahead doing so under our requirements under Amendment 11. The reporter then asked, "Is ICANN necessary for the introduction of competition?" specifically that question, and I said no. They are not necessary. That is indeed our position.

We could go ahead and introduce competition under Amendment 11, whether ICANN existed or not. ICANN can help in the process. It can be a central clearing house for certain necessary functions

and we think would add value to the Internet community, but I do believe it is a true statement that the introduction of competition to .com, .net, and .org does not require ICANN. I am glad I got a chance to clarify that.

Mr. KLINK. Thank you.

Mr. Pincus, what is your reaction to that?

Mr. PINCUS. Well, as I said in my statement, Congressman, the problem right now is that NSI exclusively operates the registry, which is necessary for competing—if you are a competing registrar, your registration has to get into the registry for it to work.

Unsupervised control of that critical facility for these critical domains, which are the commercially valuable domains, means that, for example, I think it is NSI's position, as we laid out in the letter, that after the expiration of the cooperative agreement on September 30, 2000, NSI believes that it can charge whatever it wants and set whatever terms it wants for accepting names into that registry.

So, that would obviously give it quite a lot of control over whether there will be any competition at all in registration. We need to have oversight over that, either by the government or by ICANN transitioning that responsibility to the private sector to make sure there is real competition. Otherwise, there just will not be.

Mr. KLINK. Mr. Rutt, I mean a lot of people have been in to see us. I think Mr. Pincus really laid out what the bad rap has been in the industry on NSI. I would like to give you the chance to react to what Mr. Pincus just said.

Mr. RUTT. Sure. I think I would start with something that may be a misconception in a lot of people's minds that somehow NSI is the only company that operates a registry, gives out a domain name, et cetera. The truth of the matter is we are in what is already a fiercely competitive business. There are 248 other registries in operation around the world.

Mr. KLINK. If you will hesitate for a second. You are the only one that operates .com; is that correct?

Mr. RUTT. Yes. Let me clarify what we believe that means. This is very important. This is very important.

Mr. KLINK. If you will just hesitate for a second. You are throwing out the numbers of how many there are, but you control about 80 percent of that market.

Mr. RUTT. Something less than that.

Mr. KLINK. Seventy-eight, 79, 7.4?

Mr. RUTT. Somewhere around 75, as I recall.

Mr. KLINK. All right, continue please.

Mr. RUTT. Let me start again. There are 248 other registries. There about 2 million registrations from these other registries. At least 80 of them will take on all comers, and compete with us for business in the United States. It is also very important to keep in mind, and a lot of people do not, that 30 percent of NSI's business today is outside of North America.

Mr. KLINK. The other statement that you make here today, when you talk about ICANN, you say that "ICANN has failed to engage on a deep and continuing basis with the industry and stakeholders that they purport to regulate." That is a pretty serious allegation. Will you explain that?

Mr. RUTT. There are a lot of people who ICANN has not talked to that are not necessarily representing their interests.

Mr. KLINK. Who would that be? Who have they not talked to that they should be talking to?

Mr. RUTT. Let me get back to you on that on the record.

Mr. KLINK. Mr. Pincus, do you find that to be an accurate portrayal of ICANN, one of their failings?

Mr. PINCUS. I think ICANN's outreach has been tremendous. There have been a series of public meetings around the world for them to give input. They have a website, which the accept comments from all comers. I think in terms of opening themselves up to input, it is hard for me to see how they are not doing that.

Mr. KLINK. Mr. Rutt, my time has expired. I would be very interested, on the record, in knowing specifically whom it is that ICANN has not spoken to and what damage has been done by them not doing so. If you could do that, that would be appreciated.

Mr. RUTT. We will certainly take care of that for you.

Mr. KLINK. Thank you, Mr. Rutt. I appreciate that.

Mr. UPTON. Thank you. Mr. Rutt, we all appreciate your testimony, particularly the number of examples where you found some shortcomings in terms of how the operation has progressed at this point. I guess, Mr. Roberts, how many board members are there on ICANN's board and where are they from?

Mr. ROBERTS. There are 10 members on the initial board.

Mr. UPTON. Where are they from? What areas?

Mr. ROBERTS. There are five who are non-U.S. There is a director from Australia, from Japan, from Spain, France, and the Netherlands. There are four from the U.S. I am an ex officio member of the board.

Mr. UPTON. What is your sense as we look at expanding the board to include the elected board members, it is my understanding that the timeframe is to try and get it done by September of next year, I believe. Where are you on progressing along that timetable?

Mr. ROBERTS. The bylaws of ICANN, which were developed in response to the White Paper, have created four bodies that will elect members of the board. There are three supporting organizations and there is an at large organization or cohort. We have endeavored, since I think Christmas time last year, to in parallel, advance the organization of each of those areas so that they might elect their directors in as timely a manner as possible.

Mr. UPTON. Is it your feeling then that you will make the deadline without too much difficulty?

Mr. ROBERTS. Well, I cannot speak for the entire Board, sir, but we have recognized two out of the three support organizations. We expect to recognize the third within the next few weeks. We expect the board to deliberate on the creation of the mechanisms for electing the at-large directors substantively at our next two meetings.

Ms. DYSON. If I may add.

Mr. UPTON. Go ahead.

Ms. DYSON. What that amounts to in terms of numbers is that we hope to have nine newly elected directors by our annual meeting in November.

Mr. UPTON. November of?

Ms. DYSON. November of this year; whatever it is, 4 or 5 months.

Mr. UPTON. Okay.

Ms. DYSON. Then we hope to bring on the new at-large directors probably in two clumps. The first would be in the spring or summer of next year. Then the final would be by September of 2000.

Mr. UPTON. As we look at sort of the funding stream of ICANN, it is my understanding, from an e-mail, Mr. Roberts, you had sent earlier this year dated June 17, 1999, that ICANN will have a negative net worth of \$727,000, as of June 30. Is that an accurate reflection of where ICANN is?

[The e-mail referred to follows:]

Return-Path: <mmr@darwin.ptvy.ca.us>  
 From: Mike Roberts <mmr@darwin.ptvy.ca.us>  
 Subject: Background info re ICANN situation  
 To: Thomas\_A\_Kalil@opd.eop.gov  
 Date: Thu, 17 Jun 1999 09:11:51 -0700 (PDT)  
 Cc: edyson@edventure.com, jsims@jonesday.com

Tom - pleased to hear about your offer of help to Esther and Joe. There are three current documents that may be of use to you. (In addition to Esther's letter to Nader, which lays out the current terms of political engagement.) One is a six month status report from ICANN to Commerce which carefully lays out what we have been doing and why. The second is our budget package for next year, starting 7/1/99, which details what the projected income is and what it is going to be used for. Both of these are available in html on our website, which copies better than my ascii versions.

The third document is a private and confidential financial statement based on actual results as of 6/15/99 and projected to fiscal year end at 6/30/99. The most salient figure on this schedule is a negative net worth of \$727,954 at June 30. I'd be happy to fax the entire schedule to you if you'll give me a number for a machine where the schedule won't get loose. I'm discussing it with the CFO of Cisco tomorrow and with MCI as well, with respect to a second round of financial support.

Let me know if I can provide additional help.

Regards.

- Mike

Mr. ROBERTS. Well, our financial statement of June 30 has not been audited, but that number I think is very close to the final figure.

Mr. UPTON. One of the concerns that a number of us have, particularly as we have looked at the board meetings, and some of the expenses that have been there, I mean, as you talk about the ten members that are now on your committee, and where they are from, I note that your next board meeting in August, I believe it is, is in Santiago, Chile. Is there a reason why Chile was picked when you do not have members from there?

Mr. ROBERTS. Well, the absence of representatives from Latin America in our structure has been a matter of concern to the board and to many people in our constituency. We have had discussions with the administration about that. Latin America is, from both an economic and for other reasons, an important part of the total ICANN picture. We believe it is entirely appropriate that the board meet there.

Mr. UPTON. Mr. Pincus, did you all have a role—I do not know how you manage, micro or macro, on these decisions? Ms. Burr.

Ms. BURR. We do not participate in the decisions about where board meetings are held. I think there is an important piece of the puzzle that is missing here. In addition to the fact that the board meets, there is and has always been with respect to the ICANN meetings, an open full day of open public participation.

So, one of the good things about moving around the world is when you are trying to create a global organization and create consensus globally, you need to reach out to the Internet stakeholders, not just the board members.

Mr. UPTON. Just to follow-up on that statement, until now the meetings have not been open. Is that not correct?

Ms. BURR. There have been preceded by a full day public open meeting.

Mr. UPTON. My time is expired here. So, I will go to Ms. DeGette.

Ms. DEGETTE. Thank you, Mr. Chairman.

The first thing I would like to ask everyone on the panel—

Mr. UPTON. If I might just add, because of the camera, they have asked that we try and speak a little closer to the mike. I will re-start your time.

Ms. DEGETTE. Thanks. I needed that.

I would like to ask all of the panel if they can tell me who they believe owns the intellectual property that is the domain name registry system? I think I will start with Mr. Pincus.

Mr. PINCUS. Our view is that those are rights that the government has as a result of the cooperative agreement.

Ms. DEGETTE. Ms. Dyson.

Ms. DYSON. I would say ultimately that it is public property. There are issues about how it is used, and the privacy of information where either someone like the U.S. Government or ICANN should decide what the proper policies are for its use. But I do not think it belongs to any particular company. To some extent, it belongs to the domain name holders, but it is important for it to be publically available for various public interest purposes.

Ms. DEGETTE. Mr. Rutt.

Mr. RUTT. It is our view that, under the cooperative agreement, the intellectual property, at least in its compiled form, transferred to us under the cooperative agreement as in all other cooperative agreements. We do believe that there is need for the Internet community to have access to this data through the traditional WHOIS service so that people can find people to make claims for trademark or copyright infringement.

It can also be used to contact people to purchase a domain name, et cetera. So, we do provide access to it because the community has definite legitimate use interests in the WHOIS data.

Ms. DEGETTE. But you believe the intellectual property right goes to your company?

Mr. RUTT. We believe that it is quite clearly under——

Ms. DEGETTE. What is the legal basis for this?

Mr. RUTT. [continuing] the cooperative agreement and the terms——

Ms. DEGETTE. That is spelled out? See, these guys like to bash lawyers, but I actually am a lawyer.

Mr. RUTT. I am not a lawyer, but I was very interested in this topic. So, I had some of our people go through the regulations. I do not know what the right term is, the things that apply to cooperative agreements and the history of the hundreds of cooperative agreements that have been entered into by the National Science Foundation over the years.

It appeared to me, a simple old country boy, real clear that the intellectual property, created under any cooperative agreement of this sort, transfers to the person who executed the agreement.

Ms. DEGETTE. If you could, Mr. Rutt, following up, if you could provide this committee for the record any legal opinion that your company has that might back this up, because the concern I have is because the contents of the data base are nothing more than simple facts, it would be difficult to copyright that information, for example.

Mr. RUTT. Of course we all know there are lots of different forms of ownership of intellectual property. I will be very happy to give you that.

Ms. DEGETTE. If you can get me that information from your lawyers.

Mr. RUTT. We will actually do it.

[The information referred to follows:]



August 24, 1999

The Honorable Fred Upton  
 Chairman, Subcommittee on Oversight and Investigations  
 The Commerce Committee  
 U.S. House of Representatives  
 Room 2125 Rayburn House Office Building  
 Washington, D.C. 20515-6115

Dear Mr. Chairman:

At the hearing of the Subcommittee on Oversight and Investigations of the Commerce Committee, held on July 22, 1999, entitled "Domain Name System Privatization: Is ICANN Out of Control," James Rutt, our Chief Executive Officer, agreed to provide a legal opinion affirming the intellectual property rights of Network Solutions, Inc. ("NSI") to the data compiled by it in its domain name registration business. In addition, you requested this opinion in Question 2 contained in your letter to Mr. Rutt dated August 10, 1999.

I am responding to your request in my capacity as the General Counsel of NSI and I appreciate the opportunity to provide this response.

NSI recently responded to a similar question included among a number of interrogatories we received from the U.S. Department of Justice in Civil Investigative Demand No. 19198. As General Counsel of NSI, I oversaw the preparation of the responses to these interrogatories. I believe that your request is best answered, in part, by reproducing below the relevant interrogatory and our response thereto.

The interrogatory is as follows:

1. *Identify any "registrant data" to which your company asserts any "exclusive or non-exclusive right or interest," and separately for each identified item of information, describe in detail the basis for such assertion.*

Our response to that interrogatory is set forth below:

i. The Nature of The Registrant Data:

As defined in the Schedule, "registrant data" includes information provided by entities and individuals through a Web-based registration form submitted to the Network Solutions, Inc. registrar ("NSI registrar") to register Internet domain names in the .com, .net, and .org top-level domains ("TLDs"). Registrant data also includes information submitted by other domain name registrars to the Network Solutions, Inc. registry ("NSI registry") on behalf of entities and individuals in connection with applications to register Internet domain names in the .com, .net, and .org TLDs. The NSI registrar and the NSI registry are denominated and discussed separately in these Responses. In the course of performing its functions, the NSI registrar compiles registrant data regarding its registrants into various databases and sub-databases. The NSI registry also compiles registrant data obtained from domain name registrars into a database. These databases are discussed separately below.

1. The NSI Registrar:

The information submitted to the NSI registrar, in an application to register an Internet domain name, includes identifying information (i.e., name and address) regarding the individual or organization with whom the NSI registrar contracts to maintain a domain name registration record (the "registrant"); information regarding the designated administrative, billing and technical contacts for the domain name registration contract; and the name and Internet protocol (IP) numbers of the primary and secondary servers (usually an Internet Service Provider's ("ISP's")) associated with ("hosting") the second-level domain name. (Registrants choose their own ISP to host their e-mail service and/or a web site. These servers act as electronic "traffic cops" to direct transmissions to the domain name to appropriate locations.)

If a domain name application is accepted by the NSI registrar, the information contained in the registration form is compiled into various databases and used in connection with the NSI registrar's registration services, domain name availability look-up services (WHOIS and RWHOIS), and its internal financial, business, and dispute management functions.



## 2. The NSI Registry:

Registrant data submitted by registrars to the NSI registry in an application to register an Internet domain name includes only the domain name being registered and the hostnames and IP numbers of the primary and secondary servers associated with the domain name and the identity of the registrar involved. No other registrant data is provided to the NSI registry by registrars. All rights in that registrant data reside with each of the respective registrars, subject to a non-exclusive, non-transferable, limited license from each registrar to the NSI registry for the propagation of and the provision of authorized access to the files used to match Internet domain names to IP numbers for routing of communications over the Internet.

### ii. Bases for the Company's Asserted Rights:

The NSI registrar asserts an exclusive right or interest in the database of registrant data, as identified above, obtained from its registration customers as a whole and in the secondary databases of registrant data which are extracted from the entire database of registrant data and re-aggregated from time to time. The NSI registry asserts a non-exclusive right or interest in the registrant data co-extensive with the agreement entered into with each registrar.

To understand this response, some background may be helpful. NSI began performing its domain name registration functions according to Cooperative Agreement No. NCR-92-18742. This Cooperative Agreement was effective January 1, 1993 between NSI and the National Science Foundation (the "NSF"). (Responsibility for administering the Cooperative Agreement was transferred from the NSF to the Department of Commerce on September 9, 1998.) In addition to the Special Conditions contained in Cooperative Agreement No. NCR-92-18742, the Cooperative Agreement incorporates the NSF's Grant General Conditions and Cooperative Agreement General Conditions. The NSF Grant Policy Manual supplements the terms of the Cooperative Agreement. Thus, when we speak of the "Cooperative Agreement," NSI refers to the agreement as augmented by incorporation of the relevant terms and conditions described above.

The Cooperative Agreement was the result of a project solicitation issued pursuant to the National Science Foundation Act of 1950, as amended (42 U.S.C. §§ 1861 *et seq.*), and the Federal Cooperative Agreement Act (31 U.S.C. § 6305). The Cooperative Agreement is not a "procurement contract," and is thus not governed by the Federal Acquisition Regulations. In contrast to a procurement contract, which the

United States Government uses to obtain goods or services, a cooperative agreement is used when "the principal purpose of the relationship is to transfer a thing of value to the ... recipient to carry out a public purpose ... instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." See 31 U.S.C. § 6305.

Paragraph 754 of the NSF Grant Policy Manual provides that the "NSF normally allows grantees to retain principal legal rights to intellectual property developed under NSF grants." Paragraph 18 of the NSF Grant General Conditions further provides that "[e]xcept as otherwise specified in the award or by this paragraph, the awardee may own or permit others to own copyright in all subject writings." These provisions confirm that any and all intellectual property arising from the operation of NSI's domain name registration business belongs to NSI. This is consistent with Virginia common law and statutes. Such intellectual property includes, as one example, trade secret rights in the aggregated registrant database and re-aggregated subsets of such data as modified daily and maintained in the course of NSI's business.

This understanding of the parties to the Cooperative Agreement was confirmed by the Congressional testimony of Dr. Joseph Bordogna, the Acting Deputy Director of the NSF, before the U.S. House of Representatives, Committee on Science, Subcommittee on Basic Research on September 25, 1997, in which he stated, "...[U]nder the law and under our Cooperative Agreement, and our statutory authority, the ownership of the database material belongs to the awardee, but the NSF retains the right to get a copy of it at the termination of the Agreement."

The NSF retained the right to receive a copy of the data generated under Paragraph 10.E. of the Special Conditions to the Cooperative Agreement. This paragraph provides that:

The Awardee shall submit electronically and in ten (10) hard copies a final report to NSF at the conclusion of the Cooperative Agreement. The final report shall contain a description of all work performed and problems encountered (and if requested a copy and documentation of any and all software and data generated) in such form and sufficient detail as to permit replication of the work by a reasonably knowledgeable party or organization.

NSI's delivery of a copy of NSI's registration database, were it considered to be "data generated" under paragraph 10.E., either as registry

or registrar, if requested, as part of the final report under Paragraph 10.E. does not grant the NSF any rights in either database or respective sub-databases. Any rights the NSF may have in the registrant data are governed by Paragraph 18 of the Grant General Conditions of the Cooperative Agreement which only provides the NSF with a:

[N]onexclusive, nontransferable, irrevocable, royalty-free license to exercise or have exercised for or on behalf of the U.S. throughout the world all the exclusive rights provided by copyright. Such license, however, will not include the right to sell copies or phonorecords of the copyrighted works to the public.

The express copyright license grant from NSI to NSF contained in the Cooperative Agreement further demonstrates that ownership of the registrant data, including all copyrightable material, resides in NSI subject only to this limited license in copyrightable works generated under the Cooperative Agreement.

NSI's ownership of its aggregated databases and re-aggregated subsets of such databases, thus, is predicated on the Cooperative Agreement, including the NSF Grant Policy Manual, as well as Virginia common law and the Virginia Uniform Trade Secrets Act. Virginia's trade secret law, for example, clearly protects computer software, as well as computer databases consisting of customer information. Likewise, compilations of known elements or items, considered in the aggregate, are protectible as trade secrets. In the absence of a written agreement to the contrary, the common law assigns ownership of inventions and trade secrets to their developer. This is consonant with concepts of property that extend beyond land and tangible goods to include the products of labor and invention.

Amendment 11 to the Cooperative Agreement is simply an amendment to the original Cooperative Agreement between the NSF and NSI. As stated in the relevant provision of Amendment 11, nothing "is intended to alter any intellectual property rights of the USG or NSI established in the Cooperative Agreement." Thus, the issue of rights to the software and data generated under the Cooperative Agreement was not altered by Amendment 11.

In addition to our response set forth above to the interrogatory from the Department of Justice, I would also like to provide the following information and discussion.

The National Science Foundation (the "NSF") has taken the position on other occasions that the databases developed by NSI are the property of NSI and that the

Federal Government has no control over such information. For example, on August 5, 1996, the General Counsel of the NSF responded to an appeal under the Freedom of Information Act, 5 U.S.C. §552 et seq., to obtain a copy of the domain name database, by holding that the domain name database "is not an 'agency record'" within the meaning of FOIA and that "the documents created by a grant recipient are the property of the recipient, not the Federal Government." A copy of the letter from Lawrence Rudolph, General Counsel of the NSF, to William C. Walsh, Esq., is attached as Appendix A. Mr. Rudolph explained:

NSF has neither created nor obtained the domain name database. The agency does not possess the database and cannot access it electronically (save for the same access through the Internet, noted above, that is available to you and the general public). In addition, NSF is not in control of the requested record. . . .

The domain name database consists of information collected, maintained and used by NSI, pursuant to an NSF cooperative agreement – a type of federal assistance award made by NSF under the Federal Grant and Cooperative Agreement Act of 1977, 4 U.S.C. 503, under which the agency transfers money to the recipient to accomplish a public purpose of support or stimulation. NSF Grant Policy Manual 210. Private organizations like NSI that receive federal financial assistance grants are not within the FOIA definition of "agency", *Forsham v. Harris*, 445 U.S. 169, 179 (1980), and the documents created by a grant recipient are the property of the recipient, not the Federal Government. *Id.* at 180-81. (footnotes omitted).

The NSF reached a similar conclusion in a response to a request under the Privacy Act, 5 U.S.C. §552a, for some of the data contained in the domain name database. A copy of the letter from Herman G. Fleming, Privacy Officer, NSF, to Mr. Karl Auerbach, dated December 24, 1997, is attached hereto as Appendix B. In that letter, Mr. Fleming noted that "Network Solutions, Inc. (NSI) maintains records for its own use in administering certain domain names under a cooperative agreement with NSF, NCR-9218742." After reiterating some of the points made earlier under FOIA, the NSF again held that "the documents created by a grant recipient are the property of the recipient, not the Federal Government" and concluded that "NSF maintains no such supervision and control over NSI databases."

The NSF concluded in such letter that the domain name database is not an "agency record" contained in a "system of records" maintained by a Federal agency under the Privacy Act. However, if the NSF's conclusions were incorrect and the domain name database were indeed an "agency record" contained in a "system of records" maintained by a Federal agency, and such database was owned by the NSF and is now

owned by the Department of Commerce, the NSF and the Department of Commerce would be subject to significant financial liability under the Privacy Act for past, present and future disclosures of personal information contained in this database.

The NSI registrar WHOIS database is and has always been made available by NSI to the general public on an interactive basis for the purpose of looking up various data fields associated with specific domain names. This look-up capability is vital to the functioning of the Internet, and NSI will continue to make this database available on this basis in the future. The WHOIS database has never been made available on a bulk access download basis. However, pending resolution of all outstanding issues with the Department of Commerce and the Internet Corporation for Assigned Names and Numbers, NSI has agreed to remove restrictions on the use of WHOIS data for third-party development of value-added products and services.

On the other hand, if, as described above, the NSF's conclusions about the Privacy Act were incorrect and the WHOIS database was owned by the NSF and is now owned by the Department of Commerce, it would be impracticable or impossible for the Federal Government to maintain the timely interactive database look-up capability necessary for the Internet to function without violating the Privacy Act.

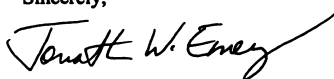
Finally, the NSF's conclusion that data created or maintained by the awardee under a cooperative agreement are the property of the awardee is consistent with the policy and practice of the Federal Government in dealing with such grants. See, e.g., Executive Order No. 12591, 52 Fed. Reg. 13,414 (1987); and NIH Grants Policy Statement, Part II: Terms and Conditions of NIH Grant Awards – Part 5 of 7 (“In general, grantees own the data generated by or resulting from a grant-supported project.”)

We intend to supplement our response to the interrogatory described above from the Department of Justice to include the additional discussion set forth above.

I hope that the foregoing has been responsive to your request for a legal opinion affirming the intellectual property rights of NSI to the data compiled by it in its domain name registration business.

Thank you for the opportunity to respond to your request.

Sincerely,



Jonathan W. Emery  
Senior Vice President –  
General Counsel and Secretary

Ms. DEGETTE. Counsel just pointed out to me that what you are basically saying is that because of these cooperative agreements, you view your company's ownership rights as a monopoly. Would that be a fair characterization?

Mr. RUTT. I would say again that the business we are in is a fiercely competitive business. We are not the only registry in town. They all work exactly the same.

Ms. DEGETTE. Sir, yes or no works with that question.

Mr. RUTT. I would guess I would say that it is a question that I cannot answer yes or no.

Ms. DEGETTE. Okay. Let us move along then. Mr. Rutt, as a publically held company, your primary fiduciary duty is to your shareholders, not the Internet industry, not to the U.S. Government, or ICANN, or some kind of big public interest like some of the folks down at this end of the table have talked about. Would that be accurate?

Mr. RUTT. Clearly, as an officer of a public company, my first responsibility is to the shareholders of the corporation. Let me say that it has been the position of Network Solutions all along that what is good for the Internet is good for Network Solutions. It is our goal, our plan, and our business plan to growth with the Internet.

Ms. DEGETTE. Yes. I can understand why that would actually be your company's motto. I am wondering if the rest of the industry shares that view as well?

Mr. RUTT. I do not know. Why do you not ask them?

Ms. DEGETTE. I will. Let me ask you then, is it your company's position that there should be full and open competition in providing domain name registration and that this will benefit your shareholders?

Mr. RUTT. Yes, we do.

Ms. DEGETTE. Well, I think that is great.

Mr. Chairman, if I may just for an additional 30 seconds. I have to leave.

Mr. UPTON. Go ahead, even though you are a lawyer.

Ms. DEGETTE. Thank you.

You know, it surprises me to hear you say that because in your testimony and in some of your press statements, you indicate that NSI questions the very existence of ICANN's authority as spelled out in your agreement with the Commerce Department. So, I find it interesting, but we can follow-up on that. Thank you, Mr. Chairman.

Mr. RUTT. If you do not mind, I would not mind addressing that.

Ms. DEGETTE. Sure.

Mr. RUTT. We believe the issue of introducing competition is good for Network Solutions, because as the new entrants come in, they are going to spend a lot of advertising time in the usual tradition to the Internet, develop new ways to use domain names, make our friends at AOL come up with some new ways to use domain names that we have never thought of.

It will cause other people to say they want to use domain names the same way and we will sell some to those people. So, we believe, truly sincerely believe, that the stimulation that will come to do-

main name business by new business models, new entrants, additional advertising dollars is a good thing for Network Solutions.

Ms. DEGETTE. Well, I am glad to hear that, and thank you, Mr. Chairman, for your indulgence.

Mr. UPTON. Mr. Bilbray.

Mr. BILBRAY. Thank you, Mr. Chairman.

On just a point of clarification of my colleagues, when we talk about NSI and the mother company, SAIC, when we talk about the stockholders, we are actually talking about the employees themselves. It is an employee-owned business. So, they are not faceless investors. They are actually people out there performing the services.

I have a question straight over, and I ask either one of the members of the Department of Commerce representatives here. Do you have a plan if NSI does not sign the contract with UCAN? Are you planning to re-bid the competitive agreement? What is your strategy?

Mr. PINCUS. Our first hope is that we can reach an agreement. If we do not reach an agreement, we have not made a firm conclusion about exactly what course we will pursue. We do believe that we have the authority to re-compete the cooperative agreement and to assign those responsibilities to whomever were the winner of that new competition.

Obviously, as I think Congressman Klink said in his opening statement, going down that road will benefit a lot of lawyers, since there probably will be a lot of litigation, since I know NSI has the view that we cannot do that. So, our hope is that we can reach agreement and we do not have to go down that road.

Mr. BILBRAY. You know it is there, but you have not developed that contingency plan yet.

Mr. PINCUS. Well.

Mr. BILBRAY. The possibility is there.

Mr. PINCUS. We have talked to the lawyers who work for me and to the Justice Department about what the steps are, and how one would go about doing it, but we have not firmly decided that is exactly how we would do it. People thought after the White Paper came out, the first was to negotiate Amendment 11 with NSI.

A lot of people said NSI would never negotiate an Amendment 11 because that was going to require the creation of a test bed process and the introduction of competing registrars. We did successfully negotiate that agreement. So, I am not ready to give up. I do not think we are up against the wall time wise on the possibility that we will reach agreement.

Frankly, I think if we have to go down the recompetition road, it will not be good for the Internet. There will be a lot of instability in the short term. So, I really want to exhaust every possibility of resolving this amicably. As somebody said, even if everyone is not completely happy, at least we have an agreement. The alternative, I think, has some very, very significant costs.

Mr. BILBRAY. You mentioned the ranking member. I want to compliment the ranking member and the line of questioning that was just performed by the ranking member. I think that I would like to get the video and show every Member of Congress a very productive way of getting the facts out and getting the dialog; al-

lowing both sides time to articulate the positions, even if the individual member may not agree.

Mr. KLINK. I thank the gentleman.

Mr. BILBRAY. Very, very commendable question series.

Let me turn around on the other side and ask NSI, you talk about developing a competitive environment. What are you doing to move toward that competitive environment?

Mr. RUTT. We have invested tens of millions, or we will eventually invest tens of millions of dollars. We spent pretty well over \$10 million today to introduce competition in .com, .net, and .org.

We already have five companies up and running today. We have a considerable list that once we come to resolution on some of the outstanding business matters, we are going to move expeditiously, as fast as is practical, to bring in the competition. We have said that we are capable of bringing on at least five a month. That comes out to 60 a year.

A year from now, if all goes well, we will have 60 people out there competing with us in .com, .net, and .org. There are not too many companies that have 60 competitors. We are going to aggressively bring competition to this business.

Mr. BILBRAY. Now you said how much money has been spent?

Mr. RUTT. It is in the tens of millions of dollars.

Mr. BILBRAY. Tens of millions. It would be nice if you could get to this committee a little closer estimate than that.

You state that the competition is out there. Can you give me the time line again? When do you think you are going to see this actually bloom?

Mr. RUTT. Five are actually in business right now able to register domains in .com, .net, and .org. So, it is actually in production now. The first one went online on the 5th of June. The rest of them have come online since then. They are all ready to go. As soon as the test bed is over, and we have agreements on how to move forward, we will start bringing them on no slower than five a month.

Mr. BILBRAY. Okay. Thank you very much.

Mr. RUTT. We are in competition right now.

Mr. BILBRAY. Thank you, Mr. Chairman.

Mr. UPTON. Mr. Stupak.

Mr. STUPAK. Mr. Rutt, it seems to me that NSI questions the very existence of ICANN's authority as spelled out in its agreement with the Commerce Department. For example, you claim that NSI has agreed to recognize ICANN, only if it has a final agreement with Commerce, which you doubt exist.

It sounds like to me it is a classic delay tactic. The Commerce Department told you in writing that this agreement had been finalized. Has it been finalized or not?

Mr. RUTT. I will leave that question to the lawyers. I will leave that question to the lawyers. I am not a lawyer.

Mr. STUPAK. I am sorry. Lawyers are not here. I am asking you.

Mr. RUTT. Let me ask my lawyer.

Mr. STUPAK. Okay.

[Pause.]

Mr. RUTT. I think a better way to talk about this issue—

Mr. STUPAK. No, no, no. I want my questions answered.



Mr. RUTT. I do not think it is really relevant because we are working with them right now to negotiate a recognition of them as anticipated in Amendment 11 under the contractual term which calls for Network Solutions to recognize ICANN pursuant to a contract.

Mr. STUPAK. Mr. Rutt, like I said, it sounds like delay tactic to me. Sir, yes or no? Is there a final agreement?

Mr. RUTT. We will get back to you for the record.

Mr. STUPAK. For the record. When will that be, Mr. Rutt?

Mr. RUTT. Let me ask my lawyer. Hope he is not on the clock. [Pause.]

Mr. RUTT. He says tomorrow.

Mr. STUPAK. Okay.

Have you ever told the Department of Commerce or ICANN that, in your opinion, there is no final agreement?

Mr. RUTT. Probably yes.

Mr. STUPAK. Okay. And that Amendment 11 is not yet operative?

Mr. RUTT. No. I have definitely said that. We absolutely believe Amendment 11 is operative, and we have been going forth.

Mr. STUPAK. But there is no final agreement.

Mr. RUTT. That is true. The recognition of ICANN by Network Solutions, pursuant to a contract between Network Solutions and ICANN, has not yet taken place. That is the moment that is important. That is what we are working toward. That is the thing you should focus on.

Mr. STUPAK. No. I think I am focusing in the right area. Let me ask Mr. Pincus and Ms. Dyson, do you believe that your agreement has not been finalized and therefore NSI is off the hook for following Amendment 11 in any of ICANN's directives? Do you believe they are off the hook and do not have to follow directives?

Mr. PINCUS. No. Our interpretation of Amendment 11 is that the obligation of NSI to recognize ICANN is due and has come due. Now it is true, it has to be done pursuant to a contract.

Obviously there is no agreement—in terms of the obligation, we think it is due now. It is quite clear that the system would not have worked if we had to wait until the end of the line.

Mr. STUPAK. Ms. Dyson.

Ms. DYSON. The short answer is yes, and we are moving forward to fulfilling the provisions of it.

Mr. STUPAK. Well, we seem to have some disagreement here. So, who is the final arbitrator here, the Courts?

Mr. PINCUS. I think our view, Congressman, is since Amendment 11 says that NSI must enter into a contract that does not have the terms, there is no way, as a practical matter that we can force NSI to enter into a contract against its will. I think the ultimate conclusion of an inability to reach that agreement is what we were talking about before, going down the road of recompeting these obligations, and assigning them to the winner of that free competition.

Mr. STUPAK. So, you are in favor then of putting it back out for recompetition?

Mr. PINCUS. If we cannot reach agreement, I think that is appropriate.

Mr. STUPAK. Is there some time line when this agreement should be reached?

Mr. PINCUS. Well, the outside limit is the expiration of the current agreement, which is September 30, 2000. Obviously, we want to move forward as soon as we can. We want to keep having discussions if they are productive, because clearly that is the best way to solve the problem. If we hit a stonewall, then we have got to do it another way.

Mr. RUTT. I would like to make a point too, Congressman Stupak, that we are engaged right now in active negotiations to reach agreement. Now, we look forward to reaching an agreement that—

Mr. STUPAK. Well, how long have those active negotiations been going on?

Mr. RUTT. Since I have been here, I think back, when was it, late June, yes. So, I would say a month.

Mr. KLINK. Would the gentleman yield to me for a moment?

Mr. STUPAK. Sure.

Mr. KLINK. What is the impetus for NSI to conclude these negotiations? This is what everyone else is saying. The longer you drag it out the more money you are making. So, what stimulus is there for you to wrap these negotiations up and to negotiate in good faith.

Mr. RUTT. Real simple answer to that. As the new CEO of Network Solutions I did not come here to run border wars with lawyers and try to squeeze two extra pennies out of the current business. I came here to grow a much more interesting business in various other segments of the Internet. I will be introducing some new products in the next few days indeed, which will be showing some of the moves that we are doing to diversify our company.

I would much rather spend my time, the management focus of the corporation, et cetera, working on how to grow our business and compete, and be a ferocious competitor in a fair and open market, rather than waste my time and everybody else's in this industry about, frankly, small change matters. We think we can make a lot more money growing a big Internet company than we can figuring out how to, you know, two little few pennies off of the current user.

Mr. KLINK. If the gentleman will continue to yield.

Are you saying that the kind of money that NSI has been making off of a virtual monopoly is small change?

Mr. RUTT. I am saying that the money we are going to make off our other businesses is larger than we will lose by what we are giving up in coming to an agreement.

Mr. KLINK. But you are walking away from a sure thing which has bought a lot of value and a lot of wealth to your corporation. The longer you hold that, that gravy is running all over your plate.

Mr. RUTT. Interesting that you think of it that way. I do not. I think that going out and becoming an aggressive, interesting, innovative, fast-moving Internet company is a much better way to grow value for our shareholders.

Mr. STUPAK. I think members here, and I do not mean to speak for everyone, but if the government had the authority to enter into a cooperative agreement, then we certainly have the authority to put in new competition for these services, and that is what we want to see.

Mr. RUTT. And we agree with you.

Mr. STUPAK. Yes, but not in a monopolistic way.

Mr. RUTT. Of course, we are not a monopoly.

Mr. STUPAK. Seventy-five percent.

Mr. UPTON. The gentleman's time is expired. Mr. Cox is recognized for 5 minutes.

Mr. COX. Thank you.

I was just asking the staff the exact status of this dollar fee. I would just like Ms. Dyson, perhaps, to clarify for us. The dollar fee is off; right?

Ms. DYSON. The dollar fee has been—we have deferred it until November when we have an elected board. That was partly in response to Commerce's suggestion.

Mr. COX. What is your recommendation; yes or no on the dollar fee?

Ms. DYSON. My recommendation is that it makes sense. It is a very practical way of covering our costs. As you are going to hear this afternoon from the registrars who are in fact the people who are paying it, they approved of it. This was not, again, a decision taken in a vacuum or in a closed room. We posted it for comment. We received comments. Commerce thought it made sense. Most of the Internet community, with the exception of NSI, thought it made sense.

Mr. COX. Is that a one-time fee or is it perpetual?

Ms. DYSON. It is per domain name per year.

Mr. COX. Is it perpetual?

Ms. DYSON. It is perpetual. It compares just as when you get a domain name fee, you get it for a period currently of 2 years for \$35.

Mr. COX. What you are talking about though is on top of the fee.

Ms. DYSON. Yes.

Mr. COX. Just paying for the domain name is an extra dollar.

Ms. DYSON. Right. It is an extra dollar, but the impact to consumers, just to make it clear, the net impact is the fee that NSI charges as going from \$35 a year down to \$9. So, in the context of that it is a dollar on top of the \$9 NSI still charges for its registry services.

Mr. COX. What about the World Intellectual Property Organization, which was going to be funded with this dollar?

Ms. DYSON. No, they are not funded through it. ICANN is funded through it. The WIPO is looking at the issue of domain names vis-a-vis trademarks, but they are not funded through ICANN or through a fee on registrars.

Mr. COX. I am sorry. What I mean to say is what about the WIPO role that is going to be funded through that dollar. Is that something that you still—

Ms. DYSON. No. WIPO's role is not funded through that dollar.

Mr. COX. No, no, your WIPO role.

Ms. DYSON. I am really sorry. I do not understand the question.

Mr. COX. My understanding is that the purpose of the dollar is to get you in the business of looking at trademark infringement.

Ms. DYSON. That is one thing we have asked WIPO to do, and that our DNSO will be considering their recommendations. But the dollar is for funding ICANN's operations overall.

Mr. COX. So, the trademark aspect is something you recommend in November that ICANN pursue or no?

Ms. DYSON. Sorry. What is happening now, WIPO made a set of recommendations. Some of them de facto we already took into account in terms of the registration agreements with the registrars. Things like requiring pre-payment for domain names so that cybersquatters would be deterred from reserving thousands of names and then not paying for them.

Some of them related to the idea that there should be some common dispute resolution procedure adopted by the registrars. We accepted that recommendation, but sent it on to the domain name supporting organization to consider the details of implementation.

Then the third large set of recommendations which concerned the famous names and trademarks, frankly we are not sure whether that recommendation makes sense. We have deferred that to the domain name supporting organization for them to consider, again, through an open process, soliciting comment and input from all affected parties.

Mr. COX. The reason I ask the question is that in the July 22, Thursday, today's Washington Post their description of this is, "the board's subsequent decision to charge a \$1 fee on every domain to fund its operations and support a World Intellectual Property Organization Plan aimed at resolving trademark disputes further enraged activists who worry that ICANN is moving well-beyond its technical management mandate to more broadly regulate the Internet."

You are probably familiar with that. You probably read that in the paper today. You know what I am asking.

Ms. DYSON. With all due respect, I now have some sympathy for Jim Rutt because it kind of puts together a whole lot of different things we are doing. To the extent that we accept the recommendations of WIPO, that will fund the things that we do.

Mr. COX. So, the answer, in short, is that the \$1 fee is something that you want to pursue for the very purposes just described.

Ms. DYSON. Either something that we believe is the correct thing, but given the criticisms, we are again putting it out for comment and soliciting opinions on it. Then the elected board, rather than just the initial board, will be voting on it in November.

Mr. COX. Thank you.

Ms. DYSON. Thank you.

Mr. UPTON. Okay. I think all members have had a chance to go through the first round. We will start a second round of questions. A number of members have a couple more questions. I want to follow-up on some of the funding. It is my understanding that ICANN was partially subsidized at the beginning through donations from a number of high-tech companies, whether it be Microsoft or IBM.

We have some e-mail correspondence, I guess, I would like to be made part of the official record. All members here on both sides have had access to this before. So, with unanimous consent, I will make that as a part of the record.

[The e-mails referred to follow:]

Return-Path: <Joe\_Sims@jonesday.com>  
 X-Lotus-FromDomain: ILGW@JONESDAY@JDRP@OUTBOUND  
 From: "Joe Sims" <Joe\_Sims@jonesday.com>  
 To: "Chair" <Chair@jonesday.com>  
 Date: Tue, 15 Jun 1999 15:42:28 -0400  
 Subject: Tom Kalil  
 Content-Disposition: inline

Esther and I met with him today, and he promised to do what he could to encourage private donations on the scale necessary to make it clear that we are not going to be financially starved for the foreseeable future. He said it would be useful to have emailed to him information on the budget, work plans, etc. -- the kind of stuff that he could give people to show them that we have a real live operation here. I will send him the status report as soon as it is filed (soon); Mike, can you see him budget or other info from the website or otherwise that meets this description? thanks

Return-Path: <conrades@akamai.com>  
 Reply-To: <conrades@akamai.com>  
 From: "George Conrades" <conrades@akamai.com>  
 To: "Esther Dyson" <edyson@edventure.com>, <patrick@us.ibm.com>  
 Subject: RE: HOT: ICANN  
 Date: Mon, 14 Jun 1999 15:52:35 -0400  
 X-MSMail-Priority: Normal  
 Importance: Normal  
 X-MimeOLE: Produced By Microsoft MimeOLE V4.72.3155.0

John, thanks so much for your help. Do you know where IBM stands on funding of ICANN? We need some leadership here among corporations...Is this a challenge IBM would take on? I realize potential downside to ICANN perception (capture and all that) but what about a "United Way" kind of involvement/support.

\*\*\*\*\*  
 George H. Conrades  
 Chairman and CEO  
 Akamai Technologies  
 201 Broadway  
 Cambridge, MA 02139  
 work 617-250-3060  
 fax 617-250-3065

> From: Esther Dyson [mailto:edyson@edventure.com]  
 > Sent: Sunday, June 13, 1999 10:08 PM  
 > To: patrick@us.ibm.com  
 > Cc: jdoerr@kpcb.com; jimb@netscape.com; gconrades@polarisventures.com;  
 > awinblad@humwin.com; bdunlevie@benchmark.com; joe@accel.com;  
 > amorgan@mayfield.com; gmcnamee@hamquist.com; patricof@patricof.com;  
 > mlevinthal@mayfield.com; vkhosla@kpcb.com; kfox@internetcapital.com;  
 > wbuckley@internetcapital.com; Grousbeck, Wyc; Weinman@avicapital.com;  
 > ackerman@mtventures.com; oak.TBG@hotoffice.net;  
 > cvonschroeter@westonpresidio.com; meustein@gs.com  
 > Subject: Re: HOT: ICANN

>  
 >  
 > Thanks very much, John! I've added a couple of you to the cc  
 > list, spurred  
 > by John's excellent example. here is an investment you can make  
 > that won't  
 > bring direct rewards, but that will foster the success of of most of the  
 > companies you fund - in the Internet infrastructure itself.  
 >  
 > Obviously, I'd be delighted to talk or meet with any of you about this....  
 > I'll be in the Bay Area Friday and Saturday, June 25 and 26, if you'd like  
 > me to follow up in person. We can talk by phone earlier; let me know.  
 >  
 > Esther  
 >  
 > At 02:43 PM 13/06/99 -0400, patrick@us.ibm.com wrote:  
 >>  
 >>Not sure how much all of you have been following the efforts of ICANN.  
 >>ICANN is trying to get the policy, technical, and financial  
 >>aspects of the  
 >>Internet moved successfully from the U.S. government to the international  
 >>private sector. Everyone thinks this is a good idea. In fact I  
 >>would say  
 >>that the future of the Internet is dependent on execution of the current  
 >>plan. Part of the plan is to create competition among companies that  
 >>create/approve/implement domain names (accel.com. or later maybe  
 >>newco.vc)  
 >>and make sure they work. Not to sound alarmist but if ICANN fails  
 >>e-business/e-anything is in jeopardy. This means your future investments  
 >>and your past ones.  
 >>  
 >>The present problem is that ICANN is out of money. Vint Cerf at  
 >>MCI and I  
 >>along with the Global Internet Project initiated a fund raising program

- >>last year and it has yielded approximately \$300,000. Bridge funding of
- >>roughly \$1m is needed to get ICANN to the point where it can be
- > collecting
- >>fees and sustaining itself long term. Esther Dyson, interim chairman of
- >>ICANN, is making appeals throughout the industry and public sector.
- >>Clearly, none of us wants any government to provide the money and attach
- >>strings. NSI, the company with the current monopoly, is not cooperating
- >>in various ways and slowing things down; the additional reason
- > for bridge
- >>funding. The problem is how to get the funding and get it quickly.
- >>
- >>Collecting small donations from a large number of companies is going to
- >>take much too long. A few big companies throwing in the money creates
- >>problems of "big U.S. companies trying to dominate/control the Internet".
- >>Loan guarantees might be an angle but they present complexities for
- >>companies to provide them.
- >>
- >>You guys and your VC colleagues have created incredibly creative
- >>financings for many \$billions of Internet opportunities. Could a handful
- >>of you jump in and help solve this relatively trivial financial hurdle to
- >>your future? I would be happy to host a telecon conf call to kick some
- >>ideas around if any of you thinks that could be productive. Looking
- >>forward to your thoughts. Thanks.
- >>
- >John Patrick
- >Vice President - Internet Technology, IBM Corporation
- >>Chairman, Global Internet Project
- >patrick@us.ibm.com
- >www.ibm.com/patrick www.gip.org
- >>
- >>
- >>
- >>
- .



Extension: x43863  
 To: Chair, JDICANN  
 cc:  
 Subject: t/c's

1. I spoke today with Chris Kelly, who is the DOJ senior person focused on NSI/ICANN issues. The thrust of the conversation was our mutual frustration with the lack of aggressiveness of DOC. Chris explained that, so long as the Cooperative Agreement was in place, the antitrust options were limited, which I of course understood, but said that DOJ was encouraging DOC to push harder -- and in fact had assigned DOC some economists to help with the price cap issues. I suggested that one thing DOJ could do is increase the level of pressure on DOC, by some form of formal communication or a higher-level contact: Chris said that was already under consideration. He also indicated that, while there may have been some legitimate basis for concern that a fight with NSI 6 months ago could destabilize the net, he thought that was less likely today, and that it would be useful for DOC to hear from significant organizations that they were perfectly willing and capable of stepping into NSI's shoes with little difficulty, assuming access to the root files. This led to a discussion on how desirable it would be to get control of the root away from NSI, so that if necessary that transfer could be made.
2. A little while later, Mark Bohannon called to set up a t/c with Andy Pincus for tomorrow. As it turned out, we ended up having the t/c today. Pincus wanted to know from the horse's mouth what ICANN's view was of this NSI contract. I told him that we did not need a contract with NSI as registry at the moment, and that the recent discussions were all generated by NSI and/or Becky. What we wanted now was to complete the registrar accreditation process, which required action by DOC; accredit the test bed registrars; and then move into open accreditation, including particularly NSI. Pincus asked if we planned to accredit non-test bed registrars now; I told him we were going to give priority to test bed applicants, but after that, we planned to process accreditation applications as fast as we could, and we did not plan to wait until some artificial time to announce open accreditations. Bohannon then asked if we were still in agreement that NSI did not have to be accredited to participate in the test bed; I said that was a point of some controversy, and I didn't know where we stood on that officially; he said that if we changed our position on that and said NSI had to be accredited to participate in the test bed, that would be a big problem. I then told them that ICANN was getting impatient, and that while we would not do anything without checking with them and would not do anything at all for the next day or so, we were likely to become more publically critical in the near future (a point I had also made with DOJ). There was a little back and forth about us working together and the call ended.

The combination of these two calls gives me some hope that there might be some progress. I am encouraged that DOJ appears to be as impatient as we are, and I think we should steadily keep up and increase the pressure on DOC. One way to do that is to start pushing on the root issues, where we have not pushed yet. We should think about whether there is a easy and obviously acceptable place to put the A root server, and maybe start pushing to have that done.



Mr. UPTON. As you indicated, there has been somewhat of a shortcoming, in terms of the funds, for the deficit that ended at the end of the fiscal year, as you commented earlier. I notice that this e-mail summarizes a meeting between Mr. Simms and Ms. Dyson that they had with Tom Kalil, who is presently listed as on the White House website as a Senior Director to the National Economic Council, with the responsibility for Science and Technology issues.

In that e-mail, it says, "Esther and I met with him," referring to Tom Kalil, "today, and he promised to do what he could to encourage private donations on the scale necessary to make it clear that we are not going to be financially starved for the foreseeable future."

Mr. Roberts, do you think that it is appropriate for a private corporation that is supposed to be managing a global medium to seek assistance from the White House? What is your reaction?

Mr. ROBERTS. Mr. Chairman, We have a number of conversations with constituencies about raising funds. As the White Paper set forth, it expected the private sector to identify and obtain funds on both the short-term and a permanent basis. You have testimony from the Department of Commerce in this regard. The obligation to assist us with funding is a very important one.

Mr. UPTON. Has there been some follow-up by the White House in terms of what they have done in the last 6 weeks?

Mr. ROBERTS. Both Ms. Dyson and I have had conversations over a long period of time with the White House people who are endeavoring to promote the President's E-commerce Initiative.

Mr. UPTON. Has there been any concrete results; any checks? Have they been received? Any pledges?

Mr. ROBERTS. Well, the manner in which these sorts of things proceed is that some phone calls are made. If there is interest and a willingness to provide us funds, those of you who have had an opportunity to look at our contributions page, understand that this is a tax-exempt, charitable deduction with no strings whatever involved with that.

Then the responsibility for making the contacts and arranging for the funding falls to me. We have indeed had direct conversations about contributions, and we continue to receive contributions.

Mr. UPTON. Is it a tax-exempt contribution?

Mr. ROBERTS. ICANN is organized as a California non-profit corporation and is going to apply for a 501(C)3 tax exemption. The IRS reviews the entire record of those submissions and either grants it or does not grant exemption, depending on the facts that are before it.

Mr. UPTON. So, the IRS has ruled on it then?

Mr. ROBERTS. No. In fact, the application, due to the shortness of time and our startup organizational activities, it has not been filed yet.

Mr. UPTON. Okay.

Mr. ROBERTS. In some part because the IRS likes to see a financial statement and we have not had a financial—we have not concluded a financial period until June 30, which was some 3 weeks ago.

Mr. UPTON. But you are anticipating on filing those papers.

Mr. ROBERTS. Yes, sir; within the next 30 or 40 days.

Mr. UPTON. In one of the e-mails also included in this packet produced for the committee by ICANN, ICANN's Counsel, Joe Simms, recounts a conversation with a DOJ attorney. In that e-mail, Mr. Simms refers to the DOJ attorney as the, "DOJ senior person focused on NSI's ICANN issues."

As you no doubt are aware, the Department of Justice is actively investigating NSI for possible anti-trust violations. A part of that e-mail reads, "I suggested that one thing DOJ could do is to increase the level of pressure on," referring to the Department of Commerce, "by some form of formal communication or a higher level contact."

Ms. Burr, were you aware that ICANN's attorney attempted to influence your agency's management of the transition of the domain name system through another agency?

Ms. BURR. We have not been following the Justice Department investigation. We know that it is ongoing, but we have not had continuing conversations with the Justice Department about it. I do not regularly follow the discussions between ICANN's lawyers and other people in the government.

Mr. UPTON. Mr. Klink.

Mr. KLINK. Ms. Dyson and Mr. Roberts, I see that you all have a problem. You are in a Catch-22 when it comes to finance. You put \$1 on and you are accused of an illegal tax. If you go out and look for donations, then you have got a problem. Look at page 3 of the memo that my dear friend, the chairman, just put in.

It is a memo from Joe Simms. It says, "collecting small donations from a large number of companies is going to take much too long. A few big companies throwing money in creates a problem of big U.S. companies trying to dominate control of the Internet. Loan guarantees might be an angle. They present complexities for companies to provide them." I suppose you could print your own money or hold up a liquor store, but that would provide some problems too. My question is, I mean, have you solved this problem yet? You obviously cannot continue to run without some income.

Ms. DYSON. What is actually happening right now is that Mr. Simms very kindly is providing his services on credit. The directors who are not paid have not received money for their expenses.

Mr. Roberts' family company, with which we have a contract, has also not been paid in the last few months. So, we are doing what everybody does. We are managing our cash-flow. We are hopeful. Let me say this. I am persuaded——

Mr. KLINK. What cash-flow is there? Is there any money at all coming in?

Ms. DYSON. There is some money coming in.

Mr. KLINK. From what?

Ms. DYSON. It is on our website. It is primarily donations from some of the companies you mentioned; IBM.

Mr. KLINK. You could start your own church.

Ms. DYSON. Pardon?

Mr. KLINK. Never mind.

Ms. DYSON. Yes; the First National Church of ICANN.

We are encouraged by the support we have received from the Internet community, including the registrars, two of whom have volunteered to pay this \$1 per name fee, even though it is not re-

quired. That is the depth of their commitment to the activities we are undertaking. So, we are convinced we will prevail, but it is a challenge, short-term.

Mr. KLINK. I can understand it would be. Mr. Rutt, in your testimony you proposed another condition that would be met before you would accept ICANN's authority. You say that NSI is not going to recognize ICANN unless it operates in compliance with the White Paper.

I would just ask you, who would make that determination whether they were complying with the White Paper? Is that a decision that NSI would make or would you depend on some other consensus or Commerce Department consensus? Who would make that determination?

Mr. RUTT. Would you point me to the language where I said we would not recognize ICANN with respect to the White Paper. We did say that was one of the reasons they were a little off-track.

Mr. KLINK. It was in your testimony. We will proceed on and I will come back to that. We will dig it out for you. We will get back to it. I read it in your testimony. Again, I would have hoped that you would be familiar with your own testimony.

On page 7, about half-way down the middle of the paragraph it says, "If ICANN is required to operate in compliance with the original statement of policy, indeed we have proposed such terms on several occasions asking, we think reasonably, that ICANN's policies be binding based upon a true industry consensus applying to all competing registries and registrars. ICANN has unfortunately refused to negotiate on the terms of such a contract," et cetera, et cetera.

Mr. RUTT. Yes. Basically, this is a comment about the contract discussions going on between Network Solutions and ICANN, through intermediaries, about how NSI will come to a contractual relationship to recognize ICANN. Those are some of the issues that are on the table.

Mr. KLINK. Let us get back. If you have a problem, whether it is whether or not they are in compliance with the White Paper, whether it is whether Amendment 11 is being adhered to correctly, who do you think makes that determination? Is that something that NSI decides itself or do you look for an industry consensus of some sort? Is that something you look for direction from the government on?

Here is the question. It boils down to this. Did NSI ever get a consensus from anyone within the community when you set the rules or the fees for domain name registration? My sense, from your testimony, is that NSI can make objections whenever you do not think the amendment is being interpreted correctly, or if you do not think the White Paper is being adhered to correctly.

You all got in business and who had input as to what the rules were that you established when you got into that business? Now you turn around, and it appears to me, and I am asking a question. I am not trying—you appear to want to hold ICANN to a completely different standard than NSI was held to when you began to do this.

Mr. RUTT. Well, actually the rules of pricing and how we operate our business were developed in cooperation with the National

Science Foundation. So, we did not set the price out of thin air ourselves. It was done by mutual agreement with the NSF. Further, you have to read carefully this part of the testimony.

What we are talking about is reaching the agreement to recognize ICANN. Amendment 11, which is the basis for the framework for us to negotiate an agreement to recognize ICANN, does call for the White Paper policy to be the framework from which we are all operating. That is all this says.

Mr. KLINK. But who makes that determination, whether or not that policy is being adhered to? That is simply, Mr. Rutt, what I am asking. How do you make that determination?

Mr. RUTT. We have two parties here attempting to negotiate a contract. When we both agree that the contract is mutually acceptable and within the context of the framework in which it is being established, we will have a contract.

Mr. KLINK. But Mr. Rutt, and again I am not trying to be argumentative. We are just trying to get to the bottom of this. A lot of people have said that NSI, again, that you have the fatted calf. The allegation is whether you are in the room or whether you are out of the room, everybody is coming and telling us that you are reluctant to give that up and that all you have to do is stall.

So, the question is you have got to parties in the room. The cash-flow is coming in. If all you have to do is sit there and stonewall and say they are not adhering to this White Paper, if all your attorneys have to do is keep saying that, and while they are saying that, you are not divesting. You are not letting other people come in and compete with you.

That is what those who want to compete with you are saying that NSI is doing. We are simply here in an open hearing trying to give you the opportunity to respond to that, that we are all hearing in our offices, and that we are all hearing in the hallways here. We are trying to do it, no in an offensive way, but just to give you the opportunity to tell us what that is not happening. Thus far, I do not think we have gotten there yet.

Mr. RUTT. I think you may not realize we are negotiating in good faith at a pretty good clip to try to move these issues about clarification, about what things mean, what does the White Paper mean which, frankly is a little bit more like the Bible than it is like the Constitution, in terms of a very broad statement of where we are going. I think we are all working in good faith to get there. When we all agree that we have a contract entered into voluntarily, but within a framework called Amendment 11, we will shake hands and go forward. I really expect that we will do that and do it soon.

Mr. KLINK. Mr. Pincus, who do you think would make that determination, whether or not the White Paper was being complied with? Where is that decision made?

Mr. PINCUS. Ultimately, we will not approve a contract between NSI and ICANN and go forward with the transition process if we do not think elements of that agreement satisfy the White Paper. So, our view certainly is we are going to make that determination.

Hopefully, we will get to that agreement. If we do not, then we will have to go down another road. We have been entrusted—the White Paper lays out our view of what the public interest is. We have to make sure that is satisfied.

Mr. KLINK. Can either party, either ICANN or NSI, scuttle that before it gets to you by them not agreeing?

Mr. PINCUS. Absolutely. The problem that we have is the September 30 deadline and the need to have a replacement in place if we are going down the road to that deadline. So, under the cooperative agreement now, it is true competition is moving forward and registrars are being added, but again under NSI's view of the world, on October 1st, everybody can be cutoff and there is no oversight, and NSI is in complete control.

Mr. KLINK. Thank you, Mr. Chairman.

Mr. UPTON. Mr. Bilbray.

Mr. BILBRAY. Thank you, Mr. Chairman.

You know, let me just say as a layman that has been involved with regulatory agencies for the last 25 years, the dynamics of this field, it is hard for us on the government-side to comprehend. We always think in, you know, two-dimensional fields. This goes into cyberspace. I mean it just moves into so many dimensions. It is hard to comprehend.

I appreciate the fact that NSI is talking with our colleagues about this issue of your right, there is a funding source here in this dimension, but you have got to comprehend the fact, you know, once we break out of this, we go into cyberspace.

It was much like a company in my District that sold its stock. It quadrupled in 1 day, and they give away free CDs. Try to explain that to those of us who went to business school in the 1960's, and 1970's, and 1980's, and then function at what is going on. It boggles my mind.

Let us get into this. I would ask the Commerce people, even with the dollar fee or tax, the talk about moving from a \$35 a unit down to a \$9 or \$10 unit, extraordinary reduction. I mean, I do not think I can place anywhere in government, be it local, State, or Federal that I have seen this kind of reduction. Can you comment on that proposed reduction?

Mr. PINCUS. I should comment that those two numbers are not exactly comparable.

Mr. BILBRAY. Okay. Here we get into the multi-dimensional.

Mr. PINCUS. So, I apologize that it is a little complicated. The \$35, \$70 for 2 years, is for both. It is paid to NSI and to the cooperative agreement, and covers both management of the registry, the central data base for that name, as well as the processing and taking in at the retail level of the name of Pincus.com.

The \$9 is the interim fee that we negotiated with NSI that it could charge itself as a registry/retail registrar and other registrars for the central purpose, the maintaining of the central registry alone. So, on top of that fee, unless it is part of a zero-cost business because the registrar is doing something else, presumably different registrars will charge different amounts for the retail half of the business.

I think it is anticipated the combination of those two things together will still be less than \$35. We do not know what the final registry fee that is now \$9 will be for the post-test bed period. There is a reasonable chance that when we get to a cost-plus profit number it will be less.

Mr. BILBRAY. Let me go over and ask Ms. Dyson, the attorney's bill that we are talking about that is being defrayed, how much is that? How much is hanging out there? I mean, it is one thing to say we do not have to pay for it, but we do not have to pay for it right now.

Ms. DYSON. We do need to pay for it. I am not sure, but I think it is on the order of—

Mr. ROBERTS. Congressman, our payables at June 30 were approximately \$800,000.

Mr. BILBRAY. That is the total attorney bill?

Mr. ROBERTS. That is for all categories of credit that has been extended to us and includes half a dozen different categories.

Mr. BILBRAY. But that is your total legal fees for ICANN?

Mr. ROBERTS. The current outstanding amount unpaid to our counsel is approximately \$500,000.

Mr. BILBRAY. So, it is at \$800,000 or \$500,000?

Mr. ROBERTS. Of the \$800,000 total, approximately \$500,000 is attributable to credit that has been extended to us from our counsel.

Mr. BILBRAY. Okay. And that is total for the whole ICANN attorney fees across the board?

Mr. ROBERTS. That is correct.

Mr. BILBRAY. Now, the issue of the openness of ICANN, something very sensitive to Californians. We have a thing called the Brown Act. I might not have voted for him. We have to follow his laws. It says, if you are either public or quasi-public, if you have been appointed or working under that, you have got to be out in the open.

There has been a big concern about that openness and how people get involved in ICANN. Ms. Dyson, how were you initially contacted to participate in this program?

Ms. DYSON. Personally, I was initially talked to about it in the summer of 1998, both by Ira Magziner and by Roger Cochetti who is with IBM. They both said to me, separately, something along the lines of we are not asking you this, but if someone were to come and ask you to join a board that would oversee this process, would you be interested?

I knew that this was going on. I was not following it very closely. Is said, sure. That sounds interesting. I think it is a worthwhile thing to do. I would have to know more details, but probably I would say yes.

Mr. BILBRAY. So, you were contacted by the private sector.

Ms. DYSON. Yes, but I was actually asked to join the board by Joe Simms in September.

Mr. BILBRAY. Joe Simms represents?

Ms. DYSON. He was representing, at the time, IANA which then de facto became ICANN.

Mr. BILBRAY. I am just saying, the private sector who contacted you, no one from the government, any government agency, had any contact at all?

Ms. DYSON. No. The formal request to join the board came from Joe Simms.

Mr. BILBRAY. What about the first informal contact?

Ms. DYSON. The informal contact was with Ira Magziner who I was very—

Mr. BILBRAY. So, the White House had contacted you and said would you be interested.

Ms. DYSON. It was—Ira Magziner, whom I ran into at a conference. He did not actually bother to call me, but he saw me and said, if we did this and you were asked to do it, would you do it, and I said probably yes. But he was very careful not to ask me, which I did not understand at the time, but I do now.

Mr. BILBRAY. I appreciate that.

Mr. Chairman, I would ask for unanimous consent for just one follow-up here because I do not want to just leave her hanging. There has been concern about openness of the procedure. When can we look forward to the Brown Act being followed. In other words, the light of day shining into the operation of ICANN?

Ms. DYSON. In Santiago. We have made the decision to open our board meeting, in addition to, as Becky mentioned, before every board meeting, not only do we post what it is we are going to be talking about and the comments on the various agenda items, we also hold an open meeting.

Openness consist of two parts, as you know. One is being open to suggestions, criticism, comments, taking into consideration all of these people who need to get together to come to consensus. The second part of openness is having people see us, the board, seeing how we think, determining for themselves, do we seem to be unduly—

Mr. BILBRAY. Figure out where you are coming from.

Ms. DYSON. Yes.

Mr. BILBRAY. How you got to the conclusion.

Ms. DYSON. Yes.

Mr. BILBRAY. Is this going to be the policy from now on? Are all the meetings going to be open from now on?

Ms. DYSON. That is going to be determined by the vote of the half-elected, half-appointed board in November.

Mr. BILBRAY. So, we do not know that yet. So, the openness of the procedure will be determined in November.

Ms. DYSON. But we are listening very carefully to your comments here today.

Mr. BILBRAY. I am glad.

That is why we have an open process so you understand where we are coming from and why we come to the conclusions.

Thank you very much, Mr. Chairman.

Mr. UPTON. Mr. Stupak.

Mr. STUPAK. Well, thanks.

Ms. Dyson, the way I understood it earlier on a question asked about the meetings was that while you may go into open, but then you reserve the right to go into a closed or a private session.

Ms. DYSON. Dealing with things such as personnel matters, or maybe proprietary negotiations with NSI.

Mr. STUPAK. So, just those areas that was often found or where there are exceptions to it then.

Ms. DYSON. The usual exclusions.

Mr. STUPAK. Right; litigation, personnel matters, and things like that.

Ms. DYSON. Yes.

Mr. STUPAK. So, we can take it by your assurances, at least you will be advocating in Santiago that you have open meetings here on through, except those common exceptions found in law.

Ms. DYSON. That is correct. The board is not of one mind on this. Being Chairman, I do not make the decisions, even within the board. There is a requirement for consensus.

Mr. STUPAK. Sure. That is what we could expect your advocacy would be down there.

Ms. DYSON. Yes.

Mr. STUPAK. Open meetings. Mr. Rutt, with the increased competition, you say there will be increased innovation and domain names sold by your competitors. As the registry, you will still be paid \$9 per domain for your registry duties; will you not?

Mr. RUTT. There will be some price agreed upon as a part of these contacts.

Mr. STUPAK. When the cooperative agreement expires in the fall of 2000, is it your view that NSI will own the registry or do you support competitive bidding for the registry.

Mr. RUTT. It is and remains our view that the operation of our business transferred to us, under the cooperative agreement. I will say that in the discussions we are having right now, we are anticipating quite likely that we would agree to terms that considerably last beyond September 30.

Mr. STUPAK. So, what are you saying? Are you saying that the monopoly goes on beyond September 30? That is what you are saying; are you not?

Mr. RUTT. No.

Mr. STUPAK. Okay.

Mr. RUTT. I am saying our business will continue to operate.

Mr. STUPAK. Is it your view then that NSI will own the registry or are you going to put it out for open bids on September 30?

Mr. RUTT. We believe the business transferred to us, under the cooperative agreement, and we are going to continue to operate our business through September 30 and beyond September 30.

Mr. STUPAK. So, you are saying .com belongs to you?

Mr. RUTT. That is a metaphysical question I will leave to the lawyers and philosophers. The business that we are in today belongs to us.

Mr. STUPAK. And you expect after September 30 it is going to remain with you?

Mr. RUTT. Yes.

Mr. STUPAK. And that business is .com?

Mr. RUTT. The registration of names in .com, .net, and .org domains.

Mr. STUPAK. So, you do not plan on putting it out for open bid after September 30, 1999.

Mr. RUTT. Had not thought about it.

Mr. STUPAK. So, the Commerce Department could do that; right?

Mr. RUTT. We do not believe they have the legal right to do so, no.

Mr. STUPAK. You know, it seems like when I ask a question, you have not thought about it, or you do not have an answer. So, let me ask you this. Your testimony seems to indicate that you accept



the decision of a "true industry consensus concerning accreditation." Tell me, Mr. Rutt, should I assume that only NSI will determine if a "true industry consensus" has been obtained?

Mr. RUTT. Not necessarily. When in our discussions on a framework for a contract, we put on the table some suggestions for, excuse me, super majority means of defining consensus that do not allow one obstructionist player, even if it is NSI, to stop the process going forward.

Mr. STUPAK. Have you proposed your definition of "true industry consensus to ICANN or to the industry so they can review it?

Mr. RUTT. We are working through our friends at the Department of Commerce on a framework that we think makes sense for everybody.

Mr. STUPAK. So, in other words, you then, as you indicate, this true "industry consensus" is something you have decided and you are now going to share it with other people in the industry.

Mr. RUTT. It will be part of a negotiation of a contract between ICANN and NSI. Both sides will agree.

Mr. STUPAK. But you have already said that in your testimony, you determined this "true industry consensus." So, what is it? What is your "true industry consensus?" What does that mean? They do not meet your standards and that is it?

Mr. RUTT. I will get back to you on that one. I do not have an answer for that one, what it exactly is. It is an interesting philosophical question.

Mr. STUPAK. Mr. Chairman, if I may, could I ask Mr. Pincus if he has an answer to that "true industry consensus?"

Mr. PINCUS. Our view, Congressman, is that the result of the shuttle diplomacy that we are performing between NSI and ICANN, were there to be an agreement, has to be put out for comment pursuant to ICANN's procedures, because that is obviously going to be very significant. Policy determinations will be made about what the rules are for registries.

So, our view is that will have to happen. We have not been able to discuss those terms with anyone because they have been stamped proprietary when we have been given proposals.

Mr. STUPAK. Proprietary by NSI?

Mr. PINCUS. By NSI, yes.

Mr. STUPAK. NSI.

Mr. KLINK. Would the gentleman yield for 1 minute?

Mr. STUPAK. Yes.

Mr. KLINK. Could I ask both Mr. Pincus and Mr. Rutt, since it is admitted that NSI controls 75 or 80 percent of that market, is it what NSI says is that the consensus? Since you control 75 or 80 percent of the market, is your opinion the consensus for industry and is it proprietary?

Mr. RUTT. Sir, the answer to your question is no. A consensus is a consensus.

Mr. STUPAK. Well, a consensus by one is not a consensus.

Mr. RUTT. I do not agree with that. A consensus is like pornography. You know it when you see it. If we are the only hold-out on a term, that is probably not enough to stop consensus.

Mr. PINCUS. One of our concerns with the system that would require consensus among separate elements of the Internet commu-

nity, is that if that were interpreted to require a consensus, for example, among registries that were overseen by ICANN, there might only be one of those for a time because the addition of others depends upon decisions by other governments.

So, we would obviously be troubled by a rule that required segment-by-segment consensus, where there was only one person in the segment.

Mr. KLINK. We would be troubled also.

Mr. UPTON. Mr. Cox.

Mr. COX. Thank you.

Ms. Dyson and Mr. Roberts, I understand that the GAC, the Government Advisory Commission, is setup under your bylaws. Is that right?

Mr. ROBERTS. Yes, sir.

Mr. COX. Your bylaws and your charter provide that the bylaws can be changed by the board of directors.

Mr. ROBERTS. That is correct.

Mr. COX. So, essentially what the GAC is, is a function of ICANN's policy. Is that right?

Mr. ROBERTS. Well, I think that the background to this is that it was felt during the open process last summer that there ought to be a mechanism for governments to convey their views to the new corporation. These bylaws and these bylaw provisions were created before ICANN existed.

As I think you are aware, the White Paper is quite definitive on the issue that there should not be active involvement by any governments in the ICANN structure. So, we have a committee. It is self-organizing. Its role is limited to providing the board of ICANN with its recommendations on issues that are before us from time-to-time.

Mr. COX. Now, we are going to hear from witnesses later on, including a representative of the Consumer Project on Technology who are concerned about ICANN becoming a quasi-government. That is really why I asked where you are headed with WIPO.

Having read the White Paper and not noticed a lot of direction where you might go in the work you pick up with WIPO, I just wonder what your response is to the concern that while we are as a government policy trying to promote competition, we have put an umpire in there that is going to stand in the place of a government and get the government out of it. That is you. That you are now conducting liaison with governments. How much policy should we expect to come out of this?

Ms. DYSON. Let me try to clarify a few points here.

First of all, we very specifically, or the people who originally created the bylaws very specifically, created a Government Advisory Committee as opposed to a supporting organization. Those three supporting organizations elect members to the board. The Government Advisory Committee gives us advice, which we need to listen to, but not to follow. It is a means of governments coming together and being clear and specific about what they want and conveying that to us.

Mr. COX. Are you listening to the right people?

Ms. DYSON. That is always a question. That is part of the challenge of determining consensus.

Mr. COX. No. I mean on GAC.

Ms. DYSON. The governments themselves.

Mr. COX. For example, I have been working for 11 years with the Democracy movement in the People's Republic of China. We hope that the Internet is a means of spreading freedom. We also observe that the People's Republic of China is putting in jail people like Lynn High for distributing e-mail addresses to anti-communist groups in the United States. Our hope for the Internet is profound.

What we see GAC doing is admitting the PRC as a member, which is trying to build an intranet to keep out foreign information, excluding Taiwan, even though our government's policy is that in any organization that does not require sovereignty as a pre-condition, we have no objection to Taiwan being a member.

Surely ICANN does not need to limit itself to sovereign states. Ms. Burr obviously wants to talk about this. I will be happy to let her do so. I just want Ms. Dyson to answer the more general question about whether we should not be concerned about policy being made without any oversight by anybody at ICANN. It is a different question than creating competition, which we are all for.

Ms. DYSON. ICANN is extremely limited in what it can do.

It manages technical infrastructure. It does not deal with, for better or worse it does not deal with, content, freedom of speech, privacy beyond what happens with domain names.

Mr. COX. It deals with architecture. What the PRC is trying to do is construct an architecture to keep out information.

Ms. DYSON. Yes.

We, unfortunately or fortunately, cannot control what the PRC does. We can control whether we listen.

Mr. COX. I guess what I am getting at with this specific example is that if the object is to create an intranet, that requires plumbing. You are in the plumbing business. I observe that the commission that you have setup under your bylaws to deal with this issue is listening only to the Communist part and not to the Democratic part of China.

Ms. DYSON. I believe Taiwan is actually admitted to GAC.

Mr. COX. Is that correct now? Are they in there? My information was that they are not.

Ms. DYSON. The Government Advisory Committee, which the members are not constituted by ICANN, but the governments of the world send their members. The original by law provision in ICANN said governments. Our first recommendation, when the Government Advisory Committee met, was to amend those by laws to include governments and distinct economies as recognized in the international, specifically for the purpose of inviting Hong Kong and Taiwan to join as full members of the GAC.

Mr. COX. That will happen next month in Santiago?

Ms. DYSON. My understanding is that they will be there as full members in Santiago.

Mr. COX. I appreciate that.

I know the chairman has been generous with the time.

Mr. UPTON. Unless another member has a pressing question, I would like to ask that we may submit questions in writing. All of members of the subcommittee will note that a number of us are on other subcommittees and they are also meeting at this time.

So, with that being understood, thank you for appearing before us today. We look forward to seeing you in the future. Thank you.

The second panel will include Ms. Mikki Barry, who is President and the Director of the Domain Name Rights Coalition; Mr. Jamie Love, Director of the Consumer Project on Technology; Mr. Grover Norquist, President of Americans for Tax Reform; Mr. Harris Miller, President of Information Technology Association of America; Mr. Johnathan Weinberg, Professor of Law, Wayne State University; and Mr. Jonathan Zittrain, Executive Director of the Berkman Center for Internet and Society, Harvard Law School.

We are going to have votes soon as well. Mr. Norquist, I know that you are testifying at 1:30 p.m. someplace else. So, we may be submitting questions to you in writing.

Before we start, I think most of you were here as we opened up panel one. As you may know, we have a long tradition of testifying under oath, if any of you have objection to that. Also, under House Rules they allow you to have counsel, if you so seek. Do any of you need or desire counsel?

[Chorus of nays.]

Mr. UPTON. Therefore if you rise and raise your right hand.

[Witnesses sworn.]

Mr. UPTON. You are under oath.

Mr. Love, you had a quick question.

Mr. LOVE. Yes.

Mr. UPTON. Are you also pressed for time?

Mr. LOVE. I was surprised at different hearings—90 minutes the last minute. So, I would just say that I would enjoy going early if possible. I apologize.

Mr. UPTON. We will do this sort of like as we all leave for our respective States. I have a 6:45 p.m. flight tonight to Michigan. Is your hearing before or after 1:30 p.m.

Mr. LOVE. The hearing has already started.

Mr. UPTON. You may go first.

By the way, all of your statements are a part of the record. You are welcome to summarize. We will try to, for sure, limit this to 5 minutes. Go ahead, Mr. Love.

**TESTIMONY OF JAMES LOVE, DIRECTOR, CONSUMER PROJECT ON TECHNOLOGY; GROVER NORQUIST, PRESIDENT, AMERICANS FOR TAX REFORM; MICHAELA M. BARRY, PRESIDENT AND DIRECTOR, DOMAIN NAME RIGHTS COALITION; HARRIS N. MILLER, PRESIDENT, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; JONATHAN WEINBERG, PROFESSOR OF LAW, WAYNE STATE UNIVERSITY; AND JONATHAN ZITTRAIN, EXECUTIVE DIRECTOR, BERKMAN CENTER FOR INTERNET AND SOCIETY**

Mr. LOVE. Thank you. I am not going to repeat my statement. I assume everyone has a copy of it. My name is Jamie Love. I work for a consumer group that was started by Ralph Nader. I am active in a lot of issues that have to do with things that are related to the Internet. I am the company-Chair of the Trans-Atlantic Consumer Dialogue Committee on the Working Group on Electronic Commerce.

I do a lot of work under Microsoft-type anti-competitive monopoly issues. We have been interested in Network Solutions and the ICANN issue because we are interested, particularly, in the institution of ICANN and what it represents in terms of future of a governance-type structure for the Internet.

I think that, from our point of view, NSI is a monopoly. They charge too much money. They are trying to do a grab on intellectual property of the domain. They want to say that they own actually the domain and they can set prices. I guess if they were down the road, I mean you can imagine the nightmare of them telling Amazon.com what their registration is. They told us if we wanted to change, you know, if they charge too much, we could get a different domain. The value of the domain is really the fact that people link to you. Your people know where you are.

On the Internet, you just cannot pickup and walk away. You are locked in basically to where you are. So, somebody has to deal with the NSI monopoly and fix that. Now, that said, we are also highly critical of some aspects of the ICANN thing, the way we see it.

Not about ICANN, per se, not about the personalities of ICANN, not even about particular decisions that have been made by the board at ICANN, but more about the way that the organization is taking off without any, what we consider to be, a charter or any kind of limiting structure as to what it can do.

To understand why this is important, trademark policy which is policy-oriented, and it is stuff that we expect governments to make decisions about or it is what we have a Patent and Trademark Office for such things. There is only one thing that could be addressed by this new organization.

It asserts that it will have the control over all the IP numbers that are used for connecting to the Internet, and it will have this authority over all of the domains of the Internet. It will be able to attach conditions upon people who want domains and possibly conditions on people that want numbers.

It is an authority in power which is unique, broad, extensive, and limited only by the ability of people to organize around that thing, if it was started in a bad way. In other words, for example, if ICANN went crazy or if NSI went crazy, I mean people could try and do work around some things like that, but it is difficult. So between crazy and not so crazy, there is a big gradation. So, there is power there.

So, people look at this control of the route servers, the control of the IP numbers, the control of domains as power. So, they want to know who has the power and how does this work? The fact that ICANN has been slow to define how you get elected to the board has been a source of problem.

As those things become defined and people, maybe they can have a better understanding of it, maybe they will feel good about it. Maybe they will not feel good. But not knowing anything is a difficult thing for people. I am glad that they say they are going to try and define that.

The fact it is a non-profit organization means next to nothing. They change their bylaws all of the time. I work for a non-profit organization and it does not mean anything that we have bylaws and Articles of Incorporation. What we were hoping is that ICANN

would accept to have a charter from the government that said, look, we are going to do domain names. We are going to do numbers and that is all we are going to do.

It would limit it in some way so that we would have some assurance that it would deal with strictly technical issues, and not get involved in the broader policymaking about electronic commerce. ICANN says to us they will not sign such a charter. That their idea is you give them their route server. You give them the IP numbers. You give them the domains and you say good-bye.

At the end of next year, they are free agents and you will have less control over them than you ever had over NSI, which is already a problem because of the lousy legal work that was done on the cooperative agreement, not by the Department of Commerce. In any event, that is what I think you have to do with them.

What are you creating? How much power does it have? What could you do down the road if it starts doing things that you do not like? Is there a better alternative?

Thank you.

[The statement of James Love follows:]

PREPARED STATEMENT OF JAMES LOVE, DIRECTOR, CONSUMER PROJECT ON TECHNOLOGY

My name is James Love. I am the Director of the Consumer Project on Technology (CPT), an organization created by Ralph Nader in 1995. I am involved in a number of issues related to electronic commerce, intellectual property rights, software, computers, telecommunications, and the Internet. The CPT web page is <http://www.cptech.org>. CPT is a non-profit organization. We have no financial relations with any company or non-profit entities that are involved in domain registration.<sup>1</sup>

I am here today to discuss proposals for the Internet Corporation for Assigned Names and Numbers (ICANN), as well as our concerns about the role of Network Solutions, Inc. (NSI) in the management of internet domains.

On June 11, 1999, Ralph Nader and I wrote to Esther Dyson, the Chair of ICANN, asking a series of questions about its mission, the degree to which ICANN could or would use its control over IP addresses or domain names to set policy on trademarks or other (unrelated) issues, the source and scope of authority to levy fees on the use of internet domains, what those funds can be used for, and the role of the interim board in making substantive policy decisions. Ms Dyson wrote back on June 15, 1999, in a letter that began with a rather lengthy "scene-setting" discussion about the efforts of NSI to protect its monopoly, and then offered often incomplete answers to the questions we raised. We have subsequently engaged in a number of discussions with persons representing ICANN, NSI and other persons who are interested in issues relating to the management of domain name registrations and other Internet governance issues.

There is a sense among some that the controversy over ICANN is about NSI and NSI's attempts to retain its monopoly over the .com, .org, .net and .edu domains. For certain interests, this is indeed the key issue. However, our concerns over ICANN are much broader, and go to more basic questions of how key internet resources are managed and controlled. Before discussing ICANN, however, I would like to make a few comments about NSI, to make it clear that our concerns about ICANN should not be misread as a defense of the NSI monopoly.

In our view, NSI is a government contractor performing a service for owners of particular domains. We do not believe that it is appropriate for NSI to assert ownership or control over the .com, .net, .org or .edu top level domains. Nor do we think it appropriate for any top level domains to be "owned" by a private firm. The prices for domain registration are excessive. We are alarmed that NSI is making claims that it "owns" certain databases that are essential for the operation of the network. We are concerned that NSI is using the profits from its current monopoly to lobby the government to extend its monopoly. We are concerned about these and many

<sup>1</sup> About two years ago my wife worked as a subcontractor for SAIC, the majority investor in NSI, on a distance education project for a client in Malaysia.

other issues, and we want the NSI contract for .com, .net, .org and .edu to be subject to periodic competitive bids.

That said, we remain very interested in the fundamental issues about ICANN itself. What is ICANN? Who will control the board of directors? What will be the legally binding limits of ICANN's power? What recourse do people have if they are unhappy with ICANN's actions or policies?

As I have said elsewhere, we don't view ICANN as a substitute for NSI, but rather as a potential substitute for the Department of Commerce, or more generally, as a substitute for governments. ICANN is poised to control key internet resources, and to impose private forms of taxation and regulation on the Internet. However, it will not be accountable in the same ways that governments are. Some persons perceive this as a positive feature, while others view the lack of accountability as a serious problem.

The July 1, 1999 Presidential Directive on Electronic Commerce directed the Secretary of Commerce:

to support efforts to make the governance of the domain name system private and competitive and to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis.

For many persons, this Directive, and the subsequent Commerce Department's Statement of Policy on the Management of Internet Names and Addresses (the "White Paper"), were highly technical matters that did not appear to have broader practical significance. However, as the ICANN proposal has become better understood, there are concerns about the scope of issues that may be addressed by ICANN, the many limitations and problems of the "self-regulatory" and governance structures that are based upon private contracts, and the uncertainty over how ICANN itself will be governed.

What exactly is ICANN, and why does anyone who is not in the domain registration business care? ICANN seeks to control Internet domains, IP numbers and root servers that are essential for anyone who wants to be connected to the Internet. David Post refers to this as "life-or-death power" over the Internet. The Australian competition authorities referred to it has the "God power" for the Internet.

What exactly will ICANN do with this power? In her June 15, 1999 letter to Ralph and Myself, Esther Dyson said:

The White Paper articulates no Internet governance role for ICANN, and the Initial Board shares that (negative) view. Therefore, ICANN does not "aspire to address" any Internet governance issues; in effect, it governs the plumbing, not the people. It has a very limited mandate to administer certain (largely technical) aspects of the Internet infrastructure in general and the Domain Name System in particular.

However, this statement is far too modest. As Professor Froomkin and David Post have pointed out, ICANN has already proposed mandatory contract terms for firms that register (and own) domains, making substantive and non-trivial policy regarding the use of trademarks and personal privacy. ICANN has also proposed a mandatory fee of \$1 per domain to finance its activities, and some persons associated with ICANN are considering asking for a fee on IP numbers, in order to cut down on the current hoarding of IP numbers.

I asked ICANN what else it could do, in terms of putting conditions on domain registrations or spending the mandatory fees it collects. To put this in a positive light, for me, I asked, if the ICANN board of directors could legally require .com domains to post privacy policies on their home pages, or use the money from the \$1 fee to fund the use of computers in Russian libraries. The purpose of this inquiry was to get a better idea of the limits of ICANN's authority.

I was told that, yes, if the ICANN board wanted, it could do both of these things. But Ms Dyson did not think that this would ever happen. At best, less than half the ICANN board members will be elected from the general public. An equal number of board members will come from business consistencies that are "stakeholders" in various Internet and ecommerce functions, such as the companies involved in domain registration. The ICANN President, who is an employee of ICANN, is given a vote on the board. Pro-consumer measures like requiring the .com domains to post privacy policies would never receive board support, Ms Dyson reckoned.

Indeed, it isn't clear if there will be any meaningful consumer representation in ICANN. Board meetings are held in places like Berlin, Santiago, and Singapore, in fancy hotels, and it is difficult to participate in such events without corporate sponsors who can pay the travel expenses.

And, having been told that it will be impossible to get support for pro-consumer policies, one wonders about policies that are supported by big ecommerce firms. Could ICANN become a mechanism to promote intrusive schemes for surveillance

of copyright on the Internet, for example? If not today, what about 10 years from now when ICANN will be run by an entirely different board of directors elected by a different group of "stakeholders?"

Our guess is that if ICANN succeeds, it will become a magnet for policy making on a wide range of issues. ICANN will have power, money and a dynamic staff. If it can "solve" trademark disputes, will it be surprising if ICANN is later asked to "solve" the SPAM problem? Or to set standards for digital signatures, or any number of e-commerce issues that benefit from harmonization? Indeed, ICANN has recently been asked to address new and novel issues that are associated with Internet searching and navigation services, raising even now the possibility of engaging ICANN in important content areas.

In fact, persons associated with ICANN are already setting their sights on issues far beyond IP numbers and domain names. One of the arguments for ICANN is that it will be quick and non-bureaucratic, and thus able to move faster than government agencies to solve new problems. This may indeed be true. But who will ICANN really be accountable to? What are the differences between "self governance" and government?

One model that has apparently been rejected is for the ICANN board to be elected directly by the people who use the Internet. If this is too hard to manage, given the difficulty of figuring out who is real and who is virtual, ICANN's board could be elected directly by domain owners, who are a known group. (A modern day version of letting property owners vote, albeit a system where people who own lots of property can vote more than once.)

Instead, ICANN (and the White Paper) proposes a structure that elects some board members from the general public, under a system that has yet to be announced, and gives seats on the board to groups like the "Address Supporting Organization," the "Domain Name Supporting Organization" or "The Protocol Supporting Organization." Later on ICANN can and probably will add additional "Supporting Organizations," each with seats on the ICANN board of directors. The idea that this is "self" governance depends entirely upon who is considered "self."

Many of the current discussions regarding ICANN concern the nature of contractual agreements between ICANN and the organizations, like NSI, that manage domain registrations. These contracts are held out as models for governance. The problems with this approach are many. For one thing, consumers are not part of this bargaining process. Neither are new entrants part of the process, thus giving too much power to established firms.

There is also a question regarding bargaining power, as ICANN becomes more firmly in control of the "plumbing" of the Internet. Contracts that may be negotiated today will likely become "take it or leave it" propositions in the future, if indeed this is not the case already.

It would be helpful if the government could begin to identify the range of issues and decisions that it expects ICANN to resolve, even in the short run, and then consider whether ICANN is truly the appropriate body to be making the decisions.

Many of our concerns about ICANN would be mitigated somewhat if there was some plan for future accountability, some way to rein ICANN in if it goes crazy.

We asked Esther Dyson if ICANN would be willing to enter into a charter with the US government or with an international intergovernmental organization (existing or new) that limited ICANN's powers in ways that were legally binding. Ms Dyson said that was not acceptable. While ICANN did not want to be accountable to any government or governments. ICANN is happy to receive the US government backing to get control over key Internet resources, it just doesn't want to ever look back once it gets those resources.

As someone who works for a non-profit organization, I am not moved by the suggestion that ICANN is seriously constrained by its Articles of Incorporation or by-laws. The ICANN Articles of Incorporation are very brief and don't say much, and the bylaws, which are pretty general to begin with, can be changed by a 2/3 vote of the board of directors.

We asked NSI if it was in favor of ICANN having some type of government charter that limited ICANN's powers. David Johnson, a lawyer representing NSI, said no. NSI apparently prefers to deal with an ICANN that has no official charter. What NSI does want is greater bargaining power with ICANN. And as noted, NSI wants very badly to become the "owner" of .com, .net and .org top level domains, at least at the registry level.

I asked NSI how consumers would be protected from over charging for registry services. NSI said that if .org was over priced, we could register a different top level domain. This of course is a ridiculous remedy. CPT has spent enormous resources to create our web pages, and the value and usefulness of the web page is based upon the internal and external hyperlinks to the web page content. We are in a "lock-



in" situation where it would be extremely costly and inconvenient to abandon www.cptech.org.

NSI also suggested that if it was required to charge everyone the same price, it would not gouge consumers, because it wanted to sell more domains, or that prices would be moderated by competition between top level domains. We don't find this persuasive, given the importance and economic value of the top level domains currently managed by NSI. NSI is clearly opposed to the idea that the contract for the registry would be re-bid, but this would be our preferred solution, to have periodic competition for the registry services.

It does appear that NSI, through its management of approximately three quarters of registered domains, has too much power. Both the government and ICANN seem to need cooperation from NSI to accomplish a smooth transition from the current monopoly to a competitive system. This raises questions in our mind about the wisdom of permitting any single firm to control so much of the critical infrastructure resources. We have suggested it might be appropriate to have redundancy at the registry level, so that a contractor would not become so essential that it could make it impossible to re-bid a contract (arguably the position we are in today). It is not at all clear that ICANN will have the authority to solve this problem as a purely private party.

We would very much like to see the Department of Commerce become more proactive on the issue of new top level domains, to address the contrived scarcity of domain name space. We recognize there is growing international interest in participation in these policy decisions, and we urge the Department of Commerce to identify suitable forums for discussing these issues, including the creation of new special purpose agreements among interested countries on this topic. Policy makers, whoever they are, should explore mechanisms for putting restrictions on the registration of the same name in different top level domains, in order to truly expand the availability of the name space (as opposed to creating a situation where persons simply register all available top level domains.)

With respect to ICANN, we are opposed to ICANN's current proposal to take control of key Internet resources without any clear understanding of the limits of ICANN's powers and without any ongoing oversight by government bodies.

The concerns that we have discussed regarding ICANN are not about its present leadership, or about any particular policy decision that ICANN has undertaken. We are concerned about ICANN as an institution, and about the ramifications of current proposals for the future of democracy in cyberspace.

Finally, I would like to thank the Commerce Committee for holding this important hearing.

Mr. UPTON. Thank you. Mr. Norquist.

### TESTIMONY OF GROVER NORQUIST

Mr. NORQUIST. Thank you. Grover Norquist for Americans for Tax Reform. We do not receive any Federal money, or State or local government money. I wear two hats. I represent Americans for Tax Reform. I also serve on the Electronic Commerce Commission, which is discussing, in the wake of the legislation that you passed on the Internet Tax Freedom Act, how or why we ought to tax Internet commerce.

There are an awful lot of States and local governments out there that have sort of one thing in mind on the Internet. They think it is really interesting and they want to tax it. I was concerned when ICANN started discussion of a \$1 tax, not that \$1 is a lot of money, but my question is where is ICANN getting the authority to levy a tax?

If they have the authority to levy a tax, to announce that they are not going to take it until November, in November can they come back and put it in and make it \$2 or \$10? I would urge Members of Congress not to hand over to any third party the ability to levy taxes, either on the Internet or on anything in the United States.

We have seen the United Nations recently announce they wanted to tax e-mail. They wanted to have a one penny tax on 100 lengthy e-mails. I am not sure what constitutes lengthy. It is not a lot of money, one penny, but they think it will raise \$70 billion.

I understand Pete Sessions has introduced legislation to explain to the United Nations that they do not have this authority, and the Congress does not agree that they do. That is necessary to do. Three years ago, the U.N. did the same thing, wanting to tax electronic transfers of money.

We saw the FCC announce recently and implement that they are allowed to levy taxes, the Gore Tax, on everybody's phone bill. Then they passed a law to tell the phone companies that you are not allowed to tell anybody what this is or what it is going to. You just hid it in their phone bill.

This idea of setting up third parties to levy taxes outside of Congress, outside of your authority, I think is extremely dangerous because it is one more step away from representative government. An institution that can raise \$1, why not \$2? Why not \$10? I do not understand quite how they got that authority, but if they got it for \$1, why do they not have it for \$10?

Last, I would just like to agree with the gentleman who was talking before. I think you need to be very careful what ICANN's authority is. There are an awful lot of people who would like to get in there and rewrite the rules on the Internet.

If you are going to hand over to ICANN some sort of blank check to have taxes or rewrite the rules, I think that is quite problematic. I agree with the earlier comments. ICANN's meeting should be open. I think that the authority should be set, not by their own internal bylaws, and not by something that Commerce hands them, but by Congress.

Thank you.

[The statement of Grover Norquist follows:]

PREPARED STATEMENT OF GROVER NORQUIST, PRESIDENT, AMERICANS FOR TAX REFORM

*Introduction*

Mr. Chairman, my name is Grover Norquist. I am President of Americans for Tax Reform (ATR).

Americans for Tax Reform is—in simple terms—a government spending watchdog, with deep concerns regarding the breadth of government generally. ATR, as I noted last month in a letter to Congress, opposes all tax increases as a matter of principle. We believe in a system in which taxes are simpler, fairer, flatter, more visible, and lower than they are today. The individuals of the taxpayer's movement believe that the government's power to control one's life derives from its power to tax. That power should be minimized.

*Americans for Tax Reform and ICANN*

These aforementioned principles have required that Americans for Tax Reform become involved in the growing controversy over the domain name system. On its face, an issue as complex technically and politically cumbersome as the domain name system may seem like an unlikely place to find Americans for Tax Reform, however very few issues are as fundamentally important to America's economic well-being as the future of the Internet.

Last year I was appointed to the Advisory Commission on Electronic Commerce, a commission tasked by congress to make recommendations regarding the allowance of Internet taxation and issues related to electronic commerce. I take this role seriously and want to make sure that every tax that impacts electronic commerce is carefully scrutinized. Also, as President of ATR I wanted to ensure that taxpayers were not increasingly burdened by new taxes.

So, when the Internet Cooperation for Assigned Numbers and Names (ICANN) proposed the world's first global tax—an Internet tax—to support its own \$5.9 million operating budget, I was concerned. Under their proposal, each registration of a domain name (the familiar Internet addresses ending in suffixes such as .com and .org would be taxed \$1.) I was caused greater concern when I learned that ICANN, while created to be a consensus-based organization that only set standards, was now reaching well beyond that express purpose.

Perhaps at first glance, a \$1 tax may not seem like much, but that's just the tip of the iceberg. Complying with ICANN's regulations and participating in the organization's bureaucratic processes will cost governments and corporations (and thus taxpayers and consumers) around the world at least another \$20 million to \$30 million annually. Of course, to cover these costs ICANN can always decide to hike the tax or impose more regulations in the future, just as the Gore Tax has been doubled without any representation.

Reportedly, ICANN has maintained that the \$1 tax on domain name holders is merely a user fee and not a tax. User fees are charged at times for the provision of a service, but what service is ICANN providing to users? ICANN provides no service. This is an arbitrary cost imposed on a business transaction that is used to fund regulators, administrators and bureaucrats mostly based in Europe. That sure sounds like a tax—of course King George probably didn't really believe that a "fee" placed on tea was a tax either.

Humorously, I found, ICANN attempted to defend itself by asserting that the National Park Service raises fees on admission to parks without a cry of taxation. Well, first, those so called fees are merely a tax by another name, admittedly aimed at those who use the park system, but a tax nevertheless. Second, ICANN's response causes me even greater concern in that again we find the organization using a governmental agency as a role model. On the one hand they say they have no governmental power and yet, on the other hand, they continuously assert their ability to take actions that at least appear quasi-governmental. In fact, in this defense we see that the best example they can give to justify their actions is of a governmental agency. From where does this power derive? And did the congress approve of the handing out of this congressional power to tax?

As you investigate the remarkable quasi-governmental reach of ICANN, please also consider that this tax is the camel's nose. Always keep firmly in mind that this new Internet tax has not been approved much less reviewed by congress. This combination is damaging to taxpayers and ultimately to the fundamental guarantees, constitutional guarantees, of citizenship.

Now, I have read that ICANN has finally responded to the many concerns that have been raised by many who have been following the domain name issue. I, for one, am not impressed. We should all carefully consider what they have said, which is not much. ICANN has stated that it would "defer collection" of the \$1 tax it imposed on new domain name registrations. The message has clearly not been received by this organization—defer collection does not equate in any way to a statement that they will not collect. Moreover, they apparently have yet to realize that only Congress has the power to tax, yet they plow forward.

One other issue causes me some concern as ICANN has continued its activities. Some will raise the alarm of international interests invading the U.S. to the detriment of our best interests. In this case, those voices may be correct. ICANN boasts that it is made up of several international interests as the domain name is an international issue. What has been lost in the rhetoric is the simple fact that it was in the U.S. that the domain name got used as a way to direct web users. Why do we want to arbitrarily export our ideas so that foreign interests begin controlling a U.S. invention? More importantly, why would we allow foreign interests to decide how a totally privatized domain system is to be developed? Worse, why are foreign interests having a deciding voice in how to tax U.S. citizens?

#### *Reason for Optimism?*

Despite my noted skepticism of the ICANN process Mr. Chairman, notably I am somewhat encouraged by the recent Department of Commerce response to the Chairman Bliley suggesting the following changes to the ICANN structure:

- ICANN's top priority must be completing the work necessary to put in place an elected board of directors on a timely basis. Specifically, it must do everything within its power to establish the Supporting Organizations, and ensure the election of nine board members by those Organizations to begin serving at the November 1999 Board Meeting. And it must work diligently to complete the process for electing at-large directors by June 2000. (Page 11 of the response)
- ICANN should eliminate the \$1 per-year per domain name tax. We believe a permanent financing method should not be adopted until after the nine elected

members are added to the ICANN Board in November. That will ensure that this important decision is made in accordance with the representative, bottom-up process called for in the White Paper. In the meanwhile, we will work with ICANN and the entire Internet community, to the extent permitted by law, to obtain interim resources for ICANN. (Page 11 of the response)

- ICANN should immediately open its board meetings to the public. Transparency is critical to establishing trust in decision making. And trust is essential for ICANN's ultimate success. As a general matter, ICANN has undertaken the vast majority of its work in an open and transparent manner. The final step of opening the board meetings is critical to establishing trust in ICANN. (Page 12 of the response)
- There is concern in the Internet community about the possibility of over-regulation, and therefore ICANN should assure all registrars and registries, through contract, that it will restrict its policy development activities to matters that are reasonably necessary to achieve the goals specified in the White Paper and that it will act in accordance with the procedural principles set forth in the White Paper. (Page 17 of the response)

#### *Reason for Pessimism*

As I noted, I am encouraged by each of these suggestions. Each of these issues is a critical first step to making ICANN work. However, they are just suggestions. Nothing has been changed. In order to implement these modifications into the process then ICANN must adopt them into their bylaws.

Despite my optimism over the Department of Commerce's suggestions, I am deeply troubled by the following section of the Department of Commerce's response to Chairman Bliley:

The White Paper stated that the new not-for-profit corporation should be funded by Internet stakeholders, including registries and registrars. ICANN concluded that it should initially finance its operations through a payment by registrars of a user fee of \$1 per year per domain name registered. This payment obligation was included in the accreditation agreement formulated by ICANN after notice, opportunity to comment, and a public meeting. (12)

In recent weeks the user fee has become controversial. Although the \$1 fee may be determined to be an appropriate method for funding ICANN activities, and we believe such a fee would be lawful, (13) we believe that ICANN should eliminate the fee. Adopting a permanent financing system is an important step that, we believe, should await the addition of the nine elected Directors in November. That will ensure that this important decision is made through a representative, bottom-up process.

To date, ICANN has been funded through corporate contributions and extensions of credit. In the short term our recommendation means that ICANN must receive government funding, continue to rely on corporate contributions, or finance itself through some combination of both sources. We pledge to work with ICANN and the entire Internet community, to the extent permitted by law, to secure interim resources for ICANN.

Americans for Tax Reform resistance of the proposed ICANN taxation without representation pales in comparison to our opposition to ANY plan by the Department of Commerce to use federal funds to support this organization. I am deeply troubled by the Department's pledge to use "government funding." That taxpayer money be used to support ICANN is an anathema. A portion of our taxes may legitimately be called an Internet tax at that point as everyone in the country would be taxed to support an organization of questionable authority, that adamantly defends its power to meet without the taxpayers gaining the benefit of sunshine. Americans for Tax Reform will work diligently to block any such initiative and urges each of you to voice your concerted displeasure with this approach.

ATR's concern over any effort to fund ICANN with taxpayer money is amplified by a report release last Friday on CNN on ICANN. The report located at <http://cnn.com/TECH/computing/9907/16/icannt.idg/> spells out what I think each Member of Congress should find shocking. In this CNN article, ICANN announced that it was one (1) million dollars in debt. In fact, the original funds raised from the Internet industry around \$500,000 were gone almost instantaneously. ICANN's General Counsel Joe Simms said in the article "The \$421,000 that came in the door ran out a long time ago," Simms stated. "We're well over \$1 million in the hole."

Now it should come as little surprise that Americans for Tax Reform would be opposed to a government bailout of an organization that in the course of seven months has spent a million and half-dollars and essentially done nothing. In fact the suggested modifications from the Department of Commerce are as clear an indication as any that ICANN deserves serious Congressional scrutiny. However before

the full light of day can be shed on this process, ICANN is passing the hat once again. Only this time the Department of Commerce has indicated it may be willing to pick up the tab.

The proposed ICANN 5.9 million dollar annual budget, to be collected from domain name registrants for the limited technical oversight of the domain name system, strikes me as excessive. Now comes the idea that tax payer dollars should be spent to host lavish receptions and secret board meetings in five star hotels in Singapore, Berlin and Santiago for nine un-elected and unaccountable ICANN Board members is a travesty. ICANN has now agreed to open its next board meeting in Santiago, Chile. However, a decision on future meetings has been deferred. This organization really wants to live by its own rules—have the power to tax, fly around the world at taxpayers expense, grant foreign interests the power to determine, in part, the direction of the U.S. electronic economy, and still meet in secret.

The fact that the Department of Commerce is signaling a willingness to fund the ICANN jet setters is a disturbing indication that its intent may not match the will of American taxpayers, Internet citizens globally and, increasingly, the U.S. Congress. The expectation that you or I would be on the hook to pay for a dubious organization's member's room service would be laughable if it weren't happening before our very eyes. The American taxpayer footing the bill for an organization that portends to be the rightful heir to control over the Domain Name system but yet cannot seem to control its own financial responsibilities is a seriously flawed premise.

Americans for Tax Reform are committed to ensuring that any further discussion or debate concerning the expenditure of taxpayer funds of ICANN be fully examined in Congress so that the various constituencies and public may have appropriate inspection. We call for your committee to fully explore the expenditures of ICANN and demand a full accounting of these activities.

It is this exact spirit that Americans for Tax Reform led the effort last week to overturn the United Nations proposed Internet tax. The UN recognized that Internet users will likely grow from 150 million this year to roughly 700 million in 2001 and is looking to find a taxing mechanism to fund its agenda. Unfortunately, Vice President Albert Gore has a record of supporting such commerce taxes for his agenda, i.e. the Gore tax. This has legitimized the most recent United Nations decree. We continue to urge Vice President Gore to join Congress and act decisively in rejecting his liberal tax and spend history, and for that matter to sign the Taxpayer's Protection Pledge and make the promise to every citizen that he will not raise taxes. IATR's efforts involving the UN Internet Tax and ICANN are consistent. Any effort to globally apply taxation without representation and fund an already bloated bureaucracy and an unaccountable secretive board are troubling to say the least. By some accounts the Internet will support nearly a trillion dollars of electronic commerce within a few short years and it is clear that American ingenuity and technological prowess has driven the Net's explosion. To suddenly turn the keys of control over to an organization that seeks to burden the very people responsible for its growth is preposterous. ATR seeks to have all the issues surrounding ICANN fully vetted before the U.S. Congress and the court of public opinion. Too much is riding on the decisions made by this body and the Congress needs to understand fully not only what will happen but what has happened.

#### *About Americans for Tax Reform*

Since 1986, ATR has sponsored the Taxpayer Protection Pledge, a written promise by legislators and candidates for office that commits them to oppose any effort to increase the federal income taxes on individuals and businesses. At present, 207 U.S. Representatives and 42 U.S. Senators have signed the pledge.

ATR also works with state taxpayer coalitions in all 50 states to ask candidates for state legislature and governor to sign the STATE TAXPAYER PROTECTION PLEDGE which reads: "I (name) pledge to the taxpayers of the (district #) district, of the state of (state), and to all the people of this state, that I will oppose and vote against any and all efforts to increase taxes." So far, 1,136 state legislators and eight governors have signed the pledge.

ATR leads the fight against the Value-Added Tax (VAT), a European style national sales tax that can raise revenue while being mostly hidden to taxpayers. The VAT has been instrumental in the growth of the European-style welfare state. Today, 178 members of Congress are members of the Congressional Anti-VAT Caucus, co-chaired by House Majority Leader Dick Armey and House Majority Whip Tom DeLay.

Americans for Tax Reform strongly supports the concept of a single rate flat tax, such as that introduced by Rep. Dick Armey as the "Freedom and Fairness Restoration Act."

In addition to the above activities, ATR sponsors the calculation of Cost of Government Day, the day on which Americans stop working to pay the costs of taxation, deficit spending, and regulations by federal and state governments. The cost of federal regulation alone comes to nearly \$700 billion, \$5,000 per household per year, more than the revenue raised by the personal and corporate income taxes combined. ATR serves as a national clearinghouse for the grassroots taxpayers' movement by working with approximately 800 state and county level groups. ATR is a non-profit, 501c(4) lobbying organization. Contributions to Americans for Tax Reform are not tax deductible. The Americans for Tax Reform Foundation is a 501c(3) research and educational organization. Memberships begin at \$25.00 and all contributions to the Foundation are tax deductible.

Mr. UPTON. Thank you. Ms. Barry.

#### TESTIMONY OF MICHAELA M. BARRY

Ms. BARRY. Thank you, Mr. Chairman.

I have to admit here that I am an attorney. Please make no mistake about ICANN's role. It goes far beyond that of technical management and enters into the realm of the regulatory body. It is not just about plumbing, but it is also about the codes and the licensing for that plumbing.

ICANN's policy will affect commerce, freedom of expression, and likely stifle the very medium it seeks to regulate. We spent years fighting communism and its vision of planned economies. Let us not let that vision happen to the Internet. Competition is paramount, but not at the cost of free expression, sacrificing small business, and individual interests, and without accountability.

ICANN is now trying to execute a policy agenda before it has created the participatory structures that would allow its decisions to be accepted and trusted by a broad spectrum of stakeholders. ICANN does not now, nor has it ever had legitimacy by consensus of the Internet community. ICANN is the classic top-down organizational structure without accountability. Most of the ordinary participant's in ICANN's activities thought that they were participating in an institution-building process. They thought that ICANN was a level playing field where all competing groups could come together to work out a consensus approach.

They thought that they would have an opportunity to create membership structures, representational mechanisms, and policy development procedures first, and that actual policymaking would happen second. These include imposition of dispute policies from the World Intellectual Property Organization, WIPO, which even the U.S. Small Business Administration says are discriminatory.

There is no consensus in the Internet community, even as to whether there should be a central domain name dispute policy. At every step of the way, participants have been completely frustrated in the goal of participation. ICANN's CEO and interim board have been driving the organization into making irrevocable, substantive policy decisions as quickly as possible.

Imagine what would have happened to the U.S. Government if the first meeting of the U.S. Congress had tried to pass laws, impose taxes, and regulate commerce before half of its elected Representatives had arrived Philadelphia, and even before some of the States had elected Representatives.

The country would have been torn apart and Congress would have lost legitimacy. This will give you a good sense of what it has been like to participate in ICANN. The sad fact is that ICANN has

been captured from the beginning. The Department of Commerce gave control of the interim board to one partisan group in the DNS wars, even though three sets of bylaws were provided by three different organizations. That group was intent on enacting its own agenda, regardless of what the rest of the community told it. Competition is, of course, very important to the future of the Internet. We agree with ICANN that there is indeed consensus on this issue. However, we do not agree with ICANN's implementation.

This is what is actually slowing competition. ICANN is requiring registries to agree to an owner's contract, which includes provisions that will stifle small business, individual, and free speech interests. Worse yet, they are doing this without the consensus of the Internet community and under unbelievable criticism.

Without a membership in place, which was supposed to be the interim board's first task, and without appropriate representation for individuals, small businesses, and others, clearly the contemplated guidelines for registries, which are required prior to entrance into the marketplace controlled by ICANN, go far beyond the technical management contemplated by the White Paper, including creation of a mode whereby ICANN claims ultimate ownership over all names in the domain name space.

For example, the accreditation agreement, in its current form, requires registrars to agree that ICANN can confiscate a domain name for any reason it sees fit. Domain name registrants must certify to the best of their knowledge that their choice of domain name does not interfere with anyone else in the world.

Even those nations with vast experience in intellectual property laws would have trouble meeting this requirement. Congress authorized the NRC Study, authorized the Commerce Department to begin the NRC Study to study the interaction between domain names and trademarks. This has not been done, yet we see these onerous aspects of the agreement, and the wish that the WIPO process be put into place.

ICANN's Advisory Committees are another serious bone of contention in the Internet community. For example, the GAC, Government Advisory Committee, is headed by Paul Twoomey of Australia. Mr. Twoomey, during the Berlin meeting of ICANN in May, made a point of threatening the Internet community that if it did not support ICANN, something even worse would take its place. This was again mentioned today by Ms. Dyson.

In closing, as a result of all of this, ICANN has all of the power, but none of the oversight that a government group would have.

Thank you.

[The statement of Michaela M. Barry follows:]

PREPARED STATEMENT OF MICHAELA M. BARRY, PRESIDENT, DOMAIN NAME RIGHTS COALITION

#### INTRODUCTION:

Thanks to the Committee for providing the opportunity to provide feedback to Congress regarding the role of ICANN and the Commerce Department in the ongoing battle for Internet governance. Although you have received letters from others who attempt to downplay ICANN's role, make no mistake; it goes far beyond that of technical management and enters the realm of a regulatory body. ICANN's policy will effect commerce, freedom of expression, and likely stifle the very medium it seeks to regulate. ICANN has not provided an accurate picture of the Internet world

to the Committee. We felt it was necessary to correct and explain much of what they reported to you in response to your questions.

PERSONAL QUALIFICATIONS:

I have been participating in Internet issues since 1984 and am currently President of the Domain Name Rights Coalition. I am a consultant with Internet Policy Consultants, a member of the Boston Working Group, a member of the Open Root Server Confederation, former steering committee member of the IFWP, steering committee member of the Individual Domain Name Supporting Organization (which is still waiting for confirmation by ICANN), member of INTA, and a trademark attorney and member of the Virginia Bar. I am co-founder of InterCon Systems Corporation, the first commercial Internet software applications developer on the Macintosh platform.

SUMMARY:

ICANN is now trying to execute a policy agenda before it has created the participatory structures that would allow its decisions to be accepted and trusted by a broad spectrum of stakeholders. Further, ICANN has delegated domain name policy decisions to the Domain Name Supporting Organization (DNSO). This group is disproportionately large corporations, and is moving forward on its expansionist trademark agenda even before the non-commercial community has even elected its representatives!

Most of the ordinary participants in ICANN's activities thought that they were participating in an institution-building process. They thought that ICANN was a level playing field where all the competing groups could come together to work out a consensus approach. They thought they would have an opportunity to create membership structures, representational mechanisms, and policy development procedures FIRST, and that actual policy making would happen SECOND.

At every step of the way, however, they have been completely frustrated in this goal. ICANN's CEO and interim board has been driving the organization into making irrevocable, substantive policy decisions as quickly as possible.

Imagine what would have happened to the United States government if the first meeting of the US congress had tried to pass laws, impose taxes, and regulate commerce before half of its elected representatives had arrived in Philadelphia, and even before some of the States had elected representatives. The country would have been torn apart and the Congress would have lost legitimacy. That will give you a good sense of what it has been like to participate in ICANN.

ICANN cannot be an organization that executes the agenda of the gTLD-MoU (one small faction in the DNS wars) and at the same time be an organization that builds the procedures and representational structures for developing a policy agenda that commands broad consensus. Either it already has a policy and executes it, or it is designed to allow the Internet stakeholders to formulate policy. Right now it is doing the former while claiming to do the latter.

The sad fact is that ICANN has been "captured" from the beginning. NTIA gave complete control of the interim board to one partisan group in the DNS wars. That group was intent upon enacting its own agenda, regardless of what the rest of the community told it.

*History:*

I have personally been involved with Internet governance issues since the early 1980s. The Domain Name Rights Coalition was formed in 1996 directly because of the NSI domain name dispute policy which we thought stifled the rights of individuals and small businesses to choose domain names. The development and growth of the World Wide Web brought with it a significant interest by the business community. It soon became clear that IANA, a US government contractor run by Dr. Jon Postel, would be unable to continue its management of domain names and numbers without significant help. The first attempt to transfer control occurred in 1994 when Dr. Postel attempted to place IANA under the Internet Society (ISOC.) This failed, but something else grew from that union. The IAHC (International Ad Hoc Committee) was created, and tried to take over Internet governance via a document called the gTLD-MoU. Comments were solicited by the IAHC from the Internet community, but the responses were largely ignored. It is not coincidental that many of the members of CORE, POC (the Policy Oversight Committee), ISOC (an original IAHC advocate), WIPO, and the ITU are now heavily involved with the ICANN process, and have in a sense "captured" that process.

The gTLD-MoU was stopped by the Internet community when it became clear that the process was closed, unaccountable, and non-transparent. Various people ap-



pealed to the Department of Commerce and the State Department for help. Through significant work and effort, the IAHC plans were thwarted, and the Commerce Department produced the "Green Paper" as a roadmap for technical management of names and numbers. The Green Paper was truly a pro-competitive solution, one that was hotly contested by many European Governments, and the previous supporters of the MoU. In fact, it was right around this time, that Jon Postel redirected over half of the world-wide root servers to his server in California. While we may never know, this combination of events apparently derailed the Green Paper, and started the process that resulted in the White Paper.

Thousands of comments were submitted by a large cross section of the Internet community, although many questioned (and still question) under what authority the Department of Commerce was taking control of Internet functions. Many of these comments were incorporated in the "White Paper" which provided a framework for considering these issues. Using the White Paper as a foundation, the IFWP (International Forum on the White Paper) was created in 1998 to discuss these issues and attempt to reach the consensus that was required to move forward with the plans envisioned in the White Paper for an open, transparent and accountable organization, Newco, to manage domain names and numbers. Please note that even with the White Paper, significant numbers of people still ask under what authority Commerce is operating in choosing one company over another, mandating that company's bylaws, mandating that company to be non-profit, and assisting in choosing the unelected board members of that company.

The IFWP steering committee consisted of members of the Internet community who were involved with not-for-profit enterprises. These included CORE, the Commercial Internet Exchange (CIX), Educause, the Domain Name Rights Coalition (DNRC), and various other groups. It was chaired by Tamar Frankel, a respected law professor and expert on corporate structure and process from Boston University. The IFWP held meetings around the world, and worked to come to consensus on various issues. In the midst of this process, Joe Sims, attorney for Dr. Postel, promulgated a set of by-laws for Newco. He did this in closed meetings with no public input. These by-laws were presented to the IFWP, but did not gain consensus, largely because the points on which the IFWP had already garnered agreement were not included. Various further drafts followed, but still none of them achieved consensus.

In late August of 1998 after the final IFWP meetings, the steering committee met telephonically to plan the final or "wrap up" meeting in which the consensus points would be memorialized, and further concessions would be provided by all sides. Although there had been multiple votes already taken that clearly supported a wrap up meeting, yet another vote was called at that time. Mike Roberts vehemently opposed a wrap up meeting, and was supported in this by Barbara Dooley of the CIX. There is speculation that Mr. Roberts had already been contacted at that time regarding serving with the ICANN board in some capacity. Further, around the time of the wrap up meeting, Esther Dyson says that she was approached by Roger Cochetti of IBM and Ira Magaziner in Aspen, Colorado and asked if she would be interested in joining the ICANN Board. The IFWP wrap up was finally completely derailed by ICANN's refusal to participate in the meeting.

Some of the members of IFWP continued their work to create an open, transparent and accountable Newco. Two major groups, the Open Root Server Confederation (ORSC) and the Boston Working Group (BWG) promulgated by laws for Newco through open process. DNRC officers play a major role in both groupings of Internet leaders. Three sets of by-laws were provided in a timely manner to the Department of Commerce. Although the Commerce Department had long stated that they would not choose one set of by-laws over any other, they chose the ICANN's bylaws as a starting point

The Commerce Department directed ICANN to consult with the BWG and the ORSC regarding areas of concern to Commerce but there was little reason for them to do so since their bylaws and structure had already been chosen. ICANN did meet telephonically with BWG and ORSC, but failed to make substantive changes in its bylaws to accommodate the diversity of opinions towards fundamental issues such as openness of board meetings, voting on the record, voices for individuals and non-commercial entities, limitations on ICANN's powers to strictly technical issues, etc. Both BWG and ORSC warned that the concept of constituencies would lead to capture by corporate interests at the expense of expression. BWG wanted to do away with constituencies altogether. ORSC wanted constituencies structured so that everyone would have a voice. The ICANN constituency structure has, as predicted, become the catalyst for capture by the old gTLD-MOU crowd, and a large and powerful group of trademark interests. These trademark interests are currently pressing

non legislative expansion of rights for trademark holders, at the expense of free speech and expression.

SUBSTANCE:

*The IANA Function.*

ICANN received a sole source award to take over the IANA function. In December of 1998, the Commerce Department through NIST quietly attempted to give official authority to ICANN over the IANA functions in December of 1998. There were many discrepancies surrounding the transfer of the IANA functions. First, Mike Roberts announced at the ICANN Meeting in Boston in November that the IANA staff then reported to him. When questioned about that, Becky Burr stated he had been mistaken. Then, quietly at the end of December, Commerce tried to sole source the transfer to the IANA.

The ORSC (Open Root Server Confederation) appealed and it was rebid sole source in January or February of 1999. ORSC and others informed the Commerce Department that they were ready, willing and able to bid for this contract, yet it was still sole sourced. No explanation for this action has been provided. It is certainly not because there was consensus that ICANN would be best able to provide these services. On the contrary, ICANN states that it expected that all major participants in the global Internet community would "rapidly come together to make ICANN an effective vehicle for global consensus development (...)." There is a reason that this did not occur. It was not an oversight. ICANN is not receiving financial backing from most of the key players in the Internet community because ICANN does not represent them, and does not fulfill the mandate of the "open, transparent and accountable" 'Newco' envisioned by the White Paper. It also raises questions of ICANN finances, which for the most part, remain hidden from the Internet Community. It has been estimated that ICANN has expended more than 1.5 million dollars, and at most, has raised \$500,000. It is unknown where the remaining financing is coming from, who is funding this deficit, why, and how is ICANN paying for the IANA staff since January.

*Creation of a Competitive gTLD Registry-Registrar System.*

Competition is, of course, very important to the future of the Internet. We agree with ICANN that there is indeed consensus on this issue, however, we do not agree with ICANN's implementation. ICANN is requiring registries to agree to a very onerous contract which includes provisions that will stifle small business, individual, and free speech interests. Worse yet, they are doing this without consensus of the Internet community, without a membership in place (which was supposed to be the Interim Board's first task), and without appropriate representation for individuals and others. For example, the accreditation agreement in its current form, requires registrars to agree that ICANN can confiscate a domain name for any reason it sees fit. Domain name registrants must certify to the best of their knowledge that their choice of domain name does not interfere with anyone in the world. Domain Registries must be run by non-profit entities eliminating incentive for competition and market checks and balances. Clearly, these contemplated "guidelines" which are required prior to entrance into the marketplace controlled by ICANN, go far beyond the "technical management" contemplated in the White Paper, including creation of a model whereby ICANN claims ultimate ownership over all names in the Domain Namespace.

It is ironic in that in the midst of all the controversy over competition, ICANN has hesitated to take the single step that would introduce the most competition: creating new TLD registries. Indeed, it was the question of new registries that moved Jon Postel to begin this entire process in 1995. Instead, ICANN has delayed on the question and has passed it on to the DNSO for a recommendation that the ICANN board has already stated that it is free to ignore. It is difficult to imagine that any new discussion can resolve this issue that has been the subject of a distinct lack of consensus for over 4 years. An observation of the leadership of the quickly-constituted (and, it should be noted, distinctly incomplete) DNSO and the membership of the working group tasked to examine this issue shows a clear predominance of IAHC, CORE and ISOC leadership. It is no great surprise that the early discussions in the DNSO center around the very concepts and requirements outlined in the gTLD-MoU and CORE's operational documents, as its proponents attempt to manufacture consensus as quickly as possible.

*Coordination of the Root Server System.*

First, and most importantly, we question the authority or rationale for a CRADA. Professor Jun Murai was appointed to be chair of the CRADA. While Professor Murai is clearly a distinguished individual in the Internet community, he is also a

member of CORE, the Counsel of Registrars formed by the IAHC process. Professor Murai's involvement, while not a direct conflict of interest, is questionable, especially as to the process by which he was appointed. Professor Murai became chair by "fait accompli" without any debate, other candidates offered, or any type of open process. The public was not informed of his nomination. In fact, it was accomplished at an ICANN meeting of the Interim Board that was closed to the public. As there is no record of voting, the Board cannot be held accountable. As there is no membership, no elected Board members exist.

*The Process of Consensus Development and Implementation.*

ICANN is correct in that its formation was an unprecedented experiment in private sector consensus decision-making. Unfortunately, that experiment has failed. ICANN's claim of "openness and transparency, based on Internet community consensus, bottom-up in its orientation and globally representative" is far from the reality of the situation. ICANN's Interim Board meetings are closed. Voting is not on the record. In nearly all documents that ICANN promulgates, it speaks of consensus, however no such consensus is apparent. ICANN is the classic top-down organizational structure without accountability. When its by-laws are inconvenient, they are changed without discussion.

Board of Directors—Without a membership or even a plan for the construction of a membership, it is misleading for ICANN to suggest that the Board will be expanding "in the very near future."

ICANN Staff—A small executive staff seems rather extravagant given ICANN's already admitted lack of funding. This is especially so, given that they are paying their President \$18,000 per month. Please note that the position of President was not contemplated by the White Paper and was added as an afterthought by ICANN's by-laws. There was no notice and comment on his appointment, or even for the addition of a new and costly position. The position of President, has thus far been of no benefit to the ICANN, and has instead caused public criticism of the organization because of the conduct of Mr. Roberts towards ICANN's critics. As an example, Mr. Roberts referred to those who disagree with him as "arrogant juveniles" in a public e-mail message.

ICANN Meetings—ICANN has been holding periodic meetings in different regions of the world. However, the regions picked have been among the most expensive in the world to travel to, and to obtain accommodations in. Further, ICANN Board members have to date stayed in expensive hotels and have held their meetings there. This, of course, drives the cost up further for anyone who wishes to participate in person. While ICANN had provided real-time broadcasts through the Berkman Center of Harvard University at their last meeting in Berlin, remote participants were acknowledged only on the first day. Very few of the hundreds of real-time comments from around the world were read on the second day. This was, of course, very frustrating to those of us attempting to participate remotely.

Advisory Committees and Supporting Organizations—ICANN's Advisory Committees are a serious bone of contention in the Internet community. Of special note is the GAC or Government Advisory Committee. Beckwith Burr appointed herself to this committee. None of the other committee members have provided any indication as to their qualifications, reasons for inclusion, or any other information on their backgrounds. Further, at the ICANN meeting in Berlin, representatives chosen by sovereign nations were excluded from the closed meeting by spontaneous "rules changes." Citing this as an ICANN funding issue seems suspect.

Further, the GAC itself is headed by Paul Twoomey of Australia. Mr. Twoomey, during the Berlin meeting of ICANN in May, made a point of threatening the Internet community that if it did not support ICANN, something even worse would take its place, run by international governments. These same types of threats were used throughout the IFWP process. Unfortunately, the result, ICANN, has all of the power but none of the oversight that a government group would have.

A further committee, the DNSO or Domain Name Support Organization, is probably the most misconceived part of the ICANN process. To a group dominated by commercial interests, with a double representation given to large businesses through the Trademark and Businesses Constituency, have been entrusted decisions regarding the delicate balance between free speech rights and intellectual property protections. No bounds or limits have been placed on what this Supporting Organization may demand. No scope has been placed on what ICANN may approve. No mandate to operate in the public interest, to protect the communication (non-commercial and commercial) of all Internet users has been provided by the US Department of Commerce or adopted by ICANN. We know of no precedent for entrusting American's vital free speech interests to a group of largely commercial players, and we know of no precedent for bypassing the US court system's traditional protection

of minority speakers, popular and unpopular political speakers and human rights speakers in favor of a commercial arbitration system where corporate rights prevail (according to the WIPO rules proposed)."

**Corporate and Office Expenses**—ICANN's budget is far more expansive than many start-up companies that many of us have been involved in. One of the first expenses that ICANN took on was the hiring of an outside public relations firm. There has never been an adequate explanation of why this would be necessary for an open, transparent and accountable organization. Also of note is the enumerated "basic legal services." At a proposed budget of what is estimated at \$65,000 x 9 months or \$585,000, these legal services seem far from "basic." Please note that despite numerous requests, we have been unable to obtain exact figures from ICANN or from Joe Sims.

**Possible Cost Recovery Mechanisms**—It is disingenuous for ICANN to claim that many supported their creation throughout the USG policy development process. The creation that was supported was that of "Newco," an open, transparent and accountable entity with bottom-up representation, a membership structure, elected officials, and fair hearing panels. ICANN is none of these things.

ICANN further states that it is desirable for the name AND ADDRESS registries to participate in the funding of the costs of consensus policy development (...) [emphasis added]. ICANN's role in charging for address allocations was not contemplated by any of us who were involved in the process. We feel this is a very dangerous tack to take, and could be even more detrimental to the further development and growth of the Internet than the current plans for domain names. The power to "charge" (even if not directly called a tax) is the power to destroy. There is no widespread dissatisfaction with the current IP registries (which are arguably representative of the Internet Service Providers in their respective geographical regions),

*Conclusion:*

The Internet is the single most significant communications medium ever created. Its power goes well beyond that of shopping malls and e-commerce, and empowers individuals in a way never before imagined. It is thus a national as well as an international resource. The ability to control important aspects of this technology cannot be underestimated. It is up to all of us to remain vigilant when organizations are given special privilege by a branch of the US Government to control this vast means of expression. Safeguards must be put into place whereby individuals, non-profit entities, churches, tribal governments, and other disenfranchised groups may provide unencumbered input and opinion to an open, transparent and accountable entity. This entity is, unfortunately, not ICANN. ICANN must either be restructured, with all current Board members and policy decisions rescinded, to be replaced with a new and elected Board, forced into acceptance of irrevocable bylaws changes that ensure these fundamental rights, or should be replaced with an organization that will be chosen from and by the Internet community.

Mr. UPTON. Thank you.

The audience will refrain from applause. Mr. Miller.

**TESTIMONY OF HARRIS N. MILLER**

Mr. MILLER. Mr. Chairman and members of this subcommittee, I feel badly because I do not have another hearing to run off to, but it is a great honor to be before this subcommittee.

I am Harris Miller. I am President of the Information Technology Association of America. I want to commend you, Mr. Chairman, and this subcommittee for holding this hearing because I think this hearing is shedding a lot of light on a subject which has been clothed in darkness, inadvertently perhaps, and has confused a lot of people.

In addition to being President of ITAA, I also serve as President of the World Information Technology and Services Alliance, which consist of 38 information technology associations from around the globe. Because this is a global issue, as members of this subcommittee have indicated, we are very interested in this topic from the international, as well as the domestic perspective.

We have been actively involved since the beginning of the process of developing ICANN, seeking solutions, developing strategies, and working with both the private and public sector to setup a global mechanism to establish a competitive, self-supporting, industry-led, market-driven approach to the Internet domain name system.

We formed with eight other organizations and submitted an application to the Board of ICANN laying out an organizational structure to be recognized as ICANN's domain names supporting organization. An ITAA senior staff member serves on the DNSO board of directors.

Let me be clear. ITAA supports ICANN. We do not agree with every decision the interim board has made, but we believe that ICANN represents a comprehensive, sensible, and practical approach to the domain name registration process. ITAA's support of ICANN is based on three principles.

One, there must be an open and transparent process for the organization. We are pleased with Ms. Dyson's announcement that the meetings will be open in the future.

Second, there must be a new era of competition for domain name registration, and it must be set in place.

Three, government involvement at all levels must be reduced.

Clearly, as this subcommittee hearing indicates, transitioning from government control to industry-led Internet governance, which ITAA strongly supports, will produce some bumps, especially given the number of stakeholders committed to the future of the Internet.

The magnitude of the challenge should not divert us from pursuing the proper course: building a domain name system that preserves the need for competition, requires minimal government intervention, and commands broad stakeholder support, all without disruption to the fundamental operations of the Internet.

Because of this debate, our board recently adopted a resolution reaffirming these points. Is ICANN perfect? No. But there is a parallel between what Churchill said about democracy and ICANN. Churchill said that democracy is the worst form of government, except for all the others. Clearly, there are some out there who are less supportive of ICANN's principles than I am being today.

Those who attack the fundamental legitimacy of ICANN may be inadvertently and unintentionally undermining the Internet itself, because unless we have an alternative that is viable to ICANN, and I do not consider turning us back over to the U.S. Government or to other governments to be a viable alternative, I think what we really need to do is to focus on improving ICANN, rather than try and undermine it.

Clearly bringing competition to the domain name system is very important. We believe that it is important that the gTLD, which is currently administered by one company, be opened to multiple registrars who will compete with one another in providing services to new and existing domain name registrants.

This will promote a stable and robustly competitive DNS and provide benefits to all users of the Internet. ICANN's top priority must be to put into place an elected board of directors and assure they begin as soon as it is reasonable. As Ms. Dyson said in her

testimony, ICANN is well on the way to that. We want to do everything possible to move that quickly.

It is also important that ICANN be as transparent as possible. Understandably, a certain amount of suspicion reigns about this new organization. Sunlight on the operations is the simplest way to reduce unwarranted and unsubstantiated conjecture about hidden motives or goals.

The introduction of competition to create the shared registration system is welcome. Transition of DNS management to the private sector can succeed only if all DNS participants subject themselves to the same set of consensus rules.

We believe that ICANN has already demonstrated that it is sensitive to and can respond to the needs of the Internet community with respect to the domain names and trademark issue, and can help reduce the inevitable friction between trademark owners and domain name holders. ICANN must be permitted to continue to proceed promptly to establish a uniform dispute resolution procedure for cyber-squatting.

One last issue I want to address is the issue of how to pay for ICANN's operations. Mr. Klink made the point well. They are caught between a rock and a hard place. At the end of the day, I do not think we want government paying for it. I do not think we want a few rich corporations paying for it. So, there must be some kind of a user fee established that will have people across the board pay for it. We need to move to that as quickly as possible.

Thank you very much, Mr. Chairman.

[The prepared statement of Harris N. Miller follows:]

PREPARED STATEMENT OF HARRIS N. MILLER, PRESIDENT, INFORMATION  
TECHNOLOGY ASSOCIATION OF AMERICA

Mr. Chairman, and distinguished members of this sub-committee—on behalf of the over 11,000 direct and affiliate member companies of the Information Technology Association of America ("ITAA"), I thank you for inviting me to participate in this morning's hearing, which focuses on the Internet Corporation for Assigned Names and Numbers ("ICANN") and its relationship to the transition to privatized management of the Internet Domain Name System ("DNS"). ITAA has been actively involved since the beginning of this process—seeking solutions, developing strategies, and working with private and public sector officials across the globe on how best to develop an unfettered, equitable, competitive, self-supporting, industry-led, market-driven approach to the Internet domain name system.

We are involved in this often times contentious process because we must be; the future of our industry demands nothing less. Our members are at the forefront of the revolution called "Electronic Commerce." ITAA members provide enterprise software, information services, telecommunications, and network and systems integration. In short, ITAA members represent the stakeholders in the Internet at every level—content providers, trademark name and copyright holders, and transmission products and services. We are the architects, builders and providers of the facilities and systems that are utilized to ensure that the digital revolution realizes its bright promise—delivering new levels of productivity and prosperity to countries around the world. We are also users of this revolutionary medium.

In addition to serving as ITAA President, I am President of the World Information Technology and Services Alliance (WITSA), consisting of 38 information technology associations around the world. Because electronic commerce is a global issue, ITAA is interested in the topic of today's hearing from both a national and international perspective. WITSA joined eight other international organizations to submit an application to the ICANN Board laying out an organizational structure to be recognized as ICANN's Domain Names Supporting Organization (DNSO). An ITAA senior staff member serves on the DNSO Names Council. We have also been closely affiliated with the Private Sector Working Group (PSWG), an ad hoc industry working group, which initially formed to respond to the issues first identified in the transi-

tion of the Internet into private sector management. This group has raised significant concerns about the growing problems related to consumer fraud and confusion, and the need to ensure that protection of trademarks, prevention of consumer confusion, and the stability of the Internet are primary considerations as the Internet moves toward a private sector governance model. Members of the PSWG include AT&T, Bell Atlantic, Disney, Viacom, Warner Lambert, Microsoft, AOL, and other famous brand holders.

Let me make it clear at the beginning: ITAA supports ICANN. We do not agree with every decision the Interim Board has made. But we believe ICANN represents a comprehensive, sensible and practical approach to the management of the central administrative functions of the Internet.

No one said the transition of the Internet from its original defense research beginnings into a global vehicle for education, commerce, communication and social interaction would be easy. Transitioning from government control to industry led Internet governance—which ITAA strongly supports—will produce some bumps, especially given the number of stakeholders committed to the future of the Internet. But the magnitude of the challenge should not deter us from pursuing the proper course: building a globally recognized, private sector-based, financially self-sufficient, institutional foundation for the permanent management of such vital Internet functions as the allocation of IP addresses, the maintenance of the system of root servers, and the management of the domain name space—all without disruption to the fundamental operations of the Internet and with undiminished protection to intellectual property rights holders.

If the Internet is to continue to prosper and grow, the development of an independent, legal and credible framework that will supply uniformity and certainty to cyberspace must exist. In light of the continuing debate surrounding the formation and support of ICANN, ITAA's National Board recently reaffirmed its position through a Resolution embracing a number of important principles:

- (1.) private sector creation and organization of the Internet Corporation for Assigned Names and Numbers (ICANN)—a new, not-for-profit corporation to conduct DNS management;
- (2.) rapid introduction of competition in the provision of domain name registration services;
- (3.) adoption of policies to reduce conflicts between trademark holders and domain name registrants; and
- (4.) review of the root server system to increase the security and professional management of that system.

Through this resolution, ITAA's leadership clearly restates its belief that successful implementation of ICANN's charter is the best available means to achieve the objectives articulated by the Department of Commerce and to ensure the future stability of the Internet.

ITAA's support of ICANN and its ability to succeed has been based on three principles:

- that there must be an open and transparent process for the organization;
- that a new era of competition for domain name registration must be set into place; and
- government involvement at all levels must be reduced.

We agree with many of the essential points raised in the Department of Commerce letter from General Counsel Andrew Pincus to Chairman Bliley on July 8, 1999. Particularly with respect to transitioning DNS management responsibility to a new, not-for-profit corporation "governed on the basis of a sound and transparent decision making process, which protects against capture by a self-interested faction."

I do not want to be apocalyptic, Mr. Chairman. But I do want to point out that if we lose this opportunity to create a workable, globally recognized organization that will help supervise a competitive and robust administrative structure, we will also lose the opportunity to realize the full value of the Internet. We have looked at this closely and have found no practical alternative to ICANN—and I do not consider having either the US government, or other governments run the Internet a viable option. As a result, I respectfully suggest that those who find fault with it work to improve ICANN's operations.

The very principles articulated in the Commerce Department's Statement of Policy on the *Management of Internet Names and Addresses* (the "White Paper"), issued more than a year ago, parallel those of our industry—particularly:

- Private sector creation and organization of a new, not-for-profit corporation to conduct DNS management;
- Rapid introduction of competition in the provision of domain name registration services; and

- Adoption of policies to reduce conflicts between trademark holders and domain name registrants

One of the principal short-term goals identified in the White Paper is the introduction of competition in the provision of domain name registry and registrar services. Under a series of documents executed by DOC and agreed-to by all the parties, the gTLDs currently administered by one company are to be opened, on reasonable terms, to multiple registrars who would compete with one another in providing services to new and existing domain name registrants. The opening up of both registry and registrar services will promote a stable and robustly competitive DNS.

Access to the "WHOIS" database of domain name registrant and registration information is a critical building block to insuring the development of competition in the registration services. In addition, this resource, which historically has been considered to be a critical public resource—widely and freely available—is critical to trademark and copyright holders, of all sizes, as they seek to protect their legitimate intellectual property rights. We recognize that this is a controversial issue, but even the Department of Commerce pointed out in its letter, and I quote: "We strongly support the prohibition of uses that adversely affect the operational stability of the Internet, but we oppose other restrictions on third-party use of this information... [the] WHOIS data had been freely available to the Internet community for years. Numerous people have built legitimate businesses that enhance the Internet using WHOIS and zone file data... The White Paper specifically endorsed the continued availability of that data to 'anyone who has access to the Internet.'"

ICANN's top priority must be to put into place an elected board of directors, and ensure that they begin serving as soon as possible. I have talked to Interim Chairwoman Esther Dyson, and, while everyone understands that some parts of this are quite complex and perhaps even unprecedented, I know she is strongly committed to this goal.

ICANN should be as transparent as possible. It is not surprising that a certain amount of suspicion might reign about this new organization. Sunlight on its operations is the simplest way to reduce unwarranted and unsubstantiated conjecture about hidden motives or goals.

We support the existence and authority of ICANN, as articulated in the DOC Memorandum of Understanding. We should not confuse a gradual transition of parts of the DNS system, e.g. the root server, to a private sector management system with an underlying grant of authority to manage and administer the overall process. The letter Chairman Bliley received on July 8 from DOC outlines the legal authority we believe permits the Secretary of Commerce to enter into such agreements.

The introduction of competition to create the Shared Registration System (SRS) is welcome. And while new registrars have been accredited under guidelines established by ICANN and the new registrars have been licensed on an interim basis, significant work still remains to be done in order to establish robust competition. Transition of DNS management to the private sector can succeed only if *all* DNS participants subject themselves to the same set of consensus rules.

ICANN has already demonstrated that it is sensitive to and can respond to the needs of the Internet community with respect to the domain names and trademarks issue and can help to reduce the inevitable friction between trademark owners and domain name holders. ICANN, for example, must be permitted to continue to proceed promptly to establish a uniform dispute resolution procedure for cybersquatting.

One contentious issue that remains unresolved is how to pay for ICANN's operations. To date, "paralysis by analysis" has created a major short-term financial hole for ICANN.

My own position, and that of most companies that I have spoken with, is that a broad-based user fee is the best solution. We do not want to fall back to US government funding, which inevitably will lead to the reintroduction of government controls. Neither do we want to have a few major Internet players be the funding source, for that will lead to suspicions related to the financial golden rule: those that have the gold rule.

Last but not least, ICANN should not attempt in any way to go beyond its fundamental charter of managing the administrative functions of the Internet. Attempts by ICANN or any organization to "run the Internet" are anathema to ITAA's members. We do not believe the Interim Board has any intention of doing so, but all stakeholders must be vigilant against possible future "mission creep" by ICANN.

### Summary

Few historical precedents help guide us with a social, economic and technical phenomenon that is largely without precedent. We glimpse the potential. Now we must



avoid the pitfalls. The Internet is a global medium. We need a global solution, free of parochial interests and public posturing. We call on all ICANN critics to channel their energy towards constructive solutions that truly serve the common good. ITAA and our member companies are committed to the successful transition of the management of the central administrative functions of the Internet to a competitive, globally recognized, private sector-driven, transparent, beneficiary-based mechanism. We applaud the progress made thus far by ICANN and appreciate the willingness of the U.S. Congress and, particularly, this Subcommittee to review the steps undertaken to date. I thank you, Mr. Chairman, for the opportunity to testify today, and will answer any questions you might have.

Mr. UPTON. Thank you. Mr. Weinberg.

### TESTIMONY OF JONATHAN WEINBERG

Mr. WEINBERG. Thank you, Mr. Chairman.

My name is John Weinberg. I am a law professor at Wayne State University. I was approached about testifying at another hearing today and I told them I could not because I had to be at this one.

Mr. UPTON. Good for you. We will give you 6 minutes.

Mr. WEINBERG. In 1997-1998, I was a scholar in residence at the Federal Communications Commission and I worked on some of the issues that are before the subcommittee today. I am not appearing here on behalf of either Wayne State University or the U.S. Government. I speak only for myself.

In my view, ICANN suffered a bunch of self-inflicted wounds. They should not be fatal. ICANN needs to implement mechanisms for choosing new board members who will be drawn from and who can represent the Internet community.

Second, it needs to learn to act like a part of the Internet community.

Finally, it needs to find an adequate way of defining and limiting its own policy mandates.

If ICANN can do these things, it will be able to fulfill the roll that the White Paper laid out for it. ICANN has taken a number of wrong turns so far. It started under a big handicap since the board members, for the most part, did not have, and do not have a lot of background in Internet technical issues.

Their selection was shrouded in secrecy. That secrecy was exacerbated by the board's closed meetings. ICANN demonstrated a tin ear when it came to the Internet traditions of openness and communication. I mean, for the most part ICANN still communicates to the outside world through its PR firm and its lawyers.

Those channels are fine for a commercial firm, but they are not going to win ICANN acceptance as an organization, as a part of the Internet technical community. ICANN has mis-stepped in other ways. It has brokered the creation of a structure for its domain name supporting organization that is arbitrary, that I think will give business and trademark interests disproportionate influence.

It has not seemed to understand the importance of limiting its policy role. It seems to lack humility, notwithstanding that there is a great deal to be humble about. All that said, though, at the same time not all of the criticisms of ICANN are justified.

I think the criticism of its proposal for the \$1 per registration year fee has been sharply over-blown. It has been criticized on the ground that it is seeking to impose over-bearing requirements on NSI, but the fact is that conflict between ICANN and NSI is inevitable.

NSI is enjoying an unparalleled monopoly in domain name registration services. It is earning huge profits from that position. ICANN's task as set out in the Green and White Papers is to eliminate NSI's monopoly by introducing competitive registrars to .com and NSI's other domains, by authorizing new generic top level domains to compete with those.

It should not be surprising that NSI, which has consistently sought to forestall competition and to leverage its control over the generic, top level, domain databases would be and has been an opponent of ICANN. Some of ICANN's problems should dissipate as mechanisms are put in place to enact new board members, although there are some questions that still remain there.

So, where do we go from here? What is the most important issue. ICANN is beginning to enter into contractual agreements with all firms. They are seeking to register domain names in .com, .net, and .org under which those entities would agree to terms, beginning with the financial and business qualifications designed to implement DNS policy goals.

Later on, it is going to enter into contracts with all entities seeking to operate top-level domain registries. This approach is going to allow ICANN to enter into registry contracts requiring the registries to enter into specified contracts with the registrars, the registrars to enter into contracts with domain name holders, and so on.

This web of top-down contrasts could give ICANN the power to impose a bunch of rules on domain name holders, and in turn, on the Internet population at large, that do not have a lot to do with Internet technical administration and domain name policy. That would be really bad.

ICANN should not be a world Internet government. Its role should not be to enact good policies and impose them on the rest of us. It should not be to make the Internet safe for electronic commerce. It needs to be limited to the structure and stability of the domain name system and the administration of other Internet identifiers.

Ironically, as Mikki Barry noted, one of ICANN's biggest current tasks in fact lies outside the boundaries I have just defined, that is trademark domain name dispute resolution. ICANN announced its intention to quickly adopt new rules to be imposed on all domain name holders through a web of top-down contracts, potentially requiring their participation in dispute resolution proceedings brought by trademark owners.

Resolution of those trademark disputes has no technical components. It is not necessary to administration of Internet identifiers. It could be handled through ordinary trademark litigation, as it has been to date, without any threat to the stability of the domain name system. It is precisely the sort of issue that IANA would never have dreamed of taking on, and one would have thought ICANN should not be engaged in.

I will stop there since my bell is rung. I am glad to answer any questions.

[The prepared statement of Jonathan Weinberg follows:]

PREPARED STATEMENT OF JON WEINBERG, PROFESSOR OF LAW, WAYNE STATE UNIVERSITY

Mr. Chairman, my name is Jon Weinberg and I'm a law professor at Wayne State University. In 1997-98, I was a professor in residence at the Federal Communications Commission and I worked on some of the issues that are currently before the Subcommittee. I am not appearing here, though, on behalf of either Wayne State University or the U.S. government; rather, I am speaking only for myself.<sup>1</sup> In my view, the largely self-inflicted wounds that ICANN has suffered to date need not be fatal. ICANN must move quickly to implement mechanisms for choosing new Board members who will be drawn from, and who can represent, the Internet community. Second, and relatedly, it must learn to *act* like a part of the Internet community. Finally, it must find an adequate way of defining, and limiting, its own policy mandate. If it can do all of these things, it will be able to fulfill the role that the White Paper laid out for it.

*Background—IP numbers and domain names*

Every computer connected to the Internet must have a unique Internet Protocol (IP) address in order to receive information, just as every telephone on the public switched network must have a unique telephone number. A stable and reliable IP addressing system is crucial to the proper functioning of the Internet.

IP addresses (such as 149.59.6.22), however, are opaque and hard to remember. It would not be practical for a user to have to remember, and type in, a different IP address for every Web site he sought to visit or electronic mail message he wished to send. Accordingly, under the current Internet architecture, each IP address maps to a more or less easy-to-remember *domain name* such as www.house.gov or www.law.wayne.edu. The domain name system (DNS) makes it easier for ordinary people to use the Internet.

The domain name system is hierarchical. That is, the domain name space is divided into top-level domains, or TLDs; each TLD is divided into second-level domains, or SLDs; and so on. The currently-available TLDs include .com, .net, .org, .edu, all administered by Network Solutions, Inc. (NSI),<sup>2</sup> and the so-called "country code" top-level domains such as .us, .uk and .fr. At the outset, it was thought that .com would be used by commercial entities, .net by entities involved with the Internet networking infrastructure, .org by nonprofit organizations, and .edu by educational institutions. NSI, though, does not enforce any such restrictions on registrants in .com, .org and .net. Indeed, NSI urges businesses to register their preferred second-level domain names in all three of those top-level domains.

*How we got where we are*

In the early days of computer networking, there was no need for a hierarchical domain name system. Until 1984, after all, there were fewer than 1000 "host" computers connected to the Internet. That number, however, quickly grew. It soon became clear that the Internet needed a new addressing structure. Scientists including Jon Postel and Paul Mockapetris of the University of Southern California's Information Sciences Institute (ISI) developed the current domain name system, and the first domains were registered in 1985. ISI assumed responsibility for oversight of the domain name system, including oversight of the root servers, which sit at the apex of the domain-name system and effectively determine which top-level domains will be recognized by the system. These and other coordinating functions, performed by Dr. Postel and his staff at ISI, came to be known as the Internet Assigned Numbers Authority, or IANA. The Defense Department, which had bankrolled almost all of the early development of the Internet, entered into a series of contracts with ISI under which the U.S. government paid for the IANA functions.

The Defense Department in 1985 assigned SRI International, a nonprofit Silicon Valley research institute, the job of registering second-level domains in the generic (non-country code) top-level domains. Later on, the National Science Foundation (NSF) assumed the lead from the Defense Department in funding basic Internet infrastructure. In 1992, NSF established a new structure known as the InterNIC, or Internet Network Information Center. It entered into cooperative agreements with AT&T to provide Internet directory and database services; General Atomics to provide certain Internet information services; and NSI to perform the registration serv-

<sup>1</sup> I am currently participating in Working Group C of ICANN's Domain name Supporting Organization, Discussing the addition of new top-level domains. It goes without saying that I am not speaking for that group either.

<sup>2</sup> Other top-level domains include .gov, administered by the General Services Administration; .int, administered by the University of Southern California's Information Sciences Institute; and .mil, administered by the U.S. Department of Defense and DISA.

ices that had been handled by SRI. NSI agreed to register second-level domains in the generic TLDs and to maintain those top-level domains' master databases. Those services were free to users; they were underwritten by the National Science Foundation. NSI had physical control of the "AA" root server, from which all of the other root servers get their information, but it operated that root server on instructions from IANA.

By 1995, the Net had come of age. It had been more than 25 years since the initial establishment of the Internet's predecessor, the Arpanet. Business were beginning to use the Internet for commercial purposes. The U.S. House and Senate were online. More than 100 countries were now connected to the Internet backbone, and operated their own top-level domains. The World Wide Web, which had become the dominant Internet application, was now thus truly world-wide. NSI negotiated with the National Science Foundation an amendment to the cooperative agreement under which NSI would begin charging a \$50 annual fee to domain-name registrants.

The NSI fee was unpopular, and crystallized growing unhappiness with the structure of the domain name system. Registrants wondered why, in seeking to registering names in the generic TLDs, they were stuck with the service provided by, and the fees charged by, the NSI monopoly. NSI also generated considerable animosity with its domain name dispute policies, under which it asserted the right to (and did) suspend any domain name upon complaint from a trademark owner, without regard to whether the trademark owner had a superior legal claim to the domain name. Finally, there was growing consensus in the technical community that the architecture would support many more top-level domains than had so far been authorized.

Accordingly, Jon Postel floated a suggestion that IANA authorize up to 150 new generic top-level domains, to be operated by new registries. As the proposal went through successive iterations, IANA and the Internet Society formed an elaborate, internationally representative "Internet Ad Hoc Committee" (IAHC) to consider the question of adding new top-level domains, with representation from, among others, the International Telecommunications Union, the International Trademark Association and the World Intellectual Property Organization. The trademark lawyers urged that the number of new domains be cut considerably; the group ultimately generated a proposal for the addition of just seven new top-level domains. Would-be domain-name holders, under the IAHC plan, could go to any of a large number of competing "registrars" to register names in those new domains; the actual master databases for all of the new domains would be controlled by a single nonprofit corporation known as CORE, to be run by the registrars. When Jon Postel requested that NSI insert the new CORE top-level domains into the "A" root server, though, NSI declined to do so absent authorization from the U.S. government. The U.S. government, in turn, instructed NSI to wait; it was still in the middle of its own analysis of the domain-name situation.

In 1998, the Commerce Department issued a "Green Paper," followed by a "White Paper," expressing its views on Internet identifiers. The White Paper emphasized that with the changing role of the Internet in the modern world, IANA's functions needed to be transferred to an entity, not funded by the U.S. government, with a more formal and robust management structure and more formal accountability to the international Internet community. While Dr. Postel had the loyalty and respect of a wide consensus of the community, his informal leadership was no longer enough—"What happens," the question ran, "if Jon Postel gets hit by a beer truck?" The new entity, the White Paper continued, should have fair, open, transparent and pro-competitive decisionmaking processes that protected it against capture by a narrow group of stakeholders.

The White Paper made clear that there was an urgent need for greater competition in domain name registration. That competition, it explained, should come in two ways. First, customers should be able to register domains in any top-level domain, including those currently operated by NSI, using any of a number of competing registrars. The U.S. government contemplated that NSI would continue to control the "registry," or master database, for .com, .net and .org, but that it would have to offer equal access to competing registrars seeking to enter names in that database. Second, the White Paper continued, IANA's successor should add new top-level domains to the root zone, operated by new domain-name registries, so as to expand the name space and maximize consumer choice.

The actual establishment of ICANN was clouded by tragedy. Jon Postel had agreed to serve as Chief Technical Officer of a new corporation, to be known as the Internet Corporation for Assigned Names and Numbers, to perform IANA's technical management functions. The corporation's Board of Directors were chosen from a group of distinguished personages who had had little involvement in (and, for the most part, little knowledge of) the "DNS wars" of the previous few years. The facts that not all of the Board members had extensive technical expertise was not consid-

ered to be a problem, since Dr. Postel could provide that technical background and guidance. On October 16, 1998, though, Postel died at 55 of post-operative complications from heart surgery. In figurative terms, he'd been hit by a beer truck. The Department of Commerce nonetheless, six weeks later, entered into a memorandum of understanding with ICANN, agreeing to work together to develop mechanisms and procedures so that the nascent ICANN could administer Internet technical identifiers in a transparent and fair manner.

Before the Internet took on its current economic importance, the substantive questions confronting ICANN could have been resolved within the Internet Engineering Task Force, a technical standards body composed of scientists and engineers interested in Internet infrastructure, with little attention paid by the outside world. By the mid-1990s, though, those questions had too much money riding on them to allow such mundane resolution. Those with money or prestige at stake—NSI, trademark interests, international standards organizations and others—all brought their lawyers to lobby in favor of their preferred models. The high-profile White Paper process, indeed, probably encouraged any entities with economic stakes that had not yet “lawyered up” that it was high time they did so. To an increasing degree, it was lawyers and lobbyists, rather than technical experts, who were demanding seats at the Internet architecture table.

#### *Where we are now*

In its quest for legitimacy, ICANN has taken several wrong turns. It started out under a considerable handicap since its Board members, for the most part, have little background in Internet technical issues. They were chosen on the theory that it would be helpful for the Board members to be new to the DNS debates, so that they were not tainted by identification with past controversy. The newness of most of the members to Internet technical issues, though, greatly complicated the task of securing the confidence of the Internet community. The Board members' selection was shrouded in secrecy, and that secrecy was exacerbated by the Board's early penchant for closed meetings, so that the Internet community knew neither who these people were nor how they were reaching their decisions. ICANN demonstrated a tin ear when it came to the Internet traditions of openness and communication. For the most part, ICANN still communicates to the outside world through its public relations firm and its lawyers. Those channels are all very well for a commercial firm, but they are insufficient to win ICANN acceptance as an organ—and thus a part—of the Internet technical community.

Nor have the structures ICANN created been the most representative. ICANN has brokered the creation of an arbitrary structure for its Domain Names Supporting Organization, which will have a lead role in the development of DNS policy, under which business and trademark interests will have a disproportionate role. ICANN, further, lacks humility, notwithstanding that it has a great deal to be humble about. I was bemused to read Esther Dyson's explanation, in her July 19 letter to NTIA Associate Administrator Becky Burr, that the public need not worry that ICANN will use its authority to impose inappropriate requirements on Internet actors. Since ICANN, Dyson explained, is by its nature “nothing more than the reflection of community consensus,” by definition it cannot do anything improper. If this message is sincere, it reflects previously unimagined depths in ICANN's lack of understanding of others' concerns.

ICANN has seemed not to understand the importance of limiting its policy role. The matter of domain-name dispute resolution provides one example. The White Paper had urged that the World Intellectual Property Organization explore recommendations for a uniform dispute resolution approach for “trademark/domain name disputes involving cyberpiracy”—that is, abusive registrations of a domain name string identical or closely similar to another firm's trademark, solely for the purpose of reselling the domain name to that firm or one of its competitors. “[I]t should be clear,” the White Paper noted, that any dispute resolution mechanism put forward by ICANN should be limited to that category of disputes. WIPO, after extensive deliberations, issued a report recommending such a dispute-resolution mechanism, limited to the cases described in the White Paper. ICANN referred the WIPO report to its Domain Names Supporting Organization. It then issued a press release expressing its view that the mandatory dispute resolution for domain name registrants imposed through ICANN-sanctioned contracts should not be limited to abusive registrations, and indeed should “ultimately cover *all* commercial dispute issues linked to Domain Name registrations” (emphasis mine). This suggests that ICANN fundamentally misunderstands its role. We do not need a world Internet government, imposing such policies as seem to it good. We need a technical coordinator to perform the limited tasks of expanding the name space, protecting the stability

of the domain name system, and policing bad actors who threaten competition and consumer welfare.

At the same time, though, not all of the criticisms of ICANN are justified. ICANN has been much criticized for its proposal that it collect a fee to defray its own costs, from registrars registering domain names in .com, .net and .org, for each domain name they register, not to exceed \$1 per registration-year. ICANN recently decided to table this fee for the time being, and to rethink it in conjunction with the directly affected entities. This was a wise decision. The fee was controversial, and ICANN's spending choices have not been beyond criticism. Nonetheless, the White Paper contemplated that IANA's successor—unlike IANA itself—would be free from government support precisely because it could be funded by “domain name registries, regional IP registries, or other entities identified by the Board.” The problem with the ICANN fee was not that there is something wrong with such a funding mechanism in principle, but that the Board went ahead with it without first securing the sort of community support that would make such a fee sufficiently broadly acceptable.

ICANN has been criticized on the ground that it is seeking to impose overbearing requirements on NSI. Conflict between NSI and ICANN, however, is inevitable. NSI currently enjoys an unparalleled monopoly in domain name registration services, and is earning huge profits from its position. NSI's .com, .org and .net top-level domains include the overwhelming majority of domain-name registrations. (NSI has over 5 million registrations in .com alone. The largest top-level domain not administered by NSI is the country-code domain .de (Germany), with fewer than 400,000 registrations.) ICANN's task, as set out in the Green and White Papers, is to destroy NSI's monopoly in two ways: first, by introducing competitive registrars to .com and the other top-level domains now administered by NSI, and second, by authorizing new generic top-level domains to compete with those domains. It should be unsurprising that NSI opposes ICANN implacably.

NSI has sought to forestall competition, and to leverage its effective control over the generic top-level domain master databases, in a variety of respects. It has aggressively and unjustifiably asserted intellectual property control over the contents of the .com, .net and .org databases, and is seeking to market the information contained in those databases through such devices as its upcoming “dot com directory.” It has been recalcitrant in its relationship with the Department of Commerce, dragging its feet on registrar competition and imposing barriers in the way of the testbed registrars. It now professes that because of “personnel resource limitations,” it will be able to enable new registrars to access its databases only at the rate of only five per month. It has arbitrarily and without notice blocked public access to sources of registration information, and has insisted on receiving a fee for maintaining the master database that unreasonably exceeds its costs.

It is plain that somebody needs to ride herd on NSI. The DNS controversy was sparked in the first instance, after all, by user concerns over the monopoly franchise NSI was exercising under its cooperative agreement with the National Science Foundation. Four years later, NSI continues to exercise tremendous market power. The White Paper gave the job of supervising NSI to ICANN (with backup from the Department of Commerce). In turn, the White Paper directed that NSI must recognize “the role of the new corporation [that is, ICANN] to establish and implement DNS policy and to establish terms [applicable to NSI among others] under which registries, registrars and gTLDs are permitted to operate.” NSI's economic interests lie in its acting to obstruct that process.

Some of ICANN's problems should dissipate as mechanisms are put in place to elect new Board members. As new Board members drawn from the Internet community take their seats, ICANN's task of winning legitimacy should become easier. Important questions, though, still remain. The voting mechanism for ICANN's at-large Board members, to be elected by the global membership, remains unsettled. Other aspects of ICANN's governance structure are already skewed. Many observers have expressed concerns (which I share) that ICANN's Domain Name Supporting Organization, which has the lead role in initiating policy concerning the DNS, is structured in a manner that is arbitrary, haphazard, and systematically tilted towards trademark and business interests. These aspects of ICANN's structure deserve continuing close attention.

*Where we go from here*

ICANN is seeking to enter into contractual agreements with all firms seeking to register domain names in .com, .net, and .org, under which those entities agree to terms (beginning with financial and business qualifications) designed to implement DNS policy goals. Later in the process, it will seek to enter into similar contracts with all entities seeking to operate top-level domains as registries. This approach will allow ICANN to enter into registry contracts requiring the registries to enter

into specified contracts with their registrars, and the registrars to enter into specified contracts with domain name holders, and so on. Indeed, the WIPO report on domain-name dispute resolution contemplates exactly that: all domain-name holders, in order to register names in top-level domains included in the ICANN root, will have to agree to particular contractual terms related to dispute resolution. This web of top-down contracts could give ICANN the power to impose a variety of rules on domain name holders (and in turn, the Internet population at large) that have little to do with Internet technical administration and domain name policy.

Such a result would be disastrous. ICANN must not be a world Internet government. Its role should not be to enact good policies, and impose them on the rest of us. In particular, its role should not be to make the Internet safe for electronic commerce. That effort, although much prized by business, would require a wide range of policy and value judgments that lie far outside ICANN's limited role. Rather, it should limit its task to the structure and stability of the domain name system and the administration of other Internet identifiers.

Ironically, though, one of ICANN's biggest current tasks lies outside the boundaries I have just defined. I have already referred twice to trademark-domain name dispute resolution: ICANN has announced its intention to quickly adopt new rules, to be imposed on all domain name holders, potentially requiring their participation in dispute-resolution proceedings brought by trademark owners who feel that the domain names "Apirate" their trademarks. Yet resolution of such trademark-law disputes between trademark owners and domain name holders has no technical component. It is not necessary to administration of Internet identifiers. It could be handled through ordinary trademark-law litigation, as it has been to date, without any threat to the stability of the domain name system. It is precisely the sort of issue that IANA would not have dreamed of taking on, and that ICANN should not be engaged in.

ICANN is involving itself in domain-name dispute resolution for three reasons. First, as a matter of pure practical politics, trademark holders have made clear that they will fight vehemently against the addition of any new top-level domains, in Congress and other fora, unless ICANN first implements a trademark dispute resolution mechanism. Second, NSI already has a trademark dispute resolution "Amechanism" in place—it will suspend any domain name upon complaint from a trademark holder with the same mark—and nearly all parties agree that that mechanism must be replaced. Finally, the current ICANN structure gives business and trademark-owning interests extensive influence, and the Board members are sympathetic to their concerns. At least the first two of these reasons may make the enactment of some sort of trademark dispute resolution mechanism inevitable at this point. But this should be the last of ICANN's forays outside of issues relating to the structure and stability of the domain name space, and the administration of other Internet identifiers.

ICANN, in short, has three tasks before it. It must move quickly to formulate, and to implement, mechanisms for choosing new Board members who will be drawn from, and who can represent, the Internet community. Second, and relatedly, it must learn to act like a part of the Internet community. Finally, it must find an adequate way of defining, and limiting, its own mandate. (It will not suffice for it to declare piously that, because it is impelled by community consensus, it is incapable of overstepping its bounds.) If ICANN can do all of these things, it will be able to fulfill the role that the White Paper laid out for it.

Mr. UPTON. Thank you. Mr. Zittrain.

### TESTIMONY OF JONATHAN ZITTRAIN

Mr. ZITTRAIN. Mr. Chairman and members of the committee, Counsel, my name is Jonathan Zittrain. I am the Executive Director of the Berkman Center for Internet and Society at Harvard Law School where I teach several classes on Internet issues as a lecturer on law.

As the materials I have submitted for the record describe, the Berkman Center has sought to document the process of ICANN's creation and the underlying debates, identify important social issues at stake, present advice to ICANN, especially on structures for openness and accountability, and develop systems for broad-based participation in ICANN-related activities and deliberation.

We thank the committee for giving us the opportunity to webcast today's hearings which, at least in the earlier session, over-flowed the physical capacity of the room. I want to touch quickly on three things.

First, the historical context behind what ICANN has been asked to do. Second, why it is so hard for ICANN to do it. Third, walk through some of the scenarios that might unfold if ICANN were to fail.

First, what ICANN has been asked to do. It takes awhile to come to understand that the way this system used to be run, at least the apex of it, of the domain name system, prior to ICANN, was by a series of handshakes, traditions, and maybe a couple of cooperative agreements with incredibly vague terms.

Government involvement was limited primarily to simply subsidizing it, much as the NEA might subsidize art, although perhaps slightly less controversial at the time. These subsidies made it then, in some sense, a public effort. Indeed, the people who received the subsidies, Dr. John Postel, not the least among them, worked on something called the IETF, the Internet Engineering Task Force, to develop the actual protocols by which the Internet, as we know it today, would work.

They do so in open meetings. Anybody can show up. The IETF is not incorporated. You do not pay dues to the IETF because there is no one to whom to give the dues. They do not take votes. In fact, their motto is we reject kings, presidents, and voting. We believe in rough consensus and running code.

The closest they come to voting actually is a hum. They will actually call for a hum in the room and see if those assembled, again mostly engineers, appear to be humming more one way or the other. At least, that is how they identify consensus and know it when they see it.

This is a wonderful system. It makes for a great story, but it is one that obviously cannot withstand the kind of pressures that have been evident in the crucible of the earlier panel. There are serious amounts of money at stake and serious demands from now very powerful parties.

The engineers, from what I can understand, really want no part of it. They do not want us at their meetings. It will disrupt the humming. As a result, John was wanting to get this out of his lap. As Professor Weinberg said, IANA never dreamed of some of the things that ICANN is contemplating doing.

In that sense, what ICANN is being asked to do does have a regulatory or governance dimension. It is because it goes beyond the technical and it involves things in the political realm; things such as trademark arbitration within the architecture of domain name registration.

I am not here to say whether that is a good or bad idea. Personally, I think it is a bad idea, but it is one that there are very powerful interests calling for. They want a forum in which it can be aired. ICANN is meant to be that forum and it is not clear to me that you have decided which way it will go on that issue.

It is also governance in the sense of if it ultimately does have power over what we are calling the route, and that is the thing to which most people subscribe in order to get their domain name in-



formation, it is something that if you do not play by the rules and get access to the route as a registrar or a registry, you are really left out in the cold.

It is a market power. It is not an outright regulatory power in that sense. It's governance. That is why it is so important to want to have many of the forms of governance present in ICANN.

What do these forms include? They include openness, representation, due process, and funding. Openness has been spoken to a lot. I just want to add a footnote to it. Open board meetings are not the be all and the end all. I am totally in favor of them. I am glad they did it, but I think we all know that is just the beginning of what really is a much deeper process that has to be done in order to be truly open, in the sense of having the issues in a room, covered by media, discussed openly, rather than simply happening in the hallways.

My belief is that if ICANN were not around to have it, somehow those discussions are still going to be had. Somehow power is still going to be brought to bear. Better to have a forum through which it happens as openly as possible, than no forum at all.

Representation is another issue. Somebody pointed out earlier today that we want ICANN to be accountable and therefore to be representative of the Internet at large. That is so difficult to do. If we had the FCC have members from AT&T, Bell Atlantic, and several radio stations, that might be representative of stakeholders, but it might still not be a commission in the public interest. Facing that challenge has been very difficult. I see my egg is ready. Let me just read one concluding sentence, if I may. I am aware that the Berkman Center's participation in ICANN activities such as webcasting the meetings, developing remote participation systems, conducting a membership study, and giving other advice is itself a form of support to the organization.

If we thought ICANN were corrupt, or renegade, or out of control, we would cease such support in a heartbeat. So far as I know, ICANN is none of these. It is making its share of mistakes in a territory that is uncharted. With that, I guess, if somebody wants to hear about scenarios if ICANN fails, maybe you could ask me in a question.

Thank you.

[The prepared statement of Jonathan Zittrain follows:]

PREPARED STATEMENT OF JONATHAN ZITTRAIN, EXECUTIVE DIRECTOR, BERKMAN CENTER FOR INTERNET AND SOCIETY, HARVARD LAW SCHOOL

Mr. Chairman, Members of the Committee: My name is Jonathan Zittrain. I am the Executive Director of the Berkman Center for Internet and Society at Harvard Law School, where I teach several courses on Internet issues as a Lecturer on Law.

The Berkman Center's research falls roughly into five categories. We look at the way in which the increasing use of the Internet and open networks generally is affecting the openness of code, commerce, education, security and government, and the relationship of law to each. Our research is active—we build out into cyberspace as a means of studying it. The development of the debate over domain names and IP numbers has thus been of great interest to us, and we have developed a perspective both as observer and participant.

In an important sense, these names and numbers are the foundation upon which the Internet as we know it is built. The fact that key elements of the system were developed and managed with little more than a series of handshakes and a set of traditions for so many years speaks to the spirit that built the Internet, kept it running, and ultimately attracted the rest of us to it. The Net is no longer just a con-

venient means to share research results or a large-scale experiment in applied computer science, but an increasingly important foundation of commerce, social activity, and information exchange.

As the materials I have submitted for the record describe, the Berkman Center has sought to document the process of ICANN's creation and the underlying debates; identify important social issues at stake; present advice on structures for openness and accountability; and develop systems for broad-based participation in ICANN-related activities and deliberation. The latter presents major challenges when the people who have an interest—the so-called stakeholders—are dispersed around the world, and indeed may have little in common except a link to the Internet and a desire to have some say in its future. In addition, individual Berkman faculty have published their respective views on ICANN, and two Berkman fellows have been drafted as advisors to ICANN.

The Department of Commerce White Paper of last summer is in essence a call for a barn-raising by the Internet community. With a clear sense of the distinctly informal, bottom-up way in which the domain name and IP numbering system was semi-privately, semi-publicly developed, the White Paper called for the Internet community to produce a coordinating organization—a “newco”—that has since been recognized as ICANN. By now you are aware of some of the tugs-of-war that took place in its formation, and competing proposals that to widely varying degrees were reconciled with the ICANN proposal.

My supplemental materials try to give a sense of the few planks we've tried to lift ourselves for the ICANN “barn,” the documentary pictures we've taken as it has been assembled, the windows we have tried to encourage in it so that one can see inside once it has been completed. To be sure, as you will hear today, there are plenty of people who wish there were a different barn or only an open field, and I would like to speak to some of those issues generally.

I want to quickly touch on three things. First, reflect on the context behind what ICANN has been asked to do. Second, discuss why it is difficult for ICANN to do it. And third, review some of the scenarios that might play out if ICANN fails.

#### *What ICANN has been asked to do*

First: the context behind what ICANN has been asked to do. As may be clear from today, there was nothing really like it before. A natural question may be: “If we did not need it then, why do we need it now?” What we had before was something called IANA, the Internet Assigned Numbers Authority. IANA was not incorporated; it had no legal personality. At its core was one figure, Dr. Jon Postel. Jon did pioneering work on domain names and personally managed key aspects of the domain name system, including the vaunted “root.” He was also the steward for the “.us” domain—the country code designated for the United States—until the day (which has not yet arrived) when the U.S. government would seek to manage the domain itself. To many, Jon was a Solomonesque figure who could apply an engineering talent to the various issues that would come up, think hard, and simply do the right thing to keep things running smoothly.

Jon did much of his work with government grants, and, from what we can tell, he put them to good use. In addition to taking the lead in developing the system of domain names as we know it, he was the leader of a process to document standards as they were decided. These standards include the specifications for how domain names can work, along with manifold other aspects of Internetworking. The standards aren't formally enforced by any commission or governmental entity; and thus in some sense are voluntary. However, each computer on the Internet deviates from these accepted protocols at the peril of incompatibility and thus dysfunction. The protocols have become the lingua franca of the Net thanks to the sum of thousands of individual decisions by network administrators and software designers to hew to them. In this sense they are quite binding.

These standards are actually written down somewhere. They are available online in documents called RFCs (“Requests for Comment,” though often they're final drafts). No one owns the RFCs in the sense we normally think of as ownership—no private company has a patent on them, and they are open to adoption by anyone without license. In this sense they are public. Yet they are not developed by governments. In this sense they are private. An organization called the IETF, the Internet Engineering Task Force, itself unincorporated, with no legal personality, for which there is no particular membership fee to join since there is nothing explicitly to join, comprises a group of engineers, most of whom participate in their spare time. These engineers discuss the protocols on email lists with each other. Occasionally they gather in a city for a meeting. They try to develop consensus around what will work best.

Indeed the IETF motto, such as it is, was coined by a colleague at MIT, Dave Clark. He says: "We reject kings, presidents and voting. We believe in rough consensus and running code." How does the IETF know consensus when it sees it? Well, in a meeting they will actually call for a hum. Since it is difficult to hum particularly loudly no matter how passionately one feels about the issue, it seems a rough way of seeing the room is in agreement.

This is not to say there isn't leadership. RFCs are shepherded by a leader of some sort. Someone takes it upon himself or herself to help own the document and to manage proposals for revisions to it. That editor, of course, has a lot of power in how the protocol that the document describes will ultimately turn out.

I digress into this area because I think it's critical to give a picture of how this all used to work—and in most ways, still does. The design of the Internet was accomplished by a bunch of people with a common goal to make the Internet bigger, faster, louder, as it were; people who came from relatively similar backgrounds and had little patience for highly formalized structures (and even less for lawyers). This informal system works best—i.e. it comes to consensus—when the issues under discussion are incredibly boring to everyone but the engineers who have gathered to discuss them, and when any political ramifications of designing a network one way beyond another are ignored or forgotten.

In the IETF setting, there are no clear competing interests at stake, at least not competing interests outside the realm of engineering. But I will give two examples of interests that have catapulted the domain name system out of the sleepy meetings of the IETF and into the public eye. These are exactly the kinds of issues beyond the technical that led Jon to want to see a new, much more structured IANA come about, and which are echoed in the White Paper as a reason for trying to go beyond the status quo.

First, there is significant concern about trademark. Domain names have become the primary way to reach something on the Internet. They're written on buses and coffee mugs, and the easier they are to remember, the more valuable they are when the audience in question is the public at large.

Thus there are fights over what domain name belongs to whom. The old system of "First come, first serve," indeed, for awhile, "First come, first serve, with no fee per name" has come under some fire, as major trademark holders, somewhat late to the Internet themselves, found that *hertz.com* (taken by a domain name speculator) and *mci.com* (taken by Sprint!) had already been registered at the time they were wanting to take up shop online. A major company is not afraid of initiating a lawsuit to claim what it thinks it's entitled to—and I don't mean to suggest today that the law says that every trademark holder pre-emptively owns her own mark plus a ".com" or ".net" at the end of it—but would prefer a simpler way to get to the bottom of the issue, or perhaps a form of dispute resolution whose results are more generous than the results of respective courts. Finally, those who think they deserve a domain name held by another may want to know simply who's behind the name—without solid contact information for the defendant, it's not easy to start a lawsuit. As you might guess, some cheer this fact (if only for privacy protection reasons) while others lament it. Decisions about domain name system architecture, and the handling of domain name registrations, can bear on whether famous mark holders and others can easily try to assert claims over names; this is a good example of a desire by powerful interests to have a means of proposing changes to the architecture of the Internet with justifications that are other than technical.

A second example of pressures on the system beyond the technical is simply the entrepreneurial forces that want to provide domain name registration services. The ministerial act of registration of domain names—associating a holder with a name, and inserting the holder's desired destination address into a table that helps convert these names to the ultimate IP numbers required to really find a site on the Internet—is itself a lucrative business. When a lot of money is directly at stake, it is very difficult to have IETF-like informality at the apex of the pyramid. The power of the root of the domain name system is the power to designate *who* can register the names under a given "top-level domain" like *.com* or *.org*, and it's also the power to designate *what* top-level domains there are. The root of the system that nearly all of us use declares that there exists a ".com" and that a computer in the custody of Network Solutions will fill in registrations under it. It has no data on a ".biz," and thus for almost all of us there is no *.biz* domain.

Given the money to be made registering names in existing domains like *.com*, and the possibility of new territory like *.biz*, control over the root is more than just a technical function. Those who want a piece of the domain name registration action—and among them there are competing claims to slices of it—may only support ICANN if they think it'll generate policy that is responsive to them. At the very least, people trying to build or maintain a business like to know where they stand,

they like to have it in writing, and they like to have what one would call "calculable rules," so that they can build a business on predictable forces rather than whether a hum happens to be heard one way or another. Thus the authority to modify the root file or veto attempted changes to it is something that everyone agrees has to be handled more systematically than it had been.

As the White Paper tells it, decisions like these are to be one of newsco's—now ICANN's—primary goals: developing policy about things like .biz in a fair and open way, so that decisions aren't arbitrary. Anyone with an interest ought to be heard, and policies that promote competition would presumably lower the cost of domain name registration and spread what surplus there is to be had on the supply side among multiple competitors. Furthermore, the White Paper structure provides an opportunity to take into account concerns that go beyond the technical—trademark, for example. ICANN is supposed to act in the public interest, not to be beholden to any one stakeholder, and it is supposed to come to closure on these issues, to develop policies that can be implemented and that put a given debate to rest.

#### *Why ICANN's job is hard to do*

Why is this so hard for ICANN to do? First, ICANN needs to be open. The easy part of openness perhaps is the ability of people to have a sense of what is going on, and if decisions are rendered, to know why they were made. Open board meetings seem a good idea, of course. But there will be tendencies still to have private consultations with staff, and perhaps even informal meetings where board members discuss things with each other. After all, there cannot be a microphone everywhere, and it may not even be desirable to have a microphone everywhere all the time. In any event, openness goes far beyond open board meetings. It is an ethos, a way of conducting business, that strives in good faith to be inclusive, clear, and genuine. ICANN here has been somewhat saddled with the baggage of a typical private corporation. After all, in form at least it is a private corporation. To call ICANN's chief policymaking body a "board" already endangers the spirit of openness—and obscures the fact that, indeed, ICANN is "governing" in some important sense. ICANN is a private company with a public trust; its contracts are "voluntary" just as much or as little as the IETF's RFC standards are. It makes policies that are explicitly meant to go beyond the technical—even a policy that considers and then refuses, say, to adapt the domain name architecture to be more beneficial to famous mark holders at the expense of other interests is still a political decision.

A second area that is difficult for ICANN is representation. The White Paper calls for ICANN to be a broadly representative body, both geographically and with respect to the interests involved. But how does one weigh the different interests? Consensus defined in this environment as "there does not appear to be any one complaining that much" or "most people seem to agree, with a few outliers" will mean that consensus is going to be elusive at times. After all, contested issues may often be a zero-sum game, and in such cases someone will "lose" on a given policy decision. When they do, they might say: "There is not consensus. I do not agree with this." And yet, ICANN cannot be paralyzed when consensus does not exist; maintaining the status quo is itself a decision that may upset some stakeholders. The first goals must be to make sure that the openness and deliberative processes are in place, then to try to forge consensus and compromise wherever possible. But when consensus is impossible ICANN really does have to make a decision, and just how to weigh the different interests will be a difficult challenge.

We tried to help address the question of representation through the Membership Advisory Committee, which laid down possible parameters of a membership for ICANN, mandated to elect half of its board through an electorate largely open to anyone who wants to sign up. A fear is that the only people who will sign up are the people who have direct stakes in the process, and therefore the process might become a race to the ballot box to see who can get the most votes in. In some sense, that is a normal election. But, in another sense, it is a recipe for capture if a number of the interests that ICANN should be looking out for—perhaps the greater interest of the public at large—are not joining ICANN by becoming members.

Jim Fishkin of the University of Texas is fond of telling the story of what happened when a question was put to the Internet at large through a poll open to anyone (this excerpted from the *Guardian*):

TIME magazine's prestigious Man of the Century should be a global figure, a person of calibre and distinction whose fame transcends frontiers, a Gandhi, perhaps, or a Mao. A man whose influence has shaped the world and whose name is known from Ankara to Zanzibar.

Step forward . . . Mustafa Kemal Atatürk. A household name in Ankara he certainly is—as founder of the Turkish republic 74 years ago—but who knows who he is anywhere else?

TIME magazine, which asked readers to nominate the key people of the century, appears to be falling victim to Today's Programme Personality of the Year Syndrome: intense lobbying on behalf of an underdog for political purposes. In Turkey the prime minister, Necmettin Erbakan, and President Suleyman Demirel have joined a frenzied media campaign to have their man win. Offices and banks provided voting forms which members of the public could sign.

Ataturk was streets ahead of the opposition. Diane Pearson, a Time magazine official, said that TIME had received between 500,000 and 1 million votes. "Our fax lines have been tied up for hours."

Ataturk led Bob Dylan in the Entertainers and Artists category. He is more of a Hero and Adventurer than Nelson Mandela or Martin Luther King, Jr. Einstein isn't even close in Scientists and Healers, while Henry Ford and Bill Gates were fighting it out for second place in Builders and Titans. Only in the Warriors and Statesmen category did Ataturk have work to do. Winston Churchill (Man of the Half-Century 50 years ago) led. But one Turkish newspaper claimed many Churchill votes came from Greece in a vain attempt to stop the Ataturk bandwagon.

Assuming the vote wasn't fraudulent—i.e. no one voted twice—was Ataturk deserving of the best "entertainer and artist" mantle, or had there been "capture" in the election? In the end, of course, ICANN will have to move forward with some form of electorate, and being accountable in part to an open membership is a way of ensuring a tethering for ICANN that could lessen the need for direct government intervention. (ICANN's most direct form of accountability right now is to the U.S. government, whose memorandum of understanding phases in responsibilities slowly, and makes those responsibilities provisional for the duration of the MoU. Another source of accountability, or perhaps simply control, is the Internet technical community, which has been allotted several seats on the ICANN board through its "supporting organizations," and which in any event could be hypothetically roused sufficiently to make the current popular, authoritative root file a pariah.)

We see the same phenomenon with due process. Due process is something cherished in Western legal traditions—to make sure that people really do have a formal opportunity to be heard, to meaningfully protest if they think their rights are being trampled upon. The process developing within ICANN right now is one that struggles to adopt internal structures for due process and deliberation. For instance, once a policy proposal is made, it may be referred to one of ICANN's supporting organizations. In the case of the domain name supporting organization, the proposal goes to one or more "constituencies" or cross-constituency working groups; the constituencies think about it, come up with views, and put it back to the DNSO, which in turn makes recommendations to the ICANN Board. The ICANN Board takes a vote and comes to a decision. At that point an internal reconsideration process can be invoked by someone who feels that the decision is contrary to ICANN's structure and bylaws. If it gets past that, there is a structure emerging—still not here, to be sure—for an independent board of review, which then looks at a disputed issue and has the power to require the Board to explicitly come to a new judgment on the subject.

One sees the same dilemmas arise in civil and criminal litigation, under the Federal Rules of Procedure, balancing the need for due process with the need to create and empower an ultimate closure—preventing abuse by those who might make frivolous claims and simply tie up a policy within a structure for a long time. ICANN faces similar tradeoffs, and it must choose a structure to reach an appropriate balance.

Funding is another issue. Somehow ICANN has to pay for itself. I think the domain name tax is a bad idea because it reinforces the notion that the right structure for domain name registration renewal is to pay by the name, and on an odd installment plan at that. (I'd be curious if anyone present today has any idea, apart from historical accident, why it makes sense to rent names by the year instead of "have" them indefinitely—or at least renew without paying.) However, any entity that pays ICANN more directly could be thought of as having undue influence over the organization, and every funding model will involve trade-offs.

#### *If ICANN fails*

So what are the scenarios if ICANN fails? I see three rough possibilities.

First, one can imagine the creation of a "Son of ICANN" which would simply try to reconstitute a new organization to do better than which ICANN has not done so well. I am skeptical about the success of a second attempt because it may be difficult to energize increasingly cynical parties to this debate to try again for a new ICANN, and also because I am not sure it would be any better. The ICANN we have

has plenty of flaws, but has also shown considerable progress since its inception under demanding conditions.

Further, if someone feels he or she is going to lose out as a result of the actions of ICANN or its possible replacement, a perfectly rational approach may be to attempt to undermine the whole organization rather than live under what the person considers an undesirable decision. Therefore, there may always be attempts to destabilize, to restart the process leading to ICANN from scratch, to throw the dice again and see what might come out. This is not to say that any criticism of ICANN is the result of sour grapes; rather, that in a healthy environment there will always be criticism, and indeed some of it will call for ICANN's end.

A second possibility is that ICANN's functions would be assigned to an inter-governmental entity. It is hard to imagine the US government alone trying to continue DNS management responsibilities solo for the very reasons stated in the White Paper. An international treaty organization is one possible way that governments could come to agreement on how this particular aspect of the Internet should be run. My personal guess is that this would be the likely outcome if ICANN were to fail. It's not clear to me that such an organization would make policies any more in touch with the Internet at large than a well-function ICANN can. More important, as the historical context suggests, the power of the root derives from the fact that a critical mass of system administrators and "mirror" root zone server operators choose to follow it. A drastic turnaround in the management of Internet top-level functions—either through a sea change in favor of much more aggressive government involvement, or one that purports to literally privatize the whole system (imagine auctioning it off to the highest bidder)—could result in abandonment of the network by the technical community.

A third possibility is that the market is simply left to its own devices. In an important sense, this is already happening. For example, we have heard ICANN's claim that the only reason that root file dictates who gets to run .biz is because everyone chooses to look to the "official" root file—the "IANA legacy" root file intended for ICANN's custody—for the answer to that question. By everyone I mean network providers like AOL, and potentially even you and me. In the network control settings on almost every computer, there is a dialog box which we can edit, and there is software to make it especially easy to edit that box, that says: "This is the computer from which I will get my domain name information." It need not be one that has any allegiance to ICANN or to Network Solutions, for that matter.

The problem is that there is such benefit in interoperability that it is difficult to switch out of a system that everyone now has bought in to. To the extent that it was done, addressing on the Net would become more confusing ("You can reach me at zittrain@law.harvard.edu@icannroot, but not at zittrain@harvard.edu@competing root"). That's why the prospect of so-called multiple roots strikes me as a remote one. What would ultimately happen is "tipping behavior" through which one naming scheme would predominate and somebody would end up with control of a new root—a private actor answerable only to itself or its shareholders—and then antitrust or other mechanisms would have to apply to keep that private actor in line. This is indeed what will happen if current private naming schemes take off.

### *Conclusion*

Is ICANN out of control? If by this one means a bull in the china shop, rampaging this way or that, unaccountable to anything but its own inexplicable motives, the answer is no. I worry about the opposite problem: ICANN has inherited an extraordinarily difficult situation, with high expectations all around, and with almost no discretionary room to move. The set of realistic options for substantive policymaking and procedural structure is quite small: for better or worse, ICANN faces swift dispatch if it strays too far from the desires of any of the mainstream Internet technical community; the United States and other governments (including executive, legislative, and judicial branches, which in turn may not agree); and powerful corporate interests. Indeed, those representing the "little guy" and/or those wanting a maximally unregulated Net—one where political concerns have no place in technical management—are quick to worry about capture of ICANN by one or another of these interests.

The key in this critical transition period is to give ICANN enough rope to either demonstrate that it can heft what it needs to in order to foster trust and respect among disparate interests (the kind of respect that has even the "losers" in a given policy question know they got a fair shake), or to show a conclusive inability to rise to the challenge. Better that we know now rather than later.

For the Berkman Center's part, we want to continue to be one voice among many pushing ICANN towards openness, and recognition of public interests that may not be well represented or fully aware of the true stakes of some of the architectural

decisions that ICANN—and other elements of the technical community—are coordinating.

I am aware that the Berkman Center's participation in ICANN—activities such as webcasting its meetings, developing remote participation systems, conducting a membership study—is itself a form of support to the organization. If we thought ICANN were corrupt or renegade, we would cease such support in a heartbeat. So far as I know, ICANN is neither. It is making its share of mistakes, in a territory that is uncharted. Our own faculty have joined others who are pointing out its deficits as they materialize. Oversight of its work is critical, and indeed hearings like these are an important way of helping it identify and correct them. But there will be inevitable letdowns as we shift from the lofty rhetoric of possibility to the hard facts of building an organization that works—retaining or rebuilding the spirit of openness, representation, and trust among stakeholders who have differences that did not materialize yesterday and which will not disappear tomorrow.

Mr. UPTON. I appreciate your eggs being done.

A couple of questions, and sadly we are going to have a series of votes very shortly. Normally, we would have started this hearing earlier, but in deference and certainly out of respect for the two Officers that were slain, there was a memorial service in the Capitol today. That is why we could not start until 11 a.m. I have a couple of questions. I am going to raise them and let each of you maybe make a quick comment, and then move to Mr. Klink.

One of the things that I have been concerned about always is the current makeup of ICANN's board; whether or not it fully reflects the diversity of the Internet community. What major voices are missing and who should they approach as they look to expand the board in the future?

The other question that I have that I would like each of you to answer, we will go down, is do you believe that it is appropriate for ICANN to in fact develop the policies to eliminate cyber-squatters? Where should we head in that direction? If you would like to comment, Ms. Barry, that would terrific, on both of those. We will just move down.

Ms. BARRY. Okay. My first comment to the first part of the question is that individuals are not appropriately represented by ICANN, in my opinion. There is no individual constituency where individual domain name holders have any kind of say whatsoever in the ICANN procedures. I have just been elected to the Steering Committee of what is trying to become the individual domain name owners constituency to the domain name supporting organization, but it has not yet been given the go ahead by ICANN to be one of the constituencies.

Regarding cyber-squatting, first, there is no definition of cyber-squatting. You can ask 20 different attorneys or 20 different law makers and they will have 20 different definitions to cyber-squatting. There have never been any cases won by so-called cyber-squatters in any court in the world; the U.S. included.

Any time that something even approaching cyber-squatting has come up, there have been some rather creative meanderings by the Judiciary to make sure that this is not allowed. I think it is a judicial issue. I do not think that it is an issue that should be addressed by a non-governmental organization or a non-Judicial organization.

Mr. UPTON. Other than the Congress.

Ms. BARRY. Other than the Congress, of course.

Mr. UPTON. Thank you. Mr. Miller.

Mr. MILLER. Mr. Chairman, I believe that the current people on the board are doing an excellent job, but I would agree to some extent with Ms. Barry's comments that we need to figure out how to get the user community broadly defined. I think the interim board is trying very hard to work with various groups to figure out how to do that systematically. It is not an easy task. It is something that I think will be achieved.

Also, as was said on the earlier panel, I think there are certain regions of the world which are not adequately represented areas, such as Latin American and Africa. I think there is going to be a conscientious effort, to the extent possible, to reach out to those regions of the world because this is a universal medium.

We need to make sure that all parts of the world are included. I commend the interim board for moving their meetings around the world and trying to get maximum input from other regions of the world, other than North America and Western Europe.

Second, on the issue of cyber-squatting, I think that this in fact is an important issue. ICANN is appropriately trying to address it. There has been a lot of effort put in by WIPO. While one could argue whether it is a technical issue or a policy issue in terms of the operations of the domain name system, it is appropriate for ICANN to address it.

Mr. UPTON. Mr. Weinberg. Do you have any comments?

Mr. WEINBERG. ICANN's current board is not representative of anyone. I think it would be hard to argue that it is. With the formation of the constituencies, I can look at representatives from the protocol supporting organization who are essentially engineers, what has been referred to as the geek aristocracy; representatives from the address supporting organization who are, for the most part, engineers; both of which I firmly approve of; representatives from the domain name supporting organization who will be people involved in the business of or interested in the business of registering domain names.

None of that will suffice to make it representative either. On the other hand, ICANN has announced its intention to have members elected at large by the general membership. I am hopeful that will give it much more of a broad-based electoral constituency.

On cyber-squatting, I have expressed my views why I think this, in a perfect world, would be outside ICANN's brief. In fact, ICANN action on cyber-squatting is going to happen. The reason it is going to happen is because business and trademark interests have made it clear that they will vehemently oppose the addition of any new generic top level domains, unless they get a trademark dispute mechanism they can live with.

Various others of us, myself included, really want new generic top level domains. An agreement is going to be reached there. It is going to include new generic top level domains. It is going to include the trademark dispute resolution, even though I would prefer not to have that last part.

On Congress, I just want to say there is a God-awful cyber-squatting bill that was marked up on the other side of the Hill this morning. They know this body will be sensible enough not to have anything to do with it.



Mr. UPTON. I will not provide editorial comment on the other side. Mr. Zittrain.

Mr. ZITTRAIN. First, on the issue of major voices missing. On the current board, since we do not know how they were picked, it is hard to say whether each is meant to represent a distinct interest. So far as I can tell, that is not the case. It is meant to be a collective; just sort of a commission-like structure.

Going forward you say well, what structures would help the board to have a broadly representative set of people? As Professor Weinberg described, this is kind of a bi-cameral structure to the board. The supporting organizations met to represent the technical community. Of course, participation there is to the extent that it is open. Also, whether it welcomes others who have an axe to grind.

Then the other half is the at-large membership. The key there is how to make it grassroots. How to actually have it represent a good cross section of all of us, rather than sort of the astroturf just sort of minded by the various interests that have clear interests at stake, and who are not bored to tears by this stuff, and then load the membership that way.

That is a difficult decision. The Advisory Committee on Membership has put forward some recommendations. I understand there will be a motion in Santiago taken to make that happen. On cybersquatting, it is too bad that many American businesses woke up to the Internet a little bit later than others, and when they got there, found their names were taken.

Hertz.com was originally in the hands of a speculator. MCI.com was in the hands of Sprint. They managed to work it out, through legal means, as Ms. Barry was describing. I am generally against heavy-handed ways in which ICANN would walk into that morass. There may be pressures to put them there. Somehow, they are going to have to sort it through.

Mr. UPTON. Thank you. Mr. Klink.

Mr. KLINK. Let me start off, in the previous panel, I suppose you all were in the room. Everybody else was. The Commerce Department and Network Solutions seemed to kind of agree on the fact that there would be an unacceptable instability if NSI did not maintain the monopoly on the registry and did not allow other companies to be able to come in and act as registrars and compete.

A lot of people have suggested to us, prior to today's hearing, that there is a game of chicken going on here. That NSI is kind of playing a game. My question is what do you think would happen? Would the Internet come crashing down if NSI were to walk away and say, we are not getting what we want? We are going to pull out. We decided we are going to go invent a competing type of system. Let me start with Ms. Barry and work down.

Ms. BARRY. There has been an old adage on the Internet that the Internet will route around censorship. I believe that it will also route around instability. There have been several occasions where NSI has had significant difficulties with their operations. The Internet did not come crashing down. There were some difficulties while people were figuring out what was happening.

Even when large trunk lines going to large carriers like Sprint, UUNET, or whomever go down, the Internet does not end. People

route around it. One popular misconception is that running a route server is something that is magical, and difficult, and all of that. As a matter of fact, there have been several route servers that have been in operation besides the ones that are running the .com, .net, and .org matrices.

There have been several alternative route servers and alternative route structures that have been up and operational. So, I think that it might take a little bit of time, but the Internet would prevail over any single company.

Mr. KLINK. Mr. Miller.

Mr. MILLER. I guess a couple of points, Mr. Klink.

No. 1, I think there has been an unfortunate tendency to demonize ICANN and NSI. I do not think either of them are bad guys. I think they are both trying to make the system work because it is, as Professor Zittrain said, a relatively fragile system with a lot of it based on consensus.

I was thinking this morning before I came to the hearing if John Postel were still alive and he were running the Internet all by himself, which he was trying to transition out of that, what kind of hearing would we have here today? People worry about consensus now. That really was, in some sense, a strange one-man consensus.

To answer your question specifically, I do believe that there is a lot at stake here. This is not an easy system to run. I have been to Network Solutions' operations in Herndon. I have met with Mr. Rutt. Mr. Daniels is the chairman and was the acting CEO before that. It is getting more difficult and more sophisticated every day because of the growth.

Is it going to be the end of the Internet? I do not want to be apocalyptic, but it would be terribly disruptive if the chicken game ended up either in court, or in the Commerce Department trying to remove NSI, against its own will, from running the registry. Yes, I think it would be terribly disruptive. I am optimistic. I believe that Mr. Rutt and his leadership team wants to work with ICANN. I believe ICANN wants to work with Mr. Rutt.

I believe the Commerce Department is playing a very good shell diplomacy role, as Mr. Pincus said. I do not want to be Pollyannaish about it, but I do not think it is going to do anybody involving the Internet any good to sit here and to try to demonize either side.

I commend this subcommittee because I think this hearing this morning probably gave both sides a little more impetus to move a little more quickly.

Mr. KLINK. I hope that it does not come across that the members here are demonizing either ICANN or DNS. We are just trying to figure out if there are checks and balances, and what is the stimulus for everybody to do the right thing as this is invented? As everybody knows, we are all on new ground here. Mr. Weinberg.

Mr. WEINBERG. NSI would like full control over the .com registry and the .com data base, preferably with a fig leaf of somebody else's control. If they say we are going to walk away and accept nobody's control whatsoever, the U.S. Government has two choices.

They can either say fine, we concede, in which case NSI gets that control. I think that would be bad from a perspective of consumer welfare, because we would have a monopolist controlling 75, 80

percent of the global market, much more, much, much more of the U.S. markets, perhaps over 95 percent, acting like a monopolist and doing the things that monopolists do. That would be a problem.

Commerce's other alternative is that Commerce could seek to re-compete the competitive agreement, or Justice could bring a prosecution. That would lead to litigation. Litigation would take several years—which is to say in Internet time several centuries—and sure would be a mess.

Mr. KLINK. Mr. Zittrain.

Mr. ZITTRAIN. There are definitely forces on each of the parties who want to try to come to an agreement, no doubt at the 11th hour, because indeed it is a game of chicken. On the Commerce Department's half, as they have explained, they do not want a lawsuit.

A lot of what has been going on has been improvisation of a sort; improvisation I think in good faith. It is difficult for me to second-guess, but improvisation none the less. On ICANN's part, a big lawsuit would be quite difficult, even from just the financial end of having to deal with it.

Third, from NSI's part, I agree, they are not to be demonized. They are a rational profit maximizing corporation with duties to shareholders to gouge every cent they can to the limit of the law. God bless them for doing it, but you need a structure around them, that then cabins their behavior appropriately with respect to the public interest. There exists a public interest.

Anti-trust law generally tries to get at it when there are market failures or only one person having great market share that is not easily contested. That is the situation we have here. It is one for which NSI will play out its hand and the other hands will play. I believe this committee has a role to play at that table and has been doing so today.

Mr. KLINK. Do we find ourselves in the position where government has created a monopoly and now does not know what to do with it? I always get that sense to that.

Mr. ZITTRAIN. I characterize it as a position where government allowed a contractor to do what was thought of as a chore, did it on a 5-year contract, eons in Internet time, and it is somewhat, if I may use the reference like the Beverly Hillbillies. You find yourself on top of a gold mine.

Mr. KLINK. Gold; Texas tea.

Mr. ZITTRAIN. Exactly.

Mr. KLINK. Does anyone else have a comment on that?

Mr. MILLER. Mr. Klink, like in a concession situation, if the government says we are going to let somebody come into Yosemite Park and manage the food service, well they cannot allow a true competitive situation because Yosemite is not going to be suddenly filled with Burger King, next to a McDonald's, next to a Kentucky Fried Chicken.

You are only going to have one food service there, but you need to have a high quality food service, who has to be able to make a profit. So, at the end of the day, there still has to be the possibility that, that has to turn over. So, I do not think anybody sat there

and said when we opened this operation, as Professor Zittrain said, we were going to do it in perpetuity.

I do think that the government realized that obviously NSI was going to be a for-profit corporation and was going to behave accordingly.

Mr. WEINBERG. I just wanted to note here, by the way, the whole DNS controversy began in 1995, when NSI went from cost-plus reimbursement to actually charging a fee to the public, which was in the amendment negotiated with the National Science Foundation to the cooperative agreement.

This, No. 1, gave NSI the beginnings of the gold mine that later accrued. No. 2, immediately sparked calls for the addition of new global top level domains, because all of a sudden, people all over the world started saying, well, why should we be stuck with them, and the prices they are charging, and the service they are offering?

Mr. KLINK. Let me just compliment the majority. This was an enlightening panel. I think you put together a good hearing. They have given us a lot to think about.

Mr. UPTON. I appreciate working with all staff.

I would just like to say at this point, that you all may have heard these buzzers and beepers. We do not have a lot of time left on this vote. Without objection, I am going to certainly allow all members of this subcommittee to pose questions in writing. If you could respond to that, that would be terrific.

I am going to excuse this panel.

I am going to ask unanimous consent. I have not had a chance to clear this with Mr. Klink that Mr. Pickering is here, though not a member of this subcommittee, that he be allowed to ask some questions and then we will adjourn until I get back.

Mr. PICKERING Good afternoon.

As many of you may know that in my previous committee assignment on the Science Committee, I have served as the Acting Chair on the Basic Research Subcommittee, which had the jurisdiction and the primary role, as were trying to debate and look at the transition of domain names and the work that NSI was doing, at that time, under the contract with NSF, to private sector competition.

It was my hope, at that time, that we would see our hopes realized. That it would be a transition through a voluntary private sector, non-profit or profit organization that would setup the governance, as well as the structure that would lead us to competition.

However, my concerns at that time that I hope would not be realized, I am fearful are being realized, and that is how do you have the accountability for the governance for ICANN or whatever entity, and how do you ensure that NSI goes to competition? It appears that we are running into the problems and the concerns.

I hope that we will be able to work those out. My concern is do we need additional authority for NTIA to ensure that we reach the competitive goals? Do we need to ensure some type of ongoing oversight to ensure the accountability of ICANN.

I have said it before and continue to believe that this is of enormous importance. This is, in essence, the Constitutional Convention, or the equivalent of what we saw in Philadelphia at the beginning of our country. This is the constitution of the int.

It establishes the governance, the checks, and the balances. I am concerned as to where we are today; so concerned that I might recommend to the members of this committee and to the full committee that when we look at NTIA reauthorization, that perhaps we need to put a moratorium or a freeze on any further action until these issues are sorted out.

Until we are adequately convinced that the issues raised in the two panels today can be worked out, where we have both the accountability, the right governance structure, that we avoid regulation, whether it is by government or by some elite group hand selected, and not open to accountability, and that we ensure that NSI goes to a competitive policy.

So, I want to ask, one, Dr. Weinberg, I believe you had some additional recommendations or steps that we should take in your testimony that you did not get to. If you could, what recommendations would you make? Do we need to step in just to have a holding period until these issues are resolved and adequately addressed, in an open forum, and an open discussion?

Mr. WEINBERG. My bottom line, ultimately, is that you do not need to step in. That I think ICANN has a long way to go. I think NSI surely has a long way to go. But right now when I look at the Commerce Department, it seems to me that the Commerce Department is basically doing all of the right things.

From time to time, I think the Commerce Department is being a little too timid in its relationship with NSI, but that is the kind of backseat driving that is easy to do if you are not actually there in negotiator seats. I think the best thing this committee can do is throw its support behind the Commerce Department, which is grappling with a difficult situation, and I think doing the best that can be done with it.

Mr. PICKERING. The question would be does the Commerce Department or does NTIA have adequate authority to ensure the objectives that they have set forth? One of the reasons that we went this route, one, I have no greater confidence that Congress will sort these things out any better than NTIA or I can.

By going this route, we could avoid the Administrative Procedures Act, a lot of the bureaucratic delays of trying to have this transition work as quickly as possible, and also from the from the private sector. The concern is though that we are reaching an impasse.

It appears that there is a conflict or a dispute over intellectual property; who owns or controls the data base? Did we, by trying to go this route, also leave us open to not having the authority or the accountability that is necessary to have a successful transition and a successful constitution?

Mr. WEINBERG. I think that to the extent there are gaps in Congress' authority, they may not be reparable now. Let me give you an example. NSI claims intellectual property rights over the contents of the .com registry. I personally think that is a silly argument. Indeed, of course they do not, as a matter of straight intellectual property law.

If they are right, if they do, then it is not open to this Body to pass a law saying you do not have it. If they in fact own these property rights, then Congress cannot divest them of it.

So, one way or another, that is something that may have to be resolved in court as opposed to by legislation, unless Commerce and NSI can come to some sort of negotiated agreement to that question. So, I have trouble thinking of exactly what action by the Congress would in fact solve the problems currently on the table.

Mr. PICKERING. Well, it could be simply a freeze in action, freezing action. It would not be to prescribe, but to force the negotiations that we would hope would resolve the issues, but to do it in a way that would have accountability and openness in that process.

Mr. MILLER. Mr. Pickering?

Mr. PICKERING. Yes, Mr. Miller.

Mr. MILLER. It seems to me, to some extent, the most important thing this subcommittee could do is plan to hold another oversight hearing in or about November. I think November is important for two reasons. No. 1, by that time the interim board is committed to try to have at least the first nine elected members on the board, which is very important in terms of the representation issue, which has taken some of the time of this subcommittee hearing today.

No. 2, the issue of openness will have been dealt with or not dealt with, depending on whether the interim board does actually open the meetings or not. So, you will have a lot of those questions answered or perhaps dissatisfaction if in fact they have not opened the meetings.

Third, the issue of funding will have to be dealt with because, even though Ms. Dyson is optimistic, they cannot continue to operate running up hundreds of thousands of dollars of debts each month. Something is going to have to be done in the near future.

Fourth, you heard commitments during the subcommittee hearing from both sides, from ICANN and NSI, to try to work quickly to resolve these issues of dispute, which are of such concern. You will have by that time, I think the subcommittee will have the right to say, you promised this 4 months ago. You were going to make a lot of progress, or maybe even complete the contract negotiations, that there be real competition.

I think at that point in time, if you still were not getting any satisfaction in those four areas, then you have a lot of questions to ask about perhaps the need to step in. I think it would be premature at this time to do so.

Ms. BARRY. Can I make a comment to that?

Mr. PICKERING. Yes, Ms. Barry.

Ms. BARRY. I just wanted to mention that it is a very common mistake to think that the Internet is all about Commerce or about E-commerce. It is essentially one of the best communications mediums that has ever been created.

To have the Commerce Department overseeing, as it were, the Internet leaves out a vital component which is the expression, the freedom of expression, the free speech interests, and all of that. As you can tell, most of the testimony, and most of what people have been saying about the Internet have revolved strictly around commerce, commercial interests, trademark interests, and things that should frankly be legislated; expansion of the—Act in ways that were never contemplated when it was passed by Congress. So, in my opinion, a freeze might be the right thing to do while all of these aspects are looked at.

Mr. PICKERING. Mr. Zittrain.

Mr. ZITTRAIN. In some sense, seeing the proceedings unfold as they have over the past year or so has been watching a faucet drip. Nothing that drastic has happened in any one quantum. What existing accountability there is for ICANN, given that we are still in the stage prior to its own bi-cameral structure coming into places, and working out a membership scheme, et cetera for internal accountability, really rests with the Commerce Department and the U.S. Government, generally.

There is a contract between ICANN and the government. I understand that expires in October 2000. At any time prior to that, I could imagine that the Congress could weigh in, in some way, and the Commerce Department would be able to take back any crown jewels that one was thinking were being handed over through the process of that MOU.

So, it is not as if you are missing a chance now, if you do not seize it to do something about it. With respect to NSI accountability, I suppose some big stick is needed by the government if it is to be a respectable negotiator at the table over such things. I agree with Professor Weinberg that it is not a very compelling legal argument to assert intellectual property control over the data base by NSI.

If it does end up in a lawsuit though, that again could stretch things on and, in effect, would be a moratorium of sorts. I just want to leave with the thought that I am not sure, it is not just a gold mine. I do not know why it is a renewable resource.

Oddly, we pay by the year for these names, even once they are registered. Just every year you come back and you put more money into the hopper. Exactly what relationship that has to the underlying economics of the system has never been clear to me. It is one reason why ownership of that data base is such an issue.

You heard NSI today say we have over 5 million registrants as our customers. I take it that is no accident. They are claiming all existing registrations, prior to this only recent test bed period, as their own, and therefore as their customers to handle the renewal each year.

Mr. MILLER. With all due respect to that last comment, it is important to realize, as Mr. Rutt said, that the pricing is going to be changing. Maybe NSI is not moving quite as quickly as some of us would like, but the pricing model is going to be changing fairly quickly, both the fee that NSI is able to collect for its registry function as long as it is permitted to do that, as well as more importantly as Mr. Pincus said, the retail side of what the competing registrars are going to charge.

We could find ourselves within literally weeks being down to \$15 to \$20 with no renewable fee, or down to \$9 or even less. So, I think we should not get too hung up on that. Again, I think that is a short-term phenomenon and it is clearly going to change in the near future.

Mr. PICKERING. It also strikes to the heart of our dilemma here. Does ICANN have the authorization to charge a fee that some would interpret to be a tax without Congressionally granted authority? The same if they were to be setting policy now from a regulatory perspective.

So, these are the dilemmas in going the route that we did. I understand why we did, in the hopes that it could be private sector-driven. That it would expedite and speed the transition. It would give the community affected, hopefully, the Democratic process to make the decisions for themselves.

I still support those objectives and want to help any way that we can. The question is can we serve as a catalyst or to facilitate the resolution of the current disputes that we are seeing, and the resolution of some of the authority issues, and accountability issues that we are now confronting.

Again, I believe it is very important that we get it right. This is the framing of the constitution, in my view, of the Internet. So, we cannot just sit back and have no role. I think it would be an abdication of Congressional authority. Again, having said that, I want a very limited role for government, and Congress, and the Department of Commerce, and a going forward role.

I do think we are at a critical point. We do have these disputes that are outstanding. We have authorization issues that are outstanding. Perhaps we do need to find a way that we can play a role as a catalyst and a facilitator to make sure that it is done right, and that we get it right.

I would appreciate any further input or insight that you all have as we go forward as we make decisions, as with the NTIA reauthorization, or any other mechanisms that we have through additional hearings.

That we play a constructive role to make sure that all parties feel like, one, it is an open accountable system, and that the objective of competition is going to be realized. With that, I have no other questions, unless you have any closing statements that you would like to make.

[No response.]

Mr. PICKERING. Mr. Upton, thank you very much.

Mr. UPTON. Thank you for your answers.

We are going to have a series of votes in about 10 minutes. I appreciate your indulgence with us. Again, you may see something coming via your mail carrier. If you would respond fairly quickly, that would be terrific. You are now excused.

The last panel includes three individuals, Mr. Richard Forman, Chief Executive Officer of Register.com; Mr. Kenyon Stubbs, Chairman of the Executive Committee of Internet Council of Registrars; and Mr. James Bramson, Counsel of America Online, Inc.

We are going to get started fairly quickly. You all, I think, were here for some if not all of the earlier two panels. You know of our long-standing practice for taking testimony under oath. Do any of you have objection to that?

[Chorus of nays.]

Mr. UPTON. If not, we also, as a part of the House Rules you are allowed to have counsel. Do any of you desire to have counsel with you?

[Chorus of nays.]

[Witnesses sworn.]

Mr. UPTON. You are now under oath. Mr. Forman, we will start with you before we get interrupted. Again, your comments will be made a part of the record; as will your entire written statement.



If you could summarize it in 5 minutes or less, that would be terrific.

**TESTIMONY OF RICHARD D. FORMAN, CHIEF EXECUTIVE OFFICER, REGISTER.COM; KENYON T. STUBBS, CHAIRMAN, EXECUTIVE COMMITTEE, INTERNET COUNCIL OF REGISTRARS; AND JAMES R. BRAMSON, COUNSEL, AMERICA ONLINE, INC.**

Mr. FORMAN. Thank you, Mr. Chairman and members of the committee. I appreciate your inviting me to testify because my company and I, personally, are concerned about the rate of transition in the industry as it was laid out in both the White Paper and Amendment 11 to the cooperative agreement.

We are very interested in ensuring that there is fair and equitable governance, and management of the Internet domain name system. As has been discussed today, NSI has maintained exclusive rights for the .com, .net, and .org top level domains up until recently.

ICANN was created with the Internet community and a consensus in order to oversee the management of names. We have benefited from that process. We were the first registrar, the first competitive registrar, to go live along side Network Solutions.

Just to try and give some brief background on the market, many projections are that the market is going to grow over 20-fold over the next 4 years to approximately 32 million new names, 32 million new registrations, for a total market of about 100 domain names by the year 2002, 2003. Competition is going to help fuel that growth.

It is also going to introduce new products and services built around a domain name. We are one of the leading registrars in the world. Our business model is geared toward trying to help small and medium-sized businesses grow, using the Internet, and by putting a domain name to work.

The subcommittee hearing regarding Is ICANN Out of Control, we believe that there are three main issues that frame the issue of ICANN.

One, participation in ICANN's processes by interested parties. What is the progress made to-date and with their fees? In terms of ICANN participation, I think that we all need to demand accountability from ICANN. We have personally been involved with every ICANN meeting. There is an open meeting at every ICANN session where there are public comment periods.

Anyone who can get to the meeting is welcomed to go up to the microphone and testify. If you are unable to make it to a meeting, they have facilitated the Internet to provide remote participation. In fact, in the Singapore meeting where I was unable to attend, I was able to participate in that meeting remotely using Real Audio.

In fact, questions that I had were asked during that session. So, I feel as though ICANN is an inclusive organization that encourages participation worldwide. There are many news groups that are out there. I think that one thing that ICANN can do in order to show that it is very interested and involved in some of the discussions is that it can take a more active role in some of the news groups, rather than just Esther Dyson or Michael Roberts participating.

I think that the entire board would benefit by getting involved in some of the discussions. To-date, we think that ICANN has been very successful. They have accredited 52 post-test bed registrars. That is in a period of, I guess the MOU was signed back in November. So, in a period of about 9 months.

They have authorized 52 registrars. It has taken the U.S. Government about 2 years to put all of these plans together. So, I think that ICANN has moved aggressively to try and deregulate the market. ICANN's solutions are not perfect, but there are open meetings and an open interest in trying to solve those problems.

In terms of their fees, I know that there has been a great deal of controversy over the \$1 fee. It may not be the best solution, but ICANN needs to find some way to recover its operating costs. As discussed in Amendment 11, the fees for ICANN are to be provided by the registry and/or the registrar. So, we are comfortable with that \$1 fee, just as we are obligated to pay Network Solutions a \$9 per name fee.

In terms of competition in the market, we believe that as this market grows and in order to help it grow and mature, we believe that all registrars must be on an equal level. There are two major issues regarding that. No. 1 is the domain name Internet .net and the contractual obligations that exist in this industry.

The data base Internet .net has caused us major problems. Approximately 20 percent of all the customer service requests we get are a function of the fact that NSI controls the domain name Internet .net, which is making it very hard for us to offer our customers service that they demand.

In terms of contractual obligations, we believe that all registrars, including NSI, should be obligated to sign the same contract with ICANN. We believe that the next step for the industry is that the Department of Commerce should be allowed to finish the process that it started out approximately a year ago.

I do believe that there is a substantial risk if the current process is derailed, that foreign governments may not continue to want to ascribe to the U.S. Government's management of Internet domain names. So, I hope that Congress and the committee support the current efforts as a road toward deregulation.

Thank you.

[The prepared statement of Richard D. Forman follows:]

PREPARED STATEMENT OF RICHARD D. FORMAN, CEO, REGISTER.COM

Mr. Chairman, Members of the Committee: It is my pleasure to appear before you today as a representative of register.com, inc. ("register.com"). I commend the Committee for holding this hearing to spotlight the issue of Internet Domain Name System Privatization—an issue of vital importance as the Internet moves into an era of massive growth and increased commercial use.

I appreciate the Committee inviting me to testify because I am concerned about the pace and the process by which the industry is transitioning to a more competitive and open environment. My testimony is organized into the following sections: Overview; Industry and Company Background; ICANN's Process and Procedures; Fair Competition; and Next Steps for the Industry

OVERVIEW

One of the interests of register.com is to ensure fair and equitable governance and management of the Internet's domain naming system. Network Solutions, Inc. ("NSI") (Nasdaq: NSOL) has maintained exclusive rights under a government con-

tract<sup>1</sup> to serve as the sole provider of generic top level domain names ("gTLDs"), primarily with suffixes .com, .org, and .net, since 1992. The majority of domain names that are issued fall under this classification. In April 1999, the Internet Corporation for Assigned Names and Numbers ("ICANN"), a not-for-profit entity recognized by the Department of Commerce to oversee the management of Internet names and addresses, selected register.com as one of five companies worldwide to be a test-bed registrar. My Company, register.com, was the first of these five registrars to successfully begin registering gTLDs alongside Network Solutions, Inc.

By way of introduction, please allow me to present some information about the growth of the Internet marketplace and my Company, register.com.

#### INDUSTRY AND COMPANY BACKGROUND

The market for domain names is projected to grow at least 20 fold over the next four years, reaching more than 32 million new registrations and achieving revenues in excess of \$2 billion annually by 2002<sup>2</sup>. According to SEC filings by Network Solutions, Inc., new generic top-level domain registrations were averaging approximately 1,000,000 names during the first quarter of 1999. This is a dramatic increase from the average quarterly volumes during previous years. I believe this high level of growth will be sustained as Internet use continues to penetrate all aspects of society and I believe we will see the market grow to over 100 million domain names in the coming years.

The recent introduction of competition by way of new registrars into the industry will facilitate (i) new products and services built around a domain name (ii) improved levels of service and (iii) an acceleration of the overall growth of the market. Register.com currently offers domain name registration services along with technical name services capabilities<sup>3</sup>, effectively the same service package as NSI, for approximately one-half the price (\$70 for register.com versus \$119 for Network Solutions, Inc.).

My company, register.com, is one of the leading domain name registrars on the Internet. We estimate that we have captured a substantial portion of the global domain name market since launching our registration service. Our business model is geared towards helping small and medium sized companies worldwide establish and grow their business by using the power of the Internet.

*Register.com* has twice been ranked as a Top 100 Web Site by *PC Magazine*, a Ziff-Davis publication, and we were recently named one of *Fortune Magazine's* Top 25 Products to Watch. The Company has also been featured in numerous publications and news services such as the Wall Street Journal, the New York Times, CNBC, CNNfn, Bloomberg, Fox News and WABC-TV.

#### "IS ICANN OUT OF CONTROL?": ICANN'S PROCESS AND PROCEDURES

The Committee is meeting to review the facts regarding the transition of the management of Internet names and addresses from the U.S. Government to ICANN, an industry led not-for-profit corporation. The interests of ICANN and NSI will undoubtedly be inconsistent given that ICANN is trying to reduce NSI's monopoly power and create a level playing field for all registrars.

There are three main issues that must be discussed to fully understand the debate:

- Participation in ICANN's process
- Progress made by ICANN
- ICANN's proposed fees

ICANN has achieved widespread recognition and participation from various individuals, interest groups and commercial enterprises worldwide. It has also demonstrated significant progress in deregulating the domain name registration market and created the foundation for a more permanent management structure. Despite some growing pains and a very limited budget, ICANN is indeed moving in the proper direction.

#### *ICANN Participation*

Among the criticisms leveled against ICANN has been that board meetings, as well as several organizational and policy development meetings, have been closed. ICANN's board cannot realistically operate and make difficult decisions in an open environment with hundreds of participants. Some of the most vocal critics of ICANN

<sup>1</sup> The *Cooperative Agreement* originally executed between the National Science Foundation and NSI

<sup>2</sup> register.com company estimates

<sup>3</sup> DNS services

have, in fact, been deeply involved in the process but have been unhappy with the results. We should all demand accountability from ICANN for its decisions and, thus far, the board has showed its responsibility in this regard. While it is true that board meetings are closed, ICANN has fostered widespread participation in the de-regulation process and the changing environment through a variety of means, including the innovative use of technology.

I personally participated remotely (from New York) in one of the ICANN meetings held in Singapore by linking up electronically via the Internet. My comments were duly noted and my questions were indeed asked and answered by the meeting's organizers and attendees, respectively. In fact, to my pleasant surprise, my question sparked a further discussion at the conference.

ICANN's board has also been criticized for their lack of participation in the various Internet domain name related newsgroups. I believe that these members should be more assertive and involved in these newsgroups. Over the past two months alone I have received over 8,000 e-mail messages as a participant in these various groups. Many of these messages come from individuals or businesses that have an interest in the evolving market and want to express their opinions. Periodically, Esther Dyson<sup>4</sup> and Mike Roberts<sup>5</sup> contribute to the newsgroups; however, few, if any, of the other board members participate. This lack of participation creates an impression among many of the involved parties, mainly concerned commercial entities and individuals, that ICANN board members do not care or do not appreciate the issues being raised. I do believe that they care, but their lack of participation sends the wrong message.

#### *ICANN Progress*

ICANN has been relatively successful in the short time it has been in existence. ICANN grew out of a U.S. Government mandate and the grass roots efforts of many parties, in effect, an industry consensus that was painstakingly reached over a period of years. The White Paper, published by the Department of Commerce, took into account the thinking of the entire industry. In only nine months from inception ICANN has accredited five test bed registrars and 52 post test bed registrars and has introduced competition into the market. At the same time, the Internet community and ICANN conceived of and recognized constituencies to help influence the evolution of the industry. While perhaps not providing perfect solutions, ICANN did indeed reflect workable compromises acceptable to a large majority of the interested parties representing individuals, corporations, industry trade groups and not-for-profit organizations.

#### *ICANN Proposed Fees*

There has been considerable controversy over ICANN's proposed \$1.00 fee per registered domain name. Given ICANN's status as a not-for-profit entity, there must be some mechanism for ICANN to recover its operating costs, without which it will be unable to continue its work. Its funding should come from the registry and registrar community as clearly written in Amendment No. 11 to the Cooperative Agreement. I view the proposed \$1.00 fee as part of the cost of doing business similar to the registry fee.

#### FAIR COMPETITION

As the industry grows and matures, it is becoming increasingly important for the governing bodies to create a level and equal playing field for all registrars. Until a few weeks ago, NSI had maintained a monopoly over domain name registrations. Going forward, NSI, in spite of being a legacy operator, must be obligated to comply with the same terms and conditions as all other registrars. I strongly believe that the following issues will greatly impact the introduction of fair competition into the domain name market:

- *internic.net*
- Contractual obligations
- Prepayment

#### *The internic.net domain name*

A key issue in this debate is NSI's claim of ownership to the *internic.net* domain name. *Internic.net* and its corresponding trademark are owned by the U.S. Government. For the past seven years, *internic.net* has been considered a public resource for the entire Internet community. All public documents, programming books, marketing links and pre-programmed computers refer to the government owned

<sup>4</sup> Interim Chairman of ICANN

<sup>5</sup> Interim President & CEO of ICANN

*internic.net* as the authoritative source for all registration services and domain name registration data. In terms of registration services, NSI has mis-appropriated the *internic.net* domain name and is redirecting traffic to its own registrar site *networksolutions.com*. In doing so, NSI has provided itself with a clear, unfair and unauthorized competitive advantage. In terms of domain name registration data, the *internic.net* database and corresponding WHOIS<sup>6</sup> services now refer only to domain names registered by NSI, not to those of any other registrars. NSI has thereby caused confusion for consumers, ISPs and many other industry players.

A significant number of customer service issues my Company handles are caused by this issue alone. Twenty percent of all customer inquiries we have received since the launch of our service have been about this issue. Following is a recent example of customer inquiry to my Company regarding this confusion:

*"I registered my domain name with register.com very soon after they became able to handle such registrations themselves. I found their service to be very good. The one problem I had is that while their site showed my domain in their whois directory immediately, if you searched through Network Solutions (which is where you get if you start with Internic), they did not show it. Thus, we had problems for our first week with some smaller ISPs not showing our site at all (and blaming it on this directory problem) and (at first) even our web host being leery of this new procedure. However, everything seems to be straightened out now, and I would hope this procedure will get smoother as we go along."*

#### *Contractual Obligations*

An inequity among registrars revolves around the ICANN accreditation agreement, which all accredited registrars are obligated to sign. The 57 accredited registrars have already signed or have agreed to sign this agreement. To date, NSI has refused to do so, asserting that it does not agree with ICANN's terms. It is imperative, however, that all registrars, including NSI, work under the same contractual rules and obligations.

#### *Prepayment*

A major requirement incorporated in the ICANN agreement is that "registrars shall not activate any registration unless and until it is satisfied that it has received payment of its registration fee." I support this prepayment requirement and believe it will control cybersquatting (registering names with the intent to sell them for a much higher price) among abusive registrants who can register, at no cost, a domain name that infringes another party's trademark rights. NSI, because it has not yet signed the ICANN contract, does not require pre-payment. As a result, NSI can give better payment terms to its own resellers (not requiring prepayment from them) thereby giving NSI a significant and unfair competitive advantage over other registrars who are playing by the rules laid out by ICANN.

#### NEXT STEPS FOR THE INDUSTRY

Mr. Chairman, the process laid out in the White Paper, including the recognition and authorization of ICANN, was intended to create competition in the generic domain name space and to transition the management of Internet names from the U.S. Government to a neutral, not-for-profit, industry developed third party. While we have made great strides, the Department of Commerce must be allowed to finish the deregulation process they have begun. NSI must formally recognize ICANN and its authority. Without such action, the entire process and the further growth, development and stability of the Internet may be in jeopardy.

By empowering the Department of Commerce to authorize ICANN to take responsibility for transitioning the management of Internet names and addresses from the government to industry, the U.S. Government is allowing the Internet to grow and mature into a global resource. If, however, this Committee delays or impedes the process, rather than supporting and correcting its minor flaws, I fear that the U.S. will lose the competitive and economic edge it currently has in the Internet space. For the benefit of the U.S. interests, I believe we should follow our present course, which will accelerate deregulation, innovation and competition.

Mr. Chairman, Members of the Committee—it has been my pleasure to share my thoughts on this subject with you today. I hope it is clear that I have both a professional and personal interest in this vital issue.

Thank you for the opportunity to speak with you today.

Mr. UPTON. Thank you. Mr. Stubbs.

<sup>6</sup>WHOIS is a term that describes both a program and a database used to look up domain name registration information

**TESTIMONY OF KENYON T. STUBBS**

Mr. STUBBS. Thank you very much, Mr. Chairman.

My name is Ken Stubbs. I am the Chairman of CORE, the Internet Council of Registrars, and I really appreciate the opportunity to appear before you today.

For more than 2 years, we have been intimately involved in the entire governance process. We have collaborated closely with the Department of Commerce, the Internet community, and contributed extensively to the White Paper, as well as a myriad of meetings and conferences bringing the creation of ICANN.

I will begin by addressing the issue that is central to this hearing. Is the ICANN completely fulfilling its responsibility to open up the Internet domain name system to competition? The answer, in my view, is right now it cannot. The reason it cannot accomplish the goals set forth is a cause for great concern, especially for those of us who are directly involved in the transitioning effort.

It is certainly a concern to many businesses and individuals hoping to get more involved in the Internet as well as the domain name registry field. ICANN's ability to accomplish its responsibilities are conditioned upon the cooperation of the company that has held a complete monopoly on domain name registrations, Network Solutions. Despite a clear mandate for ICANN to be the consensus Internet governing body with a mission to create a level playing field to ensure fair and open competition, the incumbent still continues to make the process more difficult than it really needs to be.

Let me share an observation drawn from my involvement in the effort. We are at a point in the process where critical decisions must be made if we are to realize the full value of the great promise the Internet holds for us. We are at this critical juncture, not because we have gotten off track, but because we followed two tracks.

One track we followed involves having the U.S. Government purposely decide not to get involved in dictating how the Internet must evolve. The key challenge government faced was finding a way to ensure that as the Internet environment became more complex, there would be a structure in place that we continue to coordinate this consensus-driven approach that has propelled the Internet to its present height.

The second track we followed springs from a misguided notion that to-date we are all in it together. When the DOC determined it was necessary to end the monopoly that had been conferred upon Network Solutions, in the spirit of cooperation it sought to use the incumbent contractor to help orchestrate the transition. The incumbent was given the opportunity to develop a structure for divestiture and to create the operational structure under which other competitors could enter the Internet domain name system. It is clear that NSI has taken advantage of the opportunity by creating a structure that is inordinately self-serving.

Based on the experience we gained while participating in the test bed, it also appears the structure is inherently inequitable toward obtaining new registrars and competitors. ICANN setup a system to accredit the new registrars in accordance with the charter. ICANN's guidelines were intended to provide stability and facilitate for fair and open competition.

We ended up with something of a hybrid process though, in which all of the new registrars must do business with the incumbent under the terms that ICANN sets, while the incumbent competes with the new registrars without regard to the operational guidelines that are intended to be a stabilizing force.

First of all, I believe that there are some ways that we can resolve some of these issues. There must be a better way of facilitating choice. Customers must be allowed to choose their registrar without having to pay excessive transfer fees. That is the case under the current license agreement we operate with.

We also must facilitate the transitioning through a competitive environment by ensuring that all competitors and their customers have the same relevant information to properly interact with the domain name system. I realize in discussing domain name registration, we are dealing with issues that are complex, but I think it is possible to come to well-reasoned judgments about the focal point of this hearing and that is ICANN.

Let us remember that ICANN is roughly 8 months old. Its 8 months of existence have been difficult. Its progress has been sometimes uneven, but make no mistake, ICANN is the infrastructure we need to make this transition work. Taking these principles into order, it is clear that the domain name system itself, is basically stable and fully functional, contrary to assertions of impending catastrophe that the competition has been introduced where a monopoly reigned.

The last principle to govern the transition of domain name management is representation. The concept is one that is fundamental in making progress in an increasingly difficult global economy.

That, in my opinion, is ICANN's management structure and why it basically must reflect functional and geographic diversity of the Internet. Basically, there are quite a few other issues here that hopefully we might be asked questions about in terms of how we feel we can compete more equitably. Maybe we will have these issues brought forth.

Thank you.

[The prepared statement of Kenyon T. Stubbs follows:]

PREPARED STATEMENT OF KEN STUBBS, CHAIRMAN, EXECUTIVE COMMITTEE,  
INTERNET COUNCIL OF REGISTRARS

My name is Ken Stubbs, and I am the Chairman of the Executive Committee of CORE, the Internet Council of Registrars. I appreciate the opportunity to appear before you today.

May I start by providing you with some brief background on CORE. CORE is a not for profit membership association comprising more than 50 domain name registration companies of all sizes, including my own and many others like it. CORE's member companies come from more than 20 different countries. Reflecting the strength of America's influence in the Internet, the largest share of CORE registrars are U.S. companies with a presence in many American cities.

For more than two years, CORE has been intimately involved in the entire Internet governance process. We have collaborated closely with the Department of Commerce and the entire Internet community, and contributed extensively to the Green and White Papers, as well as the myriad of meetings and conferences leading to the creation of the Internet Corporation for Assigned Names and Numbers (ICANN). In addition, CORE was chosen last April to be one of the original five test bed registrars, and has recently "gone live" actively registering domain names.

I'll begin by addressing the issue that is central to this hearing—is the Internet Corporation for Assigned Names and Numbers (ICANN) completely fulfilling its re-

sponsibility to open up the Internet Domain Name System to competition? The answer, in my view, is that right now it cannot.

The reason that it cannot accomplish the goals set forth for it—goals that were the product of years of deliberation and negotiation among people who see the Internet as the single greatest force in the global economy—is cause for grave concern. It is a concern for the people who have invested themselves heavily in the process of helping shape the future of the Internet. It is a concern for those of us who are directly involved in the transitioning effort. And it is certainly a concern of the many businesses hoping to enter the domain name registry field.

ICANN's ability to accomplish its responsibilities is conditioned upon the cooperation of the company that has held a complete monopoly on domain registration. That company is Network Solutions Inc. Despite a clear mandate for ICANN to be the consensus Internet governing body with a mission to create a level playing field to ensure fair and open competition, the incumbent continues to thwart the process.

Let me share with you an observation drawn from lengthy involvement in the effort to open the Internet's naming system to competition. We are at a point in the process where critical decisions must be made if we are to realize the full value of the great promise the Internet holds as a powerful and unifying force throughout the world. We are at this critical juncture not because we have gotten off track, but because we have followed two tracks.

One track we have followed involves having the United States Government purposefully decide to avoid dictating how the Internet must evolve. To its credit, the government recognized that, to this point, the Internet has evolved in remarkable fashion, thanks in no small measure to the voluntary efforts of individuals who shared a global vision. The key challenge the government faced was finding a way to ensure that, as the Internet environment became ever more complex, there would be a structure in place that would continue to coordinate the consensus driven approach that has propelled the Internet to its present heights.

The second track we have followed springs from a misguided notion that we are all in this together. When the Department of Commerce determined that it was necessary to end the monopoly that had been conferred upon Network Solutions, in the spirit of cooperation it sought to use the incumbent contractor to help orchestrate the transition. NSI was given the opportunity to develop a structure for divestiture and to create guidelines under which other competitors could enter the Internet domain registration system. It is clear that NSI has advantaged the opportunity by creating guidelines that were self-serving. Based on the experience we have gained while participating in the test bed, it also appears the guidelines are inherently inequitable toward new competitors.

ICANN set up a system to accredit new registrars and developed operational guidelines. In accordance with its charter, ICANN's guidelines were intended to provide stability and facilitate fair and open competition. Unfortunately, these goals became illusory when the incumbent refused to recognize ICANN's authority. We ended up with something of a hybrid process, in which all of the new registrars must do business with the incumbent under the terms it has set, while the incumbent competes with the new registrars without regard for the operational guidelines that are intended to be a stabilizing force. That must change.

I believe we must resolve the following issues:

There must be a way to facilitate choice. Customers must be allowed to choose their registrar without having to pay excessive transfer fees as is proposed by the current NSI Registrar License Agreement.

All registrars must formally recognize ICANN's authority. To date NSI has not signed ICANN's accreditation agreement, which would bind them to the same terms and conditions as all other registrars.

NSI must withdraw its claim of ownership of the government's Internet name contact database. The database must continue to be held in the public domain and protected from abuse.

We must facilitate the transition to a competitive environment by ensuring that all competitors have the relevant information to properly interact with the name registration system. The incumbent has currently implemented an inefficient and proprietary Shared Registry System (SRS).

There must be a payment policy that is the same for all registrars.

I realize that in discussing domain registration, we are dealing with issues that are complex, and working in a field that is not always easily understood. But I think it's possible to come to well-reasoned judgments about the focal point of this hearing—ICANN. Let's remember that ICANN is roughly eight months old. Its eight months of existence have been difficult, its progress sometimes uneven, but make no mistake—ICANN is the infrastructure we need to make this transition work.



The fairest way to judge how ICANN is doing is to look at its progress in light of the bedrock principles that were established to guide the transition of domain management from the government to the private sector. Those principles are stability, competition, private-sector, bottom-up coordination, and effective representation.

Taking these principles in order, it is clear that the domain system is stable and fully functional, despite ever increasing demand for domain-name services and despite the fact, contrary to assertions of impending catastrophe, that competition has been introduced where monopoly reigned.

In the interest of competition, five new registrars have been accredited, and four are up and running. ICANN has provisionally accredited 50 plus more competitors, who in turn will be followed by even more as we make the transition to full and open competition.

The third principle under which the transition to full competition in the Internet name and address system is to proceed is reliance on the private sector, and to the extent possible, incorporation of the kind of bottom-up, grass-roots kind of management that has been typical of the way the entire Internet has developed.

Here ICANN has been required to participate in a process that vaguely resembles the sentiment Bismarck expressed about the making of laws and sausage—yet, the process, while not pretty, should be judged by its results. Three supporting organizations have been formed, and each of these has been organized through a democratic and constituent driven process.

The last principle to govern the transition of domain management is representation. The concept, and it is one that is fundamental to making progress in an increasingly global economy, is that ICANN's management structure must reflect the functional and geographic diversity of the Internet, and should ensure international participation in decision-making.

Here again, because of the bottom-up sort of approach ICANN has followed, progress has been uneven. But if progress has been slower than desirable, it is due to the fact that the democratic process is certain to take more time than the autocratic process—some time ago, this country decided that the democratic process, whatever its faults, was vastly preferable.

Mr. Chairman, the process of creating a world-wide, non-profit consensus driven organization to manage domain registration on the Internet has been difficult, contentious, and occasionally acrimonious. But even the adversarial positions taken by competing entities may, in the long run, be helpful, for they bring into the open and cause us to examine differing views of how the Internet should evolve. For the process we are going through to be most helpful, we must carefully note what we have learned. At this point a number of lessons have emerged.

First, we know that the business of being a registrar must be wholly separated from the business of being a registry. We have seen the incumbent take advantage of the fact that all newly accredited registrars must do business with it to create structural advantages that, if left intact, would seriously undermine competition in the future.

Second, we have learned that pricing policies must be on an equal footing. All newly accredited registrars must be paid in advance before accepting a name for domain registration. In contrast, the incumbent offers credit terms and refunds. As a result, speculative buyers continue to flock to the incumbent. If we want to dampen domain name speculation, it is clear that advance payments must be required.

We must also see NSI withdraw its specious claim of ownership of the government's Internet name contact database. These claims violate established intellectual property law and anti-trust law and will both restrict and damage competition, and ultimately, in my opinion destabilize the governance process.

And we must know that any arguments presented that warn of the instability of the Internet brought about by ICANN's governance of the system are wholly unfounded. We must keep in mind the root server remains under the direct management of the U.S. government. There is no technical impact on the Internet brought about by competition on the business end. There are no stability issues, contrary to what is constantly being claimed by NSI as reason for continuing their policies and control.

Most of us here understand that new choices in domain names, and choice among registrars, will create increased efficiencies, lower prices, and better service for millions of Internet users worldwide. But we need to have the playing field leveled. We need to get to the point where we can have certainty in our business plans, and that requires that the incumbent formally recognizes ICANN and accepts that it must be treated on an equal basis with all other registrars. NSI will still be the big kid on the block, but it must allow the new kids to play.

Speaking as a newly accredited registrar, we have to reach the point where we have a sense of stability and confidence. Reaching that point is less a function of

what ICANN does, than what NSI does. If the incumbent will work with us to facilitate the transition to a competitive environment, and acknowledge the role of ICANN, the focus of our activities can return to where they properly belong, on continuing to build what has become perhaps the best man-made resource of our time.

Thank you for the opportunity to appear. I look forward to answering your questions.

Mr. UPTON. Thank you. Mr. Bramson.

### TESTIMONY OF JAMES R. BRAMSON

Mr. BRAMSON. Thank you, Mr. Chairman.

America Online appreciates the opportunity to contribute its own views on this very important issue. As you have already heard a fair amount of, and as the subcommittee has already shown their appreciation of, we are engaged in an extraordinary transition event right now, which is also very exciting because it will bring competition to a unique and important corner of the Internet environment, which is one of the most fiercely competitive industries that we have seen up until now.

The domain names and the assignment of IP addresses are core building blocks for the success of all of the things that we have come to rely on, on the Internet. In order to be able to ensure this transitional process, we need to make sure that there is stability, predictability, scale-ability, and an even playing field for new entrants into this market. ICANN is currently the only process that has provided any structure for this transition.

Therefore, we think in a very short time it has accomplished a fair amount. We think it needs to continue down that road. As you have already heard and discussed somewhat today, ICANN has a broad range of issues that it is going to be focusing on, involving domain name governance, involving protocol numbers, and treatment of the introduction of generic top level domains and other issues. The core function that we want to focus on is the test bed itself, which we think is the critical avenue toward introducing competition here. The goal of the test bed is to do several things.

One is to allow the registrars to understand the technical issues of being able to communicate with a relatively new shared registry system.

Second, to allow the community of registrars to understand what is involved in moving to a multi-player system which has, up until now, been a single player system.

Third, to be able to identify procedures that will be necessary to maintain reliability and predictability as we grow the competitiveness in this field, while maintaining usability for consumers, and give consumers more choice.

We think there has been a relatively ambitious timeframe for the test bed, but even so, four out of the five tested registrars are already beginning to accept registrations. Nevertheless, we still lack some fundamental functionality for all of the test bed registrars that will be necessary for there to be true competition that meets consumer expectations.

The learning that is going on in this test bed is, nevertheless, very important. We think it will help to improve the transition to additional registrants who will come after the test bed. AOL, for its part, has not yet gone live with accepting registrations, but has obtained the technical certification from NSI necessary to do that.

We are continuing to work diligently to complete the internal systems that are necessary to launch this new business for us, while still maintaining our members' expectation of privacy of information, and controlling the data base that will need to be kept in accordance with the ICANN accreditation agreement. We expect we will be able to launch also our services by the end of the extended test bed period.

We still think there are some hurdles that need to be overcome before this competitive process will really result in a true competitive environment that is user-friendly for consumers. That, at the very core, will require NSI, which is an important player, and will continue to need to be an important player for sometime to come, in our estimation.

They will need to work with the Department of Commerce and with ICANN, collectively, to try to resolve what is a very important issue. As a community, we really cannot afford not to have this process work. The WHOIS data directory is another issue that needs to be addressed.

Currently, or up until while there was a single player system, the directory was easy to use by consumers and it was effective for that reason. As we move into a multi-player system, WHOIS data bases will need to be coordinated in such a manner that we can ensure that consumers will be able to have their expectations met, and that this can really be a viable consumer oriented competitive business.

Finally, we do think that there is a need for some standardization of voluntarily accepted standards for the registrar community in order to make sure that we can cooperate in having equal access opportunities to new entrants in the space, that treatment is consistently uniform among all the entrants, and that dispute policies are enacted in such a manner that it will meet the very real and conflicting interests of many members of the Internet community. The question that has been asked is whether or not the ICANN process is something which needs to be re-thought?

We do not think so at this point. We do think that they have made a lot of headway in a relatively short period of time on a very difficult track. We think there are things that need to be done and we hope that they are. They have expressed today that they are listening to the criticisms and taking those criticisms to heart.

We certainly appreciate the role of this subcommittee and the committee at large in helping to facilitate some of those changes we have heard today, at least one example of an adopted policy by ICANN that has been affected by the letter-writing and the involvement of the House.

We look forward to having Congress continue to watch this process closely, and having this process continue to its successful conclusion, because we really cannot afford for it not to.

Thank you very much.

[The statement of James R. Bramson follows:]

PREPARED STATEMENT OF JAMES R. BRAMSON, COUNSEL, AMERICA ONLINE, INC.

#### INTRODUCTION

Chairman Upton, Ranking Member Klink, and members of the Subcommittee, thank you for the opportunity to share the perspective of America Online, Inc.

(AOL) regarding the ongoing transition of management responsibilities for the domain name system (DNS) from a single company—Network Solutions, Inc. (NSI)—under government contract to a competitive marketplace that more fully embodies the core principles that drive our burgeoning Internet economy. As one of the five initial testbed registrars in the development of a Shared Registration System (SRS), AOL believes that Congressional review and support at this juncture in the transition process is timely and appropriate to further facilitate this unprecedented migration from government-sanctioned monopolistic control to the private sector.

#### THE IMPORTANCE OF THE DNS PRIVATIZATION PROCESS

The DNS is not merely one off-shoot component of the Internet. Rather, it is the underpinning of global Internet commerce from which all on-line communications and on-line transactions originate. This critical, technical link allows families to stay in touch, information to be disseminated, and products to be marketed and purchased.

Much of the impetus for transitioning to a competitive DNS system derives from the core belief that a competitive, open, and democratic Internet community model will yield greater consumer choice, value, and innovation at lower cost. Since publication of Department of Commerce's (DOC) "White" Paper, the Department and the Internet Corporation for Assigned Names and Numbers (ICANN) have been proceeding to complete this challenging transition to a competitive marketplace according to an ambitious timeframe. DOC and ICANN, the entity empowered by DOC to oversee the transition, are to be commended for moving the registration system in a few short months much closer to this competitive reality.

In line with the themes expressed in the Department's "Green" and "White" Papers, which served as the blueprint for ICANN, the global electronic commerce framework should strive for a private system that ensures competition and universal access, allows for the protection of intellectual property and privacy, minimizes consumer fraud, and fosters transparency and broad based participation so as to provide a stable basis for commercial activity.

While there have been frustrations and technical difficulties, and their remain problems to overcome, AOL's central message to the Subcommittee is that the move into this uncharted territory is generally proceeding in the right direction. However, this fragile, forward progress could be easily corrupted if the transition is not completed in a manner that ensures competition in a stable, reliable, and predictable manner. Just as any new highway design requires an aggressive test-drive before driver confidence can be earned, so too is it imperative to ensure that the registration transition completely unfolds—both in policy direction and in technical accomplishment—in a manner that builds on and extends consumer expectations for Internet reliability. We believe the testbed is committed to achieving this goal.

We share the view expressed by DOC and, more generally and emphatically, by the Internet community, that DNS competition that emerges in a structured manner will continue to bring growth to this new medium. AOL believes that ICANN is the proper coordinating vehicle for accomplishing this structured privatization. The alternative to privatization—a return to a government-regulated monopoly—is not compatible with the goal of enhanced access, choice, and value. And within the transition process, we believe that an untried, yet-to-be determined alternative to ICANN's leadership would merely slow down a train that has not only left the station, but is nearing its destination. That ICANN is the best of all compromise alternatives is reinforced by the unimplemented efforts of the International Ad Hoc Committee (IHAC), a short lived, independent effort of the Internet community to accomplish what now has proved possible only through ICANN. A reversion to governmental control or acceptance of instability and chaos in the DNS—which would certainly result were a departure from the ICANN structure now demanded at this late date—are equally unsatisfactory.

#### ICANN'S PROGRESS

Overall, ICANN has accomplished a great deal in a very short time. It is important to remember that ICANN is not even one year old. Only in late 1998 did ICANN and DOC negotiate the agreement that has led to ICANN's role in the transition to a competitive registration system. In its managing role for the DNS transition and DNS governance generally, ICANN has provided needed structure. It is a credit to this process that the ambitious schedule set by ICANN has generally been met.

With no DNS actor able to operate in isolation, the key to a successful testbed, and ultimately an open DNS, is cooperation among the registrars. ICANN has facili-

tated communication among the testbed registrars to ensure that AOL and others have access to information necessary to operate in a commercially viable manner.

It is clear that NSI—an important participant in the stability and success of the DNS system—must continue to be an integral part of the DNS transition, not only as the registry, but also as a registrar. Even after full DNS registrar competition is a reality, a DOC-sanctioned monopoly will likely remain as NSI retains its role in maintaining the registry for .com, .org, and .net generic top level domains (gTLDs). NSI will also likely continue to act as one of many DNS registrars in the new marketplace. A challenge facing ICANN, DOC, and NSI is to bring NSI into the evolving system as a registrar on equal footing with the other registrars.

ICANN has overcome many initial doubts about its ability to pave the way into a competitive marketplace. Given the time and money invested in reaching this point in the DNS transition, there are many well articulated but conflicting interests within the Internet community that will be impacted by any change in the status quo. Despite these inherent conflicts, ICANN has filled a necessary role in trying to build a system that is open to divergent interests in a manner that can ensure stability and robustness in the final DNS transition.

#### THE TESTBED PROCESS

ICANN's formation of a testbed is a crucial step in the DNS transition, as it provides the framework for technical evaluation of multi-user access to a previously untested SRS. The ongoing stability of the transitional DNS system depends on such careful, incremental stress on this infrastructure. The testbed project commenced on a very tight application and decision time line. The testbed schedule was ambitious to ensure that the full DNS transition takes place expeditiously. As the process has unfolded, testbed registrars—including AOL—have greatly enhanced their knowledge about building a registration business in a SRS environment which, by necessity, involves coordination among registrars. This learning curve will prove invaluable in bringing additional accredited registrars in a structured way into a competitive DNS.

In commencing registration operations, there are internal technical issues that a registrar must overcome, as well as collaborative synergies that must be identified and developed among the registrar community and the registry to keep the system robust and valuable to registrant users. As it turns out, the original sixty day time frame set for the testbed was overly ambitious. Due to technical hurdles associated with starting up a new registrar service and the issues involved in launching what is essentially an entirely new business operation for some of the testbed registrars, only one testbed registrar became operational within the original sixty days. Even in the hyperspeed Internet world, sixty days can be a very short time, particularly when transitioning a five-year old government-controlled enterprise to the private marketplace. During the extension of the testbed period, three more testbed registrars have now commenced operations. Since selection as a testbed, AOL has diligently pursued its own implementation strategy, and has passed the required NSI registration test that ensures compatibility between the registry and a testbed registrar. This is a technical hurdle to becoming certified as a registrar. AOL has worked closely with NSI's technical personnel and has found them to be cooperative during the testbed. We are continuing efforts to build the internal systems necessary to launch our own registration service. We currently expect to have AOL registration services functional and on-line by the end of the evaluation extension, August 6, 1999.

AOL believes that the experience of the testbed registrars, which will be publicly shared at the end of the testbed period, will help to create a solid, competitive foundation for the DNS system.

#### REMAINING HURDLES TO CREATING A COMPETITIVE DNS

While there are a number of challenges to confront before the competitive DNS market is fully open for business, at least the following four important issues must be addressed: NSI's integration into the competitive system, coordination of the WHOIS database system, refinement of domain name transfer procedures, and finalization of dispute resolution procedures.

#### *NSI Integration*

NSI has an unusual role in the ongoing DNS system. The Internet community assumes that NSI will emerge from its historical role as a government-regulated monopoly into a dual-function entity: administrator of the DNS registry, under contract with DOC, as well as a competitor registrar in the open DNS model. DOC, ICANN, and NSI must mutually determine the course in which the NSI evolution will occur.

Because of NSI's dual role, it is likely that DOC will continue to negotiate the agreement to be used by NSI, in its role as registry, with the competitive registrars. While industry often thinks that it is better positioned than government to negotiate private sector contracts, there is a role in this instance for DOC participation. However, it is necessary that any agreement reached between DOC and NSI ensure two fundamental results: that the Registrar License Agreement used by NSI as registry will be a commercially viable framework under which the competitive registrars can operate, and that NSI as registrar will be subject to the same rules of the road as its competitors. The Internet community is carefully monitoring the status of the ongoing DOC-NSI contract negotiations.

DOC has been dealt a challenging role in this transitional period and has delicately navigated the process as well as could be expected. It is our expectation that the natural result of the DNS transition will entail a diminishing level of DOC supervisory involvement until such time as there is a stable, competitive environment that ensures a fair playing field among registrars.

#### *WHOIS Database*

ICANN and NSI, in consultation with the testbed registrars, must determine how best to construct a coordinated database of domain name registration information. Under an effective DNS, consumers and intellectual property owners must have the ability to determine in a timely manner whether a specific domain name has been registered and by whom. If this information is difficult to obtain, there is a real risk that consumers' confidence in the DNS may be shaken and the integrity of the DNS will be compromised. The Internet is a medium where consumers have come to expect real-time information and readily available access. To be successful, a competitive DNS must fully meet this consumer demand. When only one registrar is in play, as was previously the case with NSI, the need for coordination among registrant names was not at issue. In the multiple registrar environment, where each maintains a separate database of registrants, it is critical that there be coordination among all registrars so that the introduction of a competitive DNS system does not take customer service a step backwards.

Whether the chosen WHOIS database model in the competitive DNS world is a single database, or as is technically feasible, multiple databases that "call" each other when a user performs a single query, the key is to secure a cooperative, coordinated system that best serves the registrars' customers and preserves the integrity of the registry.

#### *Domain Name Transfers*

The testbed registrars have been working with NSI to develop procedures on how best to facilitate transfer of domain names between competing registrars. Discussions are ongoing for determining transfer parameters and protocols. Irrespective of the final technical design of the transfer procedures, it will be essential to preserve uniformity and ease of transfer without allowing an unscrupulous registrant to employ transfers as a means to undermine dispute resolution systems. The Internet community will be ill-served if registrants are able to game the DNS system to circumvent established dispute resolution mechanisms.

#### *Dispute Resolution*

While many have found fault with NSI's dispute resolution procedures, it is essential that a replacement process be constructed that will satisfy registrars' need to minimize their exposure, maximize registrant protection, and allow intellectual property owners to enforce their rights. As the open DNS marketplace continues to evolve and innovate, there is significant room for improvement in the current dispute resolution arena. WIPO has accelerated and aided this effort already. AOL is committed to working with others in the Internet community to continue efforts to accomplish this much needed refinement.

#### CONGRESS' ROLE

At this stage in the DNS transition, AOL believes that Congress can be most helpful by continuing to keep informed about the transition process. Mr. Chairman, hearings such as you are holding today provide a needed forum for continuing oversight of this important devolution of government control. While legislative action is presently unneeded to further facilitate the transition, it is important for Congress to provide the necessary assistance for DOC to ensure that the task at hand reaches competitive closure. At the same time, with much progress already made, Congressional support of a registration playing field among equals—NSI, the testbed registrars, and entrants yet to emerge—will further facilitate forward motion and, ulti-

mately, one of the most exciting and expeditious free market transitions of recent time.

AOL appreciates the opportunity to assist the Subcommittee in its review of this important process.

Mr. UPTON. Again, we all appreciate your fine testimony today. Again, as you hear these buzzers and bells, we have a series of votes coming. I think in the interest of time, and your time particularly, knowing you have been here all day, that I will certainly allow all members of the subcommittee to correspond with some questions, which I certainly have a list of them here, but rather than go through them, we will use the Postal Service to get back to you.

We look forward to certainly working with your groups and interests in the future as we look at this very intriguing question. As things go forward, we appreciate your comments.

This hearing is now adjourned. Thank you.

[Whereupon, the hearing was adjourned.]

[Additional material submitted for the record follows:]

THE INTERNET CORPORATION  
FOR ASSIGNED NAMES AND NUMBERS

August 4, 1999

The Honorable THOMAS J. BLILEY, JR.  
Chairman  
The House Committee on Commerce  
2125 Rayburn House Office Building  
Washington, D.C. 20515

DEAR CHAIRMAN BLILEY: I am writing to answer your letter of July 28, 1999, asking for information about communications between ICANN and the Department of Justice. As several members noted during the recent hearing of your Committee at which I was privileged to testify, the creation and operation of ICANN is a complicated undertaking, and we appreciate any opportunity to better educate and inform the Congress and the public about what ICANN is doing and what we hope to achieve.

Your inquiry apparently was prompted by an e-mail message that was one of many provided to the Committee by ICANN in response to your earlier letter of June 22. Your statement that the conversation reported in this e-mail "appear[s] to be highly inappropriate" is puzzling, and appears to be based on a misunderstanding about the nature of the conversation described in this message. The right to petition government is constitutionally protected, and indeed is one of the freedoms that has distinguished the American form of government. Members of the Board, staff and counsel of ICANN have had a number of discussions with various members of the executive and legislative branches of government since ICANN's formation in late 1998. The common focus of those conversations has been ICANN's mission and objectives, and the obstacles that remain to accomplishing those objectives.

In this particular case, ICANN's counsel was urging the Department of Justice, which as part of its official mission is the principal advocate for competition within the Executive Branch, to urge the more rapid transition of domain name registration services from a single monopoly government contractor to a competitive market. The Department's representatives listened to this request, and agreed to consider it; that was the entire sum and substance of the conversation. We do not believe that this exercise of the constitutionally-protected right to petition government could even arguably be considered inappropriate. Indeed, I assume you and other members of this Committee receive regular requests to consider various actions, perhaps even related to this same subject.

As the e-mail in question indicates, this discussion did not involve the pending antitrust investigation of NSI, which had been ongoing for some time. But if it had, that would certainly also have been completely appropriate. ICANN is charged, both by its Memorandum of Understanding with the Department of Commerce and by a clear Internet community consensus, with replacing the current non-competitive domain name registration system with a competitive system, where price, quality of service and other important criteria relating to domain name registrations are determined by the marketplace, not by a monopoly provider. The Department of Justice is charged with enforcing the antitrust laws. One possible avenue from monop-

oly to competition in domain name registration services is through enforcement of the antitrust laws. Thus, it is appropriate for ICANN, through its counsel, to discuss with representatives of the Department of Justice ICANN's views of the antitrust enforcement issues associated with the current monopoly name registration situation, and for ICANN to advocate antitrust enforcement action if it believes such would be appropriate. ICANN is entitled to express its views on such subjects, just as any other person or entity may.

With this background, let me respond on behalf of the Initial Board of Directors of ICANN to your specific questions.

1. Provide a listing of all communications between the Department of Justice and ICANN.

We are unable to provide such a listing. We are not aware of any records of such communications other than the e-mail message previously provided. Nevertheless, we can state that there have been a number of discussions between counsel for ICANN and Department of Justice lawyers over the several months of ICANN's existence. Those conversations have generally concerned the antitrust and competitive policy issues relating to domain name registrations. We are aware of no other substantive conversations between a representative of ICANN and any official or employee of the Department of Justice.

2. Provide all records relating to such communications.

The Committee is already in possession of all such records.

3. Discuss the ICANN Board's knowledge of, or subsequent authorization of, the communication by counsel reflected in the e-mail message previously provided.

To the best of my knowledge, the ICANN Board was not aware of this particular communication prior to its occurrence. Such communications are part of the ordinary activities of ICANN's counsel and would not require nor normally generate prior notification or approval. Questions about the ICANN Board's reaction to the conversation after the fact appear to be based on the premise that this communication, or others like it, was somehow inappropriate; since we do not believe this is the case, we had no reason to instruct counsel to avoid such communications in the future. In fact, the Board expects its counsel, in the ordinary course of carrying out his responsibilities to ICANN and the ICANN Board, to continue to communicate with Executive Branch agencies, members of the Legislative Branch and their staffs, and any others with whom such communications are, in his judgment, useful to support the efforts of ICANN to carry out its responsibilities.

I hope this is responsive to your inquiry. On behalf of ICANN, let me reiterate that we are committed to carrying out our responsibilities with respect to the transition of the management of certain aspects of the Domain Name System from government control to the private sector through a process that is open and transparent. As a part of this, we are eager to work with this Committee and its staff to ensure that you have all the information required to fully understand how this transition is proceeding. As you know, we have offered to provide periodic briefings to Committee staff on a bipartisan basis, in the hope of avoiding misunderstandings such as the one that apparently prompted this particular inquiry. I look forward to working with the Committee and its staff to ensure that all Members of the Committee are fully informed about this difficult but important undertaking.

Please let me know if we can provide any further information.

Sincerely,

ESTHER DYSON  
*Interim Chairman*

cc: The Honorable John D. Dingell, Ranking Member





**GENERAL COUNSEL OF THE  
UNITED STATES DEPARTMENT OF COMMERCE**  
Washington, D. C. 20230

August 24, 1999

The Honorable Fred Upton  
Chairman  
Subcommittee on Oversight and Investigations  
Committee on Commerce  
House of Representatives  
Washington, DC 20515-6115

Dear Chairman Upton:

Thank you for giving us the opportunity to appear before your subcommittee on July 22, 1999, to testify about the Internet Corporation for Assigned Names and Numbers (ICANN) and the privatization of the management of the Internet domain name system. We are happy to provide the following responses to questions posed in writing on August 10, 1999.

1. *Under what circumstances, if any, would the Department of Commerce withdraw its support for ICANN?*

The Department of Commerce has recognized ICANN pursuant to a Memorandum of Understanding (MOU) dated November 25, 1998. Under the MOU, ICANN and the Department have agreed to collaborate on the design, development, implementation, and testing of mechanisms and processes needed to complete the transition to private sector management of the Internet domain name system. The MOU articulates the principles under which ICANN is to operate including, for example, the principles of stability, competition, bottom-up decision making, and global representation. Moreover, the MOU is based on the Administration's *Statement of Policy on the Administration of Internet Names and Addresses* (the White Paper). The Department of Commerce evaluates ICANN's progress against the standards and principles laid out in the White Paper and the MOU.

ICANN's work under the MOU is to develop a new form of consensus based management. This necessarily involves some degree of experimentation, and learning through experience. Thus, the Department of Commerce does not expect ICANN always to "get it right" on the first try. The Department of Commerce would, however, withdraw its recognition of ICANN if ICANN consistently acted in a manner that was inconsistent with the standards and principles articulated in the White Paper and the MOU or refused to correct any actions taken in violation of these principles and standards.

2. *Is adding new domains an advisable means of increasing competition among domain name registrars?*

There is considerable debate in the Internet community about the competitive benefits of adding new generic top level domains (gTLDs). Businesses in the United States and elsewhere have invested heavily in developing their "dot com" identity. Many believe that lock-in and switching cost effects will preclude the development of effective competition at the registry level.

The Department of Commerce believes that adding new gTLDs might increase competition at the registry (as opposed to the registrar) level. The careful addition of new gTLDs will benefit Internet users in a number of other ways as well. As a result, ICANN is charged, under the MOU, with developing policies for the introduction of new, competing gTLDs. We understand that ICANN's domain name supporting organization (the DNSO) has begun to study this issue. The addition of new gTLDs could, however, lead to increased litigation and impose significant costs on trademark holders unless appropriate rules for resolving domain name disputes and protecting intellectual property on the Internet are in place. For this reason the Department of Commerce supports ICANN's efforts to implement such rules and dispute resolution procedures before adding new gTLDs.

The Department of Commerce appreciates the Commerce Committee's continuing interest in the transition to private sector management of the Internet domain name system.

Sincerely,



Andrew J. Pincus  
General Counsel



J. Beckwith Burr  
Associate Administrator (Acting)

cc: The Honorable Ron Klink

ONE HUNDRED SIXTH CONGRESS

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**U.S. House of Representatives**  
**Committee on Commerce**  
 Room 2125, Rayburn House Office Building  
 Washington, DC 20515-6115

August 10, 1999

Mr. Mike Roberts  
 Interim President and CEO  
 Internet Corporation for Assigned Names and Numbers  
 4676 Admiralty Way  
 Suite 330  
 Marina Del Rey, CA 90292

Dear Mr. Roberts:

I want to thank you once again for appearing before the Subcommittee on Oversight and Investigations on July 22, 1999, to testify about the Internet Corporation for Assigned Names and Numbers ("ICANN") and the privatization of the management of the Internet domain name system.

As discussed at the hearing, the Subcommittee would appreciate responses to the following questions. Please provide a complete response by the close of business Tuesday, August 24, 1999.

1. When ICANN entered into its Memorandum of Understanding with the Department of Commerce, it agreed to assume the so-called "IANA function." I understand that this vital Internet function previously was provided by a small organization -- named IANA -- affiliated with the University of Southern California under contract with DARPA, a research arm of the Department of Defense.
  - a. Given ICANN's present financial situation, how is ICANN paying for the IANA function?
  - b. Does ICANN's present financial situation threaten the continued provision of IANA function related services to the entire Internet?
2. Records that were produced to the Committee by ICANN seem to indicate that there was a close working relationship between the Administration and the principal organizers of the ICANN submission prior to the actual submission of proposals to the Department of Commerce. One e-mail, written by Mike Roberts and dated September 18, 1998, indicates that the White House may have played a role in the selection of ICANN's interim board members (copy attached). Mr. Roberts drafted this e-mail before ICANN submitted its proposal and his subsequent appointment as ICANN's Interim President and CEO.

Letter to Mr. Mike Roberts

Page 2

Writing about the ongoing process of filling out ICANN's prospective interim board, in one portion of the e-mail Mr. Roberts states, "We're getting down to short strokes on [the] slate for [the] Interim [Board]. The game plan as of this afternoon is to have [a] progress [report] with Ira M[agaziner] on Tuesday and close by Thurs/Fri so public announcement can be made [the] fol[lowing] week." In another portion of the e-mail, Mr. Roberts summarizes the merits of two prospective interim board members, then writes "Normally, we might leave this to [a] White House choice, but there is sentiment not to put Ira in that position because they probably don't want that kind of gossip around."

- a. What involvement, if any, did Ira Magaziner, or any other employee within the Executive Office of the President, have in the consideration of prospective ICANN interim board members?
  - b. The e-mail refers to a "White House choice." Did any employee within the Executive Office of the President communicate any choice or preference to the principal organizers of the ICANN submission regarding prospective ICANN interim board members?
  - c. What kind of "gossip" is Mr. Roberts referring to in his e-mail?
3. In an e-mail produced to the Committee (copy attached), Mike Roberts, ICANN's interim President and CEO, wrote the following:

Last week, Commerce asked what might be required for us to be prepared to assume responsibility for the primary root server on short notice, perhaps as short as two or three weeks. They would like to have a contingency plan in place to deal with various developments related to Network Solutions and their ongoing contract negotiations.

This e-mail -- which apparently was written sometime prior to May 15, 1999 -- provides three scenarios under which ICANN might assume responsibility for the root server. What is the status of ICANN's efforts to be prepared for each of these three scenarios?

I appreciate your willingness to answer these additional questions for the record. If you have any questions about the scope or intent of these questions, please contact Mr. Eric Link or Mr. Paul Scolese of the Commerce Committee staff at (202) 226-2424 or (202) 225-2927 respectively.

Sincerely,



Fred Upton  
Chairman

Return-Path: <jun@wide.ad.jp>  
 Date: Sat, 15 May 1999 00:32:53 +0900  
 From: Jun Murai <jun@wide.ad.jp>  
 X-Accept-Language: ja  
 To: Mike Roberts <mmr@darwin.ptvy.ca.us>  
 CC: junsec@wide.ad.jp, edyson@edventure.com, lltouton@jonesday.com,  
 woolf@icann.org, roberts@icann.org  
 Subject: Re: Root Server Developments - pls respond immed if poss  
 References: <199905132134.OAA09678@darwin.ptvy.ca.us>

Dear Mike,

I have some quick questions regarding your message.

1. with the a) below, you do not think it is possible (for NSI to accept the idea), correct?
2. clear definition about relationship between RSSAC and 'the project'. is this to achieve the goal of the primary root server redesignation specific, or more in general?
3. how do we handle it if some of the 13 are not agreeing with the redesignation plan?
4. are you comming to beijing? if so, please let me know when to arrive and where to stay. 19 in there would be much appreciated for me to work with you there.

best regards,  
 jun

Mike Roberts wrote:

- >
- > Dear Jun -
- >
- > Last week, Commerce asked what might be required for us to be
- > prepared to assume responsibility for the primary root server on
- > short notice, perhaps as short as two or three weeks. They would
- > like to have a contingency plan in place to deal with various
- > developments related to Network Solutions and their ongoing
- > contract negotiations.
- >
- > I discussed this with is Suzanne, and Louis has discussed the legal and
- > procedural side of it with Mark Bohannon at Commerce.
- >
- > There are three general alternatives available to us to deal with this:
- >
- > a) Commerce instructs NSI to transfer the A root server to ICANN.
- >
- > b) ICANN acquires a root server machine of its own and Commerce
- > instructs all of the operators to treat this new machine as the

- > new primary.
- >
- > c) ISI transfers resp for the L server currently being run by Bill Manning to ICANN, and Commerce instructs ICANN to operate it as the primary, and further asks the root server operators to redirect their servers to L as the new primary - including NSI.
- >
- > Of the three options, (c) is a recent possibility, since ISI management has agreed with us to transfer responsibility for the L server. It is also the only one of the options which seems to permit us to assume responsibility for the primary server in a very short time period. There are administrative details involved, and we do not have agreement between ISI and ICANN to do this yet, but I am working on it and will keep you advised.



Mike Roberts <mmr@darwin.ptvy.ca.us>  
09/18/98 04:16 PM

Extension:

To: rogerc@us.ibm.com  
cc: lhl@cs.wisc.edu, jsims@jonesday.com  
Subject: fyi - private note to Heath

----- Forwarded message from Mike Roberts -----

From mmr Fri Sep 18 13:05:43 1998  
Return-Path: <mmr>  
Received: (from mmr@localhost)  
by darwin.ptvy.ca.us (8.8.7/8.8.7) id NAA18542;  
Fri, 18 Sep 1998 13:05:40 -0700  
From: Mike Roberts <mmr@darwin.ptvy.ca.us>  
Message-Id: <199809182005.NAA18542@darwin.ptvy.ca.us>  
Subject: Converging on Interim Bd Names  
To: heath@isoc.org  
Date: Fri, 18 Sep 1998 13:05:40 -0700 (PDT)  
Cc: mmr@darwin.ptvy.ca.us (Mike Roberts)  
X-Mailer: ELM [version 2.4ME+ PL34 (25)]

We're getting down to short strokes on slate for Interim Bd. The game plan as of this afternoon is to have progress rpt with Ira M. on Tuesday and close by Thurs/Fri so public announcement can be made fol week - maybe even before Sept expires.

As I think others have reviewed with you, the US nets down to 4 places - 2 industry, 1 resech/educ, and 1 public interest.

Pres of Radcliffe, Linda Wilson, seems solid for resch/educ. Esther Dyson seems solid for public interest although some reverberations from within that community. (Negative voices need to come up with better name if they can.)

That leaves industry. ICC/INTA/ITAA still going around but presumably will come up with content/trademark oriented person at CEO level.

Then we're down to telecomm/computer indsutry. Apparently, we have CEO or Level 3 - Crowe, and outgoing CEO of Bell Atlantic - Smith having benn contacted and expressed interest. I sent a note to Vint this morning which suggests we should act quickly to agree on one or the other. Sending this followup to you to indicate what's going on. Either wd prob be good choice. Depending on pt of view, both are "controversial." Normally, we might leave this to White House choice, but there is sentiment not to put Ira in that position because they probably don't want that kind of gossip to get around.

Roger C is in process of trying to reach Vint to discuss.



August 24, 1999

The Honorable Fred Upton  
 Chairman, Subcommittee on Oversight and Investigations  
 The Commerce Committee  
 U.S. House of Representatives  
 Room 2125 Rayburn House Office Building  
 Washington, D.C. 20515-6115

Dear Mr. Chairman:

On behalf of Network Solutions, Inc. ("NSI"), I appreciate the opportunity to respond to your August 10, 1999 letter. I have repeated below your questions, followed by my responses.

**Question 1**

*In your written testimony, you note that, "ICANN has failed to engage on a deep and continuing basis with the industry and stakeholders that they purport to regulate." During your oral testimony, you agreed to identify the parties with whom ICANN has not communicated in this regard and the damage that has occurred as a result of this lack of communication. Please provide this information for the record.*

**Response**

When I testified that "ICANN has failed to engage on a deep and continuing basis with the industry and stakeholders that they purport to regulate", I had the following in mind. Despite the fact that ICANN is proposing substantive policies that would apply only to the .com, .org and .net domains, for which NSI is registry, the ICANN Board has declined invitations to visit NSI's facility to be briefed in detail regarding the actual workings of the business. Only a very few of the Board members have participated at all in the many online discussion groups that continually debate policy issues relating to the domain name space -- and even these few post quite infrequently and often suggest that any dissent merely represents "foot dragging".

The Board's practice of holding closed meetings has made it more difficult for the broader community to assess the Board's qualifications and the reasoning they have brought to bear on their decisions. Two Board meetings were conducted telephonically in secret even after the recent hearings and an admonishment from the Department of Commerce to open their process. The



practice of scheduling Board meetings on a quarterly basis delays the development of a true dialogue and is out of sync with the "Internet time" pace of this dynamic industry.

In its decisions to establish and structure a Domain Name Supporting Organization, the Board has so far declined to recognize constituencies reflecting the noncommercial sector, would-be registries for new domains, and individual holders of domain names. The Board has done this even though the interests of these groups are directly implicated by policy decisions that the Board has been making (and that the Board has been urging the DNSO to consider on an expedited basis). Even when present at meetings of the DNSO Names Council, representatives of the Board have allowed the ICANN Bylaws to be violated by partisans attempting to capture the DNSO Names Council process for their own purposes, thereby discouraging a more open and constructive dialogue. An example of this was the expulsion of authorized representatives of the gTLD constituency from such a meeting.

The Board has scheduled most of its "public" meetings in geographical locations (Singapore, Berlin, Santiago) far removed from the majority of Internet users. They have insisted on in-person meetings, rather than online discussions that might more readily cut across time zones and allow the maximum number of people to participate. In short, the Board has failed to engage in a real dialogue with the community, particularly with parties that the Board feels should be required to implement whatever policies the Board adopts. This has led and will likely lead to the endorsement of policies and procedures that do not fit well with the technical and operational realities of the business of domain name registration.

### **Question 2**

*In your oral testimony, you stated that you believed the intellectual property rights to the domain name registry system transfer to Network Solutions Incorporated ("NSI") under the Cooperative Agreement, whereas Mr. Pincus testified that he believes those rights belong to the government under the Cooperative Agreement. In your oral testimony, you agreed to provide a legal opinion affirming this belief. Please provide this information for the record.*

### **Response**

Enclosed as Exhibit I is a letter from Jonathan W. Emery, Senior Vice President – General Counsel and Secretary of NSI, which provides the legal opinion you have requested.

### **Question 3**

*During your oral testimony, you agreed to provide a more accurate estimate of the amount of money NSI has spent to create a competitive environment for the registration of domain names. Please provide this information for the record.*

### **Response**

Through July 31, 1999, NSI had expended approximately \$15.6 million to create and operate a competitive environment for the registration of domain names. This amount will continue to grow.

**Question 4**

*In your oral testimony, you noted that "true industry consensus" will be used concerning accreditation in the privatization of the Internet domain name system. You also agreed to provide the Subcommittee with your definition of "a true industry consensus." Please provide this information for the record.*

**Response**

My comment regarding "true industry consensus" was made in reference to the language of the Department of Commerce's so-called White Paper (the "White Paper"), which called for creation of a not-for-profit entity that would implement consensus-based, bottom up, decision-making of the type that gave rise to the Internet in the first place. My remarks were made in the context of attempting to explain our efforts to negotiate a contract with ICANN that would specify the circumstances under which ICANN policies should be binding on registries and registrars, including those that might disagree with a proposed standard and be reluctant to adopt it voluntarily. Typically, standard setting bodies of this type operate by developing attractive standards that can be adopted voluntarily by industry participants. For example, there is no law that says networks must use the TCP-IP protocol (many do not), but there is an incentive for those who want to communicate together with the protocol to do so. In the case of the domain name system, there may in some instances be a need for the adoption of uniform standards. In certain instances, it can make sense to attempt to require registries and registrars for various domains to adopt similar practices or follow standardized rules. But, because ICANN will not and should not have any governmental power simply to require all registries to follow its policies, there is a need for registries to become bound by contracts with ICANN to follow ICANN policies only under certain circumstances. Such contracts cannot simply state that the registry will do whatever the ICANN Board says -- that would be tantamount to turning the operation of the registries over to a new, unaccountable, board of directors.

The most reasonable alternative, advanced by NSI among others in connection with its support of the Paris Draft proposal for structuring the Domain Name Supporting Organization, is that all registries should agree to be bound by contract to follow policies that have been agreed to by a supermajority (say 2/3rds or 3/4ths, perhaps counted in terms of registration volume) of those registries that would be called upon to implement such policies. In other words, registries might reasonably be asked to go along with most other registries -- rather than holding out. NSI advanced this view even though it would clearly require NSI at times to go along with policies with which it disagreed.

In addition, another requirement of such contracts should be the existence of consensus support among the many other Internet stakeholders who might be impacted by the adoption of uniform ICANN policies. In the absence of consensus on mandatory policies, registrars and registries would compete in the marketplace for registrations and adopt diverse policies to meet various needs. The question how to reliably assess the existence of any such broad consensus has been the subject of long discussion in many different fora. NSI has been an active participant.

The best available method would appear to be creation of a truly open General Assembly for a Domain Name Supporting Organization. The DNSO Names Council would then be tasked with

the creation, through working groups, of a documented report that (a) focuses on a concise proposition to be advanced as a candidate for consensus support, (b) demonstrates that open processes and active outreach have provided reliable information regarding the views of the full range of stakeholders, (c) analyses the full range of support and opposition, and (d) demonstrates that any opposition has been persuasively answered or is minor and inconsequential in extent.

The nature of the issue presented will determine whether there will be strong disagreements, whether the disagreements will come from those most impacted by the policy (a factor that should produce hesitancy in finding consensus), and how much outreach ought to be conducted before there can be any comfort that the full spectrum of views has been adequately canvassed. Nevertheless, the overall requirement for a demonstration of consensus can and should be a key requirement in any contract that would bind a registry to adopt a policy against its will -- and the standard can and should be institutionalized in processes and templates for required reports.

Representatives of NSI have submitted concrete and constructive suggestions regarding the nature of such processes and reports. But the basic idea of looking for industry consensus, according to the White Paper, is the core source of ICANN's legitimacy, and the key test for any registry's or registrar's contractual obligations. This requirement is at the heart of the White Paper, is one of the reasons it was endorsed by NSI and others, and is, I respectfully submit, appropriately at the heart of NSI's effort to establish a constructive, bilateral contractual relationship with ICANN.

#### **Question 5**

*I understand that NSI currently controls the "A" root server, which is the controlling database for every .com, .net and .org domain name. In the Department of Commerce's White Paper, it was indicated that the "A" root server would be moved to an independent third-party when the transition of the DNS infrastructure to the private sector was stabilized. So far, this has not occurred. What factors, if any, have prevented NSI from entering a memorandum of understanding with the Department of Commerce that covers such issues as control over the "A" root server and the separation of NSI's registry and registrar functions?.*

#### **Response**

The Root Server System sits at the top of the Internet's hierarchy of computers, and contains the "root zone file." That file contains a list of the approximately 250 top level domains ("TLDs") (.us, .com, .mil, etc.) and the number (known as an Internet Protocol ("IP") number) for each machine at the next level down which, in turn, serves to hold all of the second-level domain names and IP numbers in each particular TLD (the "TLD zone files").

The Root Server System, however, is not a "system" in the way you might believe. It is composed of thirteen "redundant," separate machines, located, by historical accident, at sites which do not necessarily provide the best geographic dispersion. Eight of the thirteen machines are directly or "indirectly" controlled by the United States Government:

- 2 - owned by Network Solutions, Inc.
- 2 - owned by the University of So. California
- 1 - owned by the University of Maryland
- 1 - located at the NASA Ames Research Center

4

- 1 - located at the DOD Network Information Center
- 1 - located at the U.S. Army Research Laboratory - Aberdeen

The other five are located in New York, California (2), Sweden, and Japan, respectively.

No contracts, however, exist between or among the thirteen Root Server operators. Although NSI, pursuant to its Cooperative Agreement with the U.S. Government, acts as the "primary" (or "A") Root Server operator, NSI has no contract with the other Root Server operators. Each evening, NSI "updates" the root zone file, making any modification, as authorized and directed by the U.S. Government. As you might assume, however, very few changes are made. No new TLDs have been added and the machine locations (i.e., the IP numbers) for these machines seldom change. The other Root Server operators, however, are not contractually obligated together and, as a matter of normal course, do not necessarily pull the root zone file from NSI on a daily basis. Thus, the "system" is voluntary, unregulated and unprotected.

The above explanation is encapsulated in the White Paper statement:

The root server system is a set of thirteen file servers, which together contain authoritative databases listing all TLDs. Currently, NSI operates the "A" root server, which maintains the authoritative root database and replicates changes to the other root servers on a daily basis.

Further, as the White Paper describes:

Similarly, coordination of the root server network is necessary if the whole system is to work smoothly. While day-to-day operational tasks, such as the actual operation and maintenance of the Internet root servers, can be dispersed, overall policy guidance and control of the TLDs and the Internet root server system should be vested in a single organization that is representative of Internet users around the globe.

The White Paper concludes with the statement:

The new corporation ultimately should have the authority to manage and perform a specific set of functions related to coordination of the domain name system, including the authority necessary to:

\* \* \*

- 2) oversee operation of the authoritative Internet root server system;
- 3) oversee policy for determining the circumstances under which new TLDs are added to the root system....

NSI has performed the function as the primary Root Server operator since the beginning of the Cooperative Agreement in 1993. That function, i.e., the dissemination of the list of TLDs permitted on the Root Server System by the U.S. Government and the server locations for those TLDs' zone files, was included in our proposal (Section I.2.2) and incorporated into the Cooperative Agreement. Amendment 11 to the Cooperative Agreement did not make any change to that function or to the overall control of the Root Server System by the U.S. Government, but allowed for the possibility that the U.S. Government could transfer the function or instruct us to take direction from "NewCo" under certain circumstances. Amendment 11 states that

NSI agrees to continue to function as the administrator for the primary root server for the root server system and as a root zone administrator until such time as the USG

instructs NSI in writing to transfer either or both of these functions to NewCo or a specified alternate entity.

While NSI continues to operate the primary root server, it shall request written direction from an authorized USG official before making or rejecting any modifications, additions or deletions to the root zone file. Such direction will be provided within ten (10) working days and it may instruct NSI to process any such changes directed by NewCo when submitted to NSI in conformity with written procedures established by NewCo and recognized by the USG.

Thus, in direct answer to your inquiry, NSI has agreed to perform the function of being the primary Root Server operator until directed to do otherwise by the U.S. Government. Nothing has prevented NSI from transferring the function of being the primary Root Server operator. Any one of the thirteen Root Server operators could be designated as the "primary" one from which the other twelve copy the root zone file. The U.S. Government could direct NSI, under Amendment 11 to the Cooperative Agreement, to transfer that function tomorrow and we would comply.

As to your question regarding what factors, if any, have prevented us from entering into a memorandum of understanding with the Department of Commerce regarding "the separation of NSI's registry and registrar functions," that subject was already negotiated with the Department of Commerce and covered in Amendment 11 to the Cooperative Agreement. Amendment 11 provides that

NSI also will by February 1, 1999, employ appropriate safeguards, approved by the USG, to ensure that revenues and assets of the registry are not utilized to financially advantage NSI's registrar activities to the detriment of other registrars.

On February 1, 1999, we sent a letter to the Department of Commerce describing the "safeguards" mentioned above (Exhibit II). In addition, we recently issued a press release announcing a new organizational structure which formalizes the separation of our registry and registrar functions into two discrete business units (Exhibit III).

#### **Question 6**

*The test-bed period has been extended several times. Many observers have charged NSI with creating technical delays in order to extend its monopoly. How do you respond to these charges and what efforts have you made to permit unfettered access to the Shared Registration System?*

#### **Response**

Let me assure you that NSI has not created "technical delays in order to extend its monopoly." To the contrary, we have used our best efforts so that registrars would have access to the shared registration system as soon as they were able. For example, each of the five testbed registrars was assigned a Network Solutions account representative and our technical team provided around-the-clock support. In addition, we currently have a team of customer service representatives available 24 hours a day, seven days a week, to assist new registrars as they develop their software. I would like to provide the history of and facts behind each extension of the testbed to provide you with an accurate account of the events that have occurred.

On October 6, 1998, NSI and the U.S. Government signed Amendment 11 to the Cooperative Agreement. Amendment 11 called for a two-month period of testing, to begin on April 1, 1999. During the testbed period, five registrars were to test the shared registration system. At the beginning of December 1998, no testbed registrars had been accredited, and we were beginning to become concerned that the contemplated schedule was in jeopardy due to the extent of preparations that we believed would be required of each registrar in order to be able to begin actual testing. Thus, in an effort to help, by letter dated December 10, 1998, we advised the Department of Commerce that:

NSI anticipates that it will take a registrar about three months to develop, test, and implement its end of the new registration system . . . after receipt of the Registry Registrar Protocol. Therefore, in order for the participants in the system test planned for commencement on April 1, 1999, to be ready, designation, accreditation, and licensing will have to be completed by the end of December 1998.

Despite this December notification from us, February 1999 arrived, and ICANN and the Department of Commerce had still not announced the names of the five testbed participants. As a result, on March 12, 1999, we signed Amendment 12 to the Cooperative Agreement providing that the testbed would begin on April 26, 1999 and end on June 25, 1999. For our part, we had already completed development of the shared registration system so that we were ready to start testing on April 1 had registrars been available to conduct the tests at that time.

On April 21, 1999, or just five days before the revised start of the testbed period, the Department of Commerce and ICANN announced the names of the five companies that would participate in the testbed. At the press conference announcing the companies, ICANN set the stage for subsequent criticisms of NSI by announcing that the registrars would begin providing domain name registration services on Monday, April 26 – a technical impossibility for those registrars.

Register.com was the first company to complete its software development and achieve technical certification to enter the live, production environment for the testbed period. The fact that they began live registrations only six weeks after the announcement is testimony to the competency of register.com's software development team and to NSI's technical staff's commitment to success of the testbed phase. The remainder of the registrars achieved technical certification as quickly as they were able.

However, a Beta test of any new software application discloses "bugs," and this test was no exception. In all instances of problem definition, NSI moved as quickly as possible to achieve problem resolution. As one example, the registrars encountered problems establishing a secure connection to the Registry using the "certificates" provided by NSI. Rather than delay development until each registrar could obtain a commercial certificate from a certificate authority, NSI allowed each registrar to generate its own certificate and NSI modified its software to recognize and accept the self-generated certificates.

By June 25, 1999, four of the five testbed registrars had achieved technical certification to participate in the testbed, but only one of the registrars was registering domain names in the live production environment. (Melbourne IT, the second testbed registrar to begin actual registrations,

entered its first registration on June 29.) In order to provide for reasonable operational testing and to assure security, stability and robustness in a multi-registrar environment, NSI and the U.S. Government again amended the Cooperative Agreement on June 25, to provide that the testbed period would be extended for an additional three weeks, until July 16, 1999. This extension was considered to be the only prudent course of action to avoid threatening the stability and security of the Internet.

On July 16, 1999, a third extension of the testbed, until August 6, 1999, was announced to provide for further testing. This extension was requested by the Department of Commerce.

On August 6, 1999, the testbed was again extended, until September 10, 1999. It was extended for two reasons. First, during this period, more testing could occur and testbed registrars in addition to the original five would be eligible to register domain names in the shared registration system. The total potential number of eligible registrars, as of August 20, 1999, was 59. Second, this period was designed to afford NSI, the Department of Commerce and ICANN a reasonable period of time to agree on contractual terms that would apply after the end of the testbed.

I hope that this history has been helpful in explaining the reasons for each extension of the testbed and that it demonstrates that NSI's efforts have been designed to facilitate competition rather than impede it.

Thank you again for the opportunity to respond to your request.

Sincerely,



James P. Rutt  
Chief Executive Officer



August 20, 1999

The Honorable Fred Upton, Chairman  
 Subcommittee on Oversight and Investigations  
 House Committee on Commerce  
 2125 Rayburn House Office Building  
 Washington, DC 20515

Dear Chairman Upton:

This is in response to your letter of August 10, 1999, in which you asked me to respond to several questions. The questions and response appear below in the order in which they were asked.

**1. How is ICANN paying for the IANA function?** These costs are primarily costs associated with the IANA staff, who are currently on detail from ISI, which is being reimbursed for the portion of their time used by the IANA. The resources from which these payments are being made are ICANN's general resources, which include corporate and individual donations, loans from corporations, and voluntary contributions from accredited registrars in lieu of the registrar fees that were suspended by the ICANN Board.

**2. Does ICANN's financial condition threaten the continued provision of IANA services?** To the extent that ICANN has assumed responsibility for the costs of the IANA, ICANN's inability to generate sufficient revenues to cover those costs would make it impossible to carry out that responsibility. In that event, however, it seems likely that the United States Government would contract with some other entity (such as ISI) to carry out those responsibilities, so it seems unlikely that the IANA functions would be interrupted.

**3. Describe the involvement of Ira Magaziner or any other employee of the Executive Office of the President in the consideration of prospective ICANN interim board members.** Given Mr. Magaziner's central role in the USG's efforts to encourage the development of what became ICANN, he was kept generally informed as to the progress being made in the creation of the community consensus that eventually became ICANN. The general information provided included information about progress in identifying a broadly representative and broadly supported Interim or Initial Board. Mr. Magaziner did not choose the Board members, nor did he seek or was he offered a right to veto any particular candidate. Mr. Magaziner did

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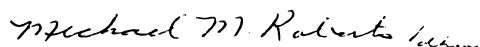
The Honorable Fred Upton, Chairman  
 August 20, 1999  
 Page 2

offer his views on the type of candidate that, based on his discussions with numerous people, would likely find broad support in the community, and those views were taken into account, along with similar opinions expressed by numerous others. With regard to my email of September 18, it was never intended by any of the participants in the process, including myself, that the decision on the selection of Interim or Initial Directors would be made by anyone other than Jon Postel, after receiving and considering advice from as broad a range of community participants as possible. This is consistent with my recollection of the circumstances that, if we had two equally acceptable choices, we might want to ask Mr. Magaziner for his views as to which would be more likely to receive broad community support, and we may have done so, since we did ask that question of numerous other participants in the process.

**4. What is the status of ICANN's preparation to assume responsibility to operate the primary root server?** As you know, the "primary" root server is the particular computer out of the 13 root servers that is the source of the daily updates that keep all 13 root servers coordinated so that each of them provides consistent root nameservice throughout the Internet. ICANN has assumed responsibility for operating one of these root servers, formerly operated by ISI, which is designated the "L" root server. At present, the "A" root server, which Network Solutions assumed the responsibility for operating when it entered its cooperative agreement with the USG in 1992, is designated as the primary root server. It has long been the view of many participants that the root server that is designated primary should be operated by a neutral party -- that is, an entity not engaged in the competitive aspects of the DNS. To this end, the ICANN Root Server System Advisory Committee, which is made up of all of the root server operators, has formulated technical procedures for shifting the designation of the primary root server between existing servers in the root server system, as well as other procedures for enhancing the security and stability of the root server system. These procedures have been approved by all members of the Root Server System Advisory Committee, including the two Network Solutions employees/root server operators who serve on that committee. If and when the Department of Commerce determines that it is desirable to shift the primary designation from the root server designated "A," the Root Server System Advisory Committee's plan will allow that to be done in a secure and stable manner that should not even be noticed by Internet users.

I hope this information is fully responsive to your questions. Please let me know if we can provide any further clarification or information.

Sincerely,



Michael M. Roberts  
 Interim President and Chief Executive Officer



August 18, 1999

The Honorable Fred Upton  
Chairman  
Subcommittee on Oversight and Investigations  
U.S. House of Representatives  
Room 2125  
Rayburn House Office Building  
Washington, D.C. 20515-6115

Dear Chairman Upton:

Pursuant to your letter of August 10, 1999, enclosed please find responses to the questions you raised regarding the Internet Corporation for Assigned Names and Numbers (ICANN) and the privatization of the management of the Internet domain name system. The future stability of the Internet is of interest to all members of the Information Technology Association of America (ITAA) and we appreciate the opportunity to provide our views on this important issue.

Please do not hesitate to contact me should you have any further questions.

Respectfully,

A handwritten signature in black ink, appearing to read "H. Miller".

Harris N. Miller  
President

Enclosure

**Information Technology Association of America**

1616 N. Fort Myer Drive, Suite 1300, Arlington, Virginia 22209-3106 Phone: (703) 522-5055 Fax: (703) 525-2279

**1. Regarding the possible addition of new gTLDs:**

**a. What concerns do you think trademark holders have regarding the addition of new gTLDs?**

ITAA members include companies responsible for the building of the Internet infrastructure and companies that conduct a growing percentage of business over the Internet. As such, ITAA is equally concerned with both the operational and trademark aspects of the management of Internet domain names.

The Internet today is a global, commercial medium. If the promise of global electronic commerce is to be fulfilled, there must be effective policing and protection of trademarks. Trademark holders have raised concerns that a rapid increase in gTLDs without consideration to the protection of trademarks may result in more cases of cybersquatting and make it increasingly difficult to protect trademarks. The addition of new gTLDs may lead to increased opportunities for trademark infringement and increased enforcement costs.

ITAA has maintained that we should proceed with caution to create new gTLDs and the introduction of new gTLDs there must be a parallel effort to:

1. Establish precise standards and rules for trademark-like protection for domain names;
2. Create international searchable databases to secure effective trademark enforcement;
3. Harmonize international trademark laws; and,
4. Adopt policies to reduce conflicts between trademark holders and domain name registrants.

**b. How would the addition of new gTLDs increase competition in the registration and use of domain names?**

The addition of new gTLDs would provide domain name holders with increased options under which gTLD(s) it might register its domain name, provide the option to get service from different registries (that track different gTLDs), and provide a choice of registration services from competitive providers.

**c. Does ICANN presently have the authority to add new gTLDs?**

Paragraph 3 (iii) of the ICANN Articles of Incorporation, explicitly states that ICANN shall perform and oversee functions related to the coordination of the Internet domain name system ("DNS"), "including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system."

The development of such policies should be done in full coordination with ICANN's relevant supporting organization, most notably the Names Council.

**2. Regarding the registration of one of the so-called "seven dirty words" as part of a domain:**

**a. Should registrars have the right to refuse to register domain names containing any of these words?**

It is our understanding that the U.S. Government and many other governments around the world can regulate the use of some of these words under certain circumstances, particularly if minors have access to the words. This issue for both registrars and registries will require further discussion in the appropriate ICANN working bodies.

**b. Should registries have the right to refuse to accept a registration containing any of these words?**

See above answer.

**3. Does the Department of Commerce have the authority to recompute the .com, .net and .org registries? How would such recompetition affect the Internet's stability and**

**competition for domain name registration and related services?**

We believe the U.S. Administration has the authority to re-compete the .com, .net and .org registries and we support fully its efforts to privatize the management of Internet domain names.

Re-competition would ultimately provide end users with a wider selection of choices in terms of both registrars and registries. Additionally, competition would force registrars and registries to offer new and innovative services at lower costs.

As to stability, if re-competition is done thoughtfully and it involves the input of all Internet stakeholders in a transparent manner, that stability can be maintained. Specifically, ITAA supports:

- (1) private sector creation and organization of the Internet Corporation for Assigned Names and Numbers (ICANN) -- a new, not-for-profit corporation to conduct DNS management;
- (2) rapid introduction of competition in the provision of domain name registration services;
- (3) adoption of policies to reduce conflicts between trademark holders and domain name registrants; and
- (4) review of the root server system to increase the security and professional management of that system.

**4. Regarding domain name disputes among legitimate trademark holders, is this an appropriate area of policy for ICANN to consider? Are such policies needed by the entire Internet community, and not merely by the trademark or business community?**

Conflicts between trademark holders and domain name holders have become increasingly common and mechanisms for resolving these conflicts are often expensive and cumbersome. In so far as domain name and trademark disputes may cause confusion among tens of millions of Internet users and may affect the addition of new gTLDs, it is an appropriate area of policy for ICANN and its supporting organizations to consider. We believe these policies would be beneficial to the entire Internet community.

**5. There has been much discussion about the role to the Governmental Advisory Committee (GAC) to ICANN. Regarding GAC:**

**a. Has the GAC taken any actions to date that are inconsistent with its official role?**

I am not aware of any action by the GAC that is inconsistent with its role as laid out in the ICANN Articles of Incorporation and Bylaws and the GAC Operating Principles.

**b. Is the GAC subject of its own rules or to the rules of ICANN?**

The GAC Operating Principles clearly state that GAC is not a decision-making body (Principle 2) and it has no authority to act for ICANN (Principle 5). GAC Operating Principles also clearly state (Principle 55) that any difference in interpretation between the principles in the GAC Operating Principles and ICANN's Articles of Incorporation and Bylaws, ICANN's Articles of Incorporation and Bylaws shall prevail.

**c. What reforms to the GAC, if any, should be made to ensure that it will act only as an advisory body to ICANN and not as a policy-making body?**

At the present time, we see no need for reforms to the GAC. Our primary concern is that ICANN be a non-governmental organization and that no government representative should have a decision-making role in the ICANN board. We believe this objective has been achieved.

**6. If ICANN ultimately does not charge its now-suspended \$1 per domain name fee, how should ICANN fund its operations?**

As I stated during my testimony, I personally believe the \$1 per domain name fee is a legitimate means of funding ICANN operations. While ICANN has received "no strings attached" funding largely from corporate contributions, it is not a substitute for a permanent, stable source of funding for ICANN. One alternative worth exploring is to have registrars and registries bear some of the costs of ICANN operations.

James Love  
Director  
Consumer Project on Technology  
P.O. Box 19367  
Washington, DC 20036  
<http://www.cptech.org>

September 10, 1999

Fred Upton  
Chair  
Subcommittee on Oversight and Investigations  
Committee on Commerce  
US House of Representatives 20515-6115

Dear Chairman Upton:

The following are my answers to the subcommittee questions regarding ICANN and the privatization of the management of the Internet domain name system.

1. Regarding the possible addition of new generic Top Level Domains ("gTLDs"):
  - a. What concerns do you think trademark holders have regarding the addition of new gTLDs?

Trademark owners aggressively seek to protect the use of names, including for new gTLDs. IBM probably wants to prevent anyone but IBM from using IBM.web or other possible gTLDs that might be created. However, trademark owner concerns must be balanced by other public interest considerations. For example, in many cases there are lots of different firms or organizations that use the same name, and the existence of additional gTLDs will permit more than one organization to use the name. This will often be appropriate, as consumers will have opportunities to tell the difference between different firms who use the same name, with different gTLDs. For example, the journal Nature owns nature.com. The Nature Company owns natureco.com. I don't think Nature, the journal, would be harmed if the Nature Company could buy nature.web or nature.biz or any other gTLD using Nature. There are countless examples like this. Indeed, in our view, any proposals to add new gTLDs should seek to expand the name space available to firms, organizations and individuals, and discourage hoarding by firms. I might add that there are already technologies

under development to make it easier for the public to find firms by their true names, regardless of their domain name, further reducing confusion among like sounding domain names. It is also important to protect the right of parody and free speech in the allocation of domain names, and to protect the rights of individuals and non-commercial organizations.

- b. How would the addition of new gTLDs increase competition in the registration and use of domain names?

New gTLDs should be created. However, governments should decide now who will "own" a gTLD. It is our view that the gTLD is a global commons, and should not become the property of any private party. If the gTLD is a global commons, it would be appropriate to create an international governance structure to manage the resource for the benefit of the public.

- c. Does ICANN presently have the authority to add new gTLDs?

We are unsure if ICANN has the legal authority to do anything with regard to gTLDs.

2. Regarding the registration of one of the so-called "several dirty words" as part of a domain:

- a. Should registrars have the right to refuse to register domain names containing any of these words?

No.

- b. Should registries have the right to refuse to accept a registration containing any of these words?

No.

3. Does the department of Commerce have the authority to recompetete the .com, .net and .org registries? How would such recompetition affect the Internet's stability and competition for domain name registration and related services?

We assume the Department of Commerce does has the authority to recompetete the .com, .net and .org registries, and we urge the Department of Commerce to do so as soon as possible. The recompetition should enhance the Internet's stability, and indeed, the purpose of the recompetition should be to create a system that cannot be held hostage to a private

body. This may require more redundancy, posting of bonds, backup of key data with trusted third parties, changes of financial incentives or other management measures.

4. Regarding domain name disputes among legitimate trademark holders, is this an appropriate area of policy for ICANN to consider? Are such policies needed by the entire Internet community, and not merely by the trademark or business community?

As presently envisioned, ICANN should not be expected to undertake policy making on trademark disputes. ICANN is an unelected body without any particular competence or authority in the field of trademark disputes.

Trademarks are for the benefit of the public, and protection of legitimate trademark rights protect consumers. However, trademark owners have commercial interests that are not identical to the consumer or public interest in trademarks. For example, trademark owners sometimes try to assert rights that would be anticompetitive or that would harm free speech. So far both ICANN and the World Intellectual Property Organization (WIPO) have demonstrated too much concern for the rights of trademark owners and too little concern for the public interest in competition and free speech.

5. There has been much discussion about the role of the Government Advisory Committee ("GAC") to ICANN. Regarding the GAC:
  - a. Has the GAC taken any actions to date that are inconsistent with its official role?
 

Yes. The GAC does not operate in a transparent manner, and has excluded the public from its deliberations.
  - b. Is the GAC subject to its own rules or the rules of ICANN?
 

The GAC seems to operate without any rules at all.
  - c. What reforms to the GAC, if any, should be made to ensure that it will act only as an advisory body to ICANN and not as a policy-making body?

The problems with the GAC are part of more general problems with the ICANN. The entire enterprise operates outside of rules that would normally protect the public or provide accountability. Both ICANN and the GAC should be subject to measures comparable to the US laws on open records, open

meetings, conflicts of interest, public notice, and other public accountability provisions.

6. If ICANN ultimately does not charge its now-suspended \$1 per domain fee, how should ICANN fund its operation?

ICANN should not be permitted to collect mandatory fees or taxes on domain registrations unless ICANN is democratically accountable to domain owners, or is accountable to democratically elected governments. At very minimum, there should be legally binding limits on use of this money by ICANN. ICANN should not be able to use these fees or taxes to do anything permitted by the non-profit laws of the State of California -- this is far too broad. As a practical matter, ICANN has many other mechanisms to fund its operations, if it gains control over the power to grant gTLDs, it could auction off the rights to some gTLDs to the top bidders, for example, or even auction off the rights to use selected popular names. But any of these schemes raise the same issues. Why would all of these resources be given to a private unelected and unaccountable body in the first place? And, how big of a budget is justified for such a modest technical role by ICANN? Do we really need a huge bureaucracy with \$300,000 or more salaried officials to carry out ICANN's mission? And who should make these decisions? The unelected ICANN board of directors? The small number of commerce firms that will dominate the stakeholder board allocations?

In general, we think governments should create a special *sui generis* multinational agreement to manage global DNS resources. A group like ICANN could then function under a charter this is based upon the multinational agreement, subject to oversight and accountability, including financial accountability.

Sincerely,



James Love  
Director  
Consumer Project on Technology






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## AMERICANS FOR TAX REFORM

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Grover G. Norquist  
President

August 24, 1999

Chairman Fred Upton  
Subcommittee on Oversight and Investigations  
Room 2125  
Rayburn House Office Building  
Washington, DC 20515

Dear Chairman,

Thank you for the opportunity to respond to the subcommittee's questions regarding the Internet Corporation for Assigned Names and Numbers (ICANN) and the privatization of the management of the Internet domain name system.

**Q1: According to your testimony, you believe that ICANN's \$1 per domain name is actually a tax. What is the legal basis for your belief that this is a tax?**

This question goes directly to the heart of my concern in regards to ICANN. Legally, the question cannot be answered as we are still left to wonder exactly to what extent ICANN is a de facto governmental entity. As they have used the example of the Park Service in that ICANN should have the same ability one is left to wonder what they see as their governmental reach.

Obviously, a tax, by definition, must be imposed by a government and laid upon individuals. In all other aspects this is clearly a tax. The "fee" is involuntary and for the continued operation of an end that is, supposedly, in the state's interest. So, the question that remains is whether, in fact, ICANN is operating as a governmental entity through, or in conjunction, with the Commerce Department. Until we know the answer to that question we cannot determine if, legally, the \$1 charge that does not reflect the provision of a service, is a tax.

**Q2. You state that ICANN's bureaucracy will cost government's and corporation's at least another \$20 – \$30 million annually. How did you arrive at this figure?**

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Chairman Fred Upton  
September 10, 1999  
Page 2

Let's consider some of the ongoing costs.

a. Policy making

Each ICANN meeting has typically attracted about 150 people from the private sector and 35 from governments. If you figure travel and accommodation expenses at \$2k/person, plus another \$2k in employee expenses for travel and participation time, you have about \$4k per person per meeting. That's \$2,960,000 just for the four board meetings a year.

If we then further assume that about half those people are required to spend about half their time per year dealing with ICANN developments, and that this represents about \$40k per year, that amounts to \$7.4 million. 185 people is probably a reasonable number to use, as there are at least as many people who never go to meetings.

b. Operational

The expenses for complying with the bureaucratic administrative requirements would encompass doing daily escrows of data and transferring those to ICANN, legal fees, and all of the other imposed requirements. This is elusive, but when multiplied across potentially several hundred registrars, you get into the \$2-10 million range.

c. Taxation

If one assumes 10 million registrations a year, the tax alone amounts to \$10 million

**Q3. If ICANN does not charge the \$1 fee per domain name, how should ICANN fund its operation?**

ICANN should fund itself like any other organization – by offering a product that is attractive to consumers. If they are not governmental as they claim even as they act governmental, then they should not be receiving tax dollars or imposing their own tax.

A for profit organization produces a product that consumers want in the free marketplace. By doing so, such organizations survive and prosper. In a very similar way a non-profit organization survives. A couple examples are by receiving corporate, foundation or individual donations. Again, the money is given because of the perceived benefit to giving the money. If ICANN is indeed an organization with something to contribute to the world of technology other than lavish trips to faraway destinations, then certainly the on-line world would fund this venture.

Chairman Fred Upton  
September 10, 1999  
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Ultimately, neither I, nor anyone else, knows enough of how this shadowy organization operates to answer this question conclusively. For that matter, this is a question that should have been answered before ICANN came into existence and certainly before they began attempts to craft and force policy its policy decisions onto the digital marketplace.

**Q4. There has been much discussion about the role of the “GAC” to ICANN.  
Regarding the GAC:**

- a. Has the GAC taken any actions to date that are inconsistent with its official role?**
- b. Is GAC subject to its own rules or to the rules of ICANN?**
- c. What reforms tot he GAC, if any, should be made to ensure that it will act only as an advisory body to ICANN and not as a public policy making body?**

As mentioned previously the overriding problems with ICANN has been the focus of my commentary. The greatest concern is exactly what sort of organization ICANN is supposed to be. ICANN faces some serious issues in its operations and functioning. Either it is governmental or it is not and all other questions can be answered as a direct result of that analysis. Hopefully, this fundamental question will be answered and, if ICANN is found to be governmental, that its operations will brought into accord through sunshine. If they are indeed merely a non profit organization then ICANN should begin acting accordingly.

Onward,



Grover G. Norquist



WAYNE STATE UNIVERSITY

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August 24, 1999

The Honorable Fred Upton  
Chairman  
Subcommittee on Oversight and Investigations  
Committee on Commerce  
U.S. House of Representatives  
Room 2125, Rayburn House Office Building  
Washington, D.C. 20515-6115

Dear Chairman Upton:

Thank you again for the opportunity to testify before the Subcommittee. These are my thoughts in response to the questions you posed in your August 10 letter.

*1. In your written testimony, you mention that trademark and business interests have a very strong influence in ICANN. In your opinion, has ICANN been "captured" by these interests?*

It's useful, in this context, to look separately at ICANN's various policymaking components. The most important of these are (1) the Board of Directors; and (2) the Names Council, which is charged by ICANN's Bylaws with primary responsibility for developing substantive policies relating to domain names.

The current membership of the Board of Directors seems highly responsive to trademark and business concerns. This should not be surprising: half of the Board members were drawn from the large-business community. Moreover, ICANN depends on large-business largesse for its day-to-day operating funds. On the other hand, it is too early to say that the Board's planned structure will necessarily skew its membership in favor of trademark and business interests. ICANN plans that in the future, half of the Board will be elected by the global membership and the other half selected by the three Supporting Organizations. It is hard to say today exactly what sort of representation this will generate. I am hopeful, though, that the resulting structure will indeed be a balanced and workable one.

The real problem of capture appears in connection with the Names Council — the

governing body of ICANN's Domain Names Supporting Organization.<sup>1</sup> The ICANN by-laws give that body initial policymaking authority in connection with the domain name system; as a practical matter, it will be tremendously difficult for ICANN to enact any policy relating to domain names that does not meet with the approval of the Names Council. The Names Council's structure is problematic and highly disturbing. Currently, the Council is made up of three representatives from each of five "constituencies" — [1] commercial and business entities, [2] intellectual property interests, [3] country-code top-level domain operators, [4] ISPs and connectivity providers, and [5] registrars — and a representative from NSI. In the near future, ICANN will add three representatives from a constituency composed of nonprofit organizations. ICANN has so far been unresponsive to calls for an "individual domain name owners" constituency.

Currently, thus, more than a third of the Names Council's members are representatives of trademark and business interests, whose explicit role is to advance those policies supported by the trademark and business communities. On issues where other Names Council members do not feel strong interests, this can easily be enough to control the vote. Indeed, it is arguable that the current Names Council has a built-in majority inhospitable to gTLD expansion — six business and trademark representatives, who oppose the addition of new gTLDs for the reasons given below, and three country-code top-level domain representatives, who may see any new gTLDs as undesirable competition for their own registries.

One answer might be to add additional representatives to the Names Council, representing other interests. The larger problem, though, is that the Names Council's constituency structure is incoherent. It gives specified interest groups decision-making power that is wholly unrelated to the groups' importance, or support, in the Internet community as a whole. It was adopted because it had the support of each of the interest groups awarded a seat at the table, but there is no reason to think that it will generate either representative decision-making or good policy.

*2. What has been the role of the trademark community in preventing the addition of new top level domains? What are their specific concerns over adding new top level domains? In your opinion, are their concerns legitimate?*

The trademark community has consistently lobbied, using both public and private channels, in favor of adding as few new gTLDs as possible, as slowly as possible. Their primary, and oft-expressed, concern is that adding new gTLDs will increase their trademark policing costs. The more new gTLDs there are, they argue, the more work they will have to do in order to ensure that nobody is using their trademarks (or variants) as second-level domains in ways that would confuse consumers.

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<sup>1</sup> ICANN's Domain Name Supporting Organization consists of the Names Council and the General Assembly. The latter body, which was intended as "an open forum for participation in the work of the DNSO," has no powers or authority as a body. Rather, it simply provides the resource pool from which the Names Council can draw when staffing working groups and research and drafting committees.

This concern, it seems to me, is vastly overblown. Trademark owners are already policing their marks in the existing generic top-level domains, as well as in a variety of country-code top-level domains. Cost concerns can be addressed through requirements that the new top-level domain registries make their lists of second-level domains easily searchable through an automated process. The additional costs to trademark owners should not be great. More importantly, it does not make sense to distort the entire structure of the Internet name space simply in order to avoid additional costs to trademark owners.

Members of the business and trademark community have an additional, perhaps more weighty, concern about expansion of the name space, and it is this: Companies that currently have a domain name in the form of <www.companyname.com> have, right now, an extremely important marketing and name-recognition tool. They have an advantage over all other companies that do not have addresses in that form, because they are the ones that consumers, surfing the Net, will be able to find most easily. If the name space is expanded, so that (say) companies can secure second-level domains in .biz and .firm as well as .com, then .com will no longer be the default commercial TLD. As a result, the value of the <www.companyname.com> domain name will be diminished.

It is easy to see why current domain-name holders might not welcome this prospect. But it would be a good thing for the rest of us. It would allow more companies to get easy-to-remember domain names more easily. It would lower the entry barriers to successful participation in electronic commerce. And indeed, it would help solve one of our most intractable problems relating to trademark and domain names. Currently, when multiple unrelated companies have the same or similar names (such as United Airlines and United Van Lines), there is no good way to resolve the question of who gets the valuable domain name <www.companyname.com>. But if the domain name space were expanded, so that one firm could have, say, <www.companyname.biz> and another could have <www.companyname.firm>, many of these disputes could be avoided.

*3. Regarding the possible addition of new generic Top Level Domains ("gTLDs"):*

*a. What concerns do you think those trademark holders have regarding the addition of new gTLDs?*

See above.

*b. How would the addition of new gTLDs increase competition in the registration and use of domain names?*

Addition of new gTLDs will increase competition in the registration of domain names because the new top-level domains will be operated by new registries. Users who are unhappy with the performance of one registry can instead acquire a new domain name in a different top-level domain, run by a different registry. Addition of new gTLDs will increase competition in the

use of domain names because it will allow multiple companies to have the same second-level domain name in different TLDs. That is (to pick an arbitrary example), shopping.com might face competition from shopping.biz and shopping.store. Those businesses will have to compete based on price, quality and service, rather than on the happenstance of which company locked up the most desirable domain name first.

*c. Does ICANN presently have the authority to add new gTLDs?*

The power to add new gTLDs rests, in the first instance, with the operators of the thirteen *root servers*, which contain databases that listing all “recognized” top-level domains. When a user types in a domain name, his or her computer consults the local DNS servers that are specified within the computer’s software in order to find the IP address corresponding to that domain name. If the local servers don’t know the answer, they kick the query to a higher level. The root servers sit at the top of the pyramid. If a user types in an domain name incorporating a top-level domain that is not included in the root server databases, then the DNS will be unable to find a computer corresponding to that domain name.<sup>2</sup>

Historically, the root server operators took their direction from the Internet Assigned Numbering Authority (IANA) regarding which top-level domains to include in the root database. They did so as a matter of custom and informal agreement; they had no formal legal relationship with IANA. Today, it is generally understood that the root server operators will take similar direction from ICANN. For any root server operator to refuse ICANN’s instructions would spark (or, more likely, flow from) a major crisis of legitimacy in the Internet infrastructure, and would generate immense confusion.

The “A” root server, which maintains the authoritative root database and replicates changes to the other root servers on a daily basis, is currently operated by NSI. Under the Cooperative Agreement (Amendment 11), NSI must transfer those functions to ICANN, or to a third party, upon the request of the U.S. government. In addition, so long as it operates the root server, NSI may not make or reject any modifications to the root zone file without the approval of the U.S. government. Thus, so long as the root server is located at NSI, the U.S. government has veto authority over any changes to the root zone. ICANN has entered into a Cooperative Research and Development Agreement with the U.S. government, <<http://www.icann.org/committees/dns-root/crada.htm>>, under which the parties have explored the possibility of moving operational responsibility for the “A” root server to ICANN. The

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<sup>2</sup> The root servers are identified in the software running in each local DNS server. Individual users have the ability to point their computers at alternate DNS servers that in turn point to alternate root servers, referencing a different group of TLDs. Such alternate TLDs and alternate root servers exist today, so that if one points one’s computer at the right DNS server, one can send electronic mail to addresses the rest of the Internet does not recognize. Very few Internet users, though, look to alternate root servers. Rather, the vast majority rely on the set of thirteen authoritative root servers discussed in text.

Department of Commerce has stated that it will direct NSI to transfer that responsibility only if ICANN agrees to operate the "A" root server, as NSI now does, under the direction of the U.S. government.

ICANN, thus, has the ability to add new gTLDs with the cooperation of the root server operators and the concurrence of the U.S. government.

4. *Regarding the registration of one of the so-called "seven dirty words" as part of a domain name:*

a. *Should registrars have the right to refuse to register domain names containing any of these words?*

b. *Should registries have the right to refuse to accept a registration containing any of these words?*

In a hypothetical competitive environment, in which both registrars and registries operated as private, competing businesses, with no connection to government, there would be no basis for limiting their abilities to accept or reject particular domain names. As private businesses, they could make their own choices. More concretely: in the future, if ICANN should authorize a substantial number of new gTLDs, there would be no basis for limiting the new registries' and registrars' abilities to accept or reject particular domain names. If a particular registrar, or a particular top-level domain registry, decided that it would not accept registrations containing certain words, would-be registrants would be free to take their business somewhere else. If all of the registries independently reached such a conclusion, there would still be no reason to disturb those private choices.

The current situation, however, is different. Essentially all gTLD registrations today are processed by NSI, which occupies that monopoly position because of its relationship with the U.S. government. A cogent argument can be made that NSI has been acting as the government's agent, and that the government should be held responsible for NSI's policies vis-a-vis what words can and cannot be included in domain name strings. That question is currently being contested in two separate lawsuits.<sup>3</sup> If one accepts the argument, then any NSI policy restricting the words that a domain name can contain must pass First Amendment scrutiny.<sup>4</sup> The First Amendment

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<sup>3</sup> See Associated Press, *Woman files suit seeking to register "dirty words" as Internet addresses* (May 7, 1999), <<http://www.freedomforum.org/speech/1999/5/7/wwwdirtywords.asp>>; Dan Goodin, *NSI's ban on "dirty" domains challenged* (May 3, 1999), <<http://www.news.com/News/Item/0,4,36003,00.html>>.

<sup>4</sup> Even if one concludes that NSI, as a private company, is not formally subject to the First Amendment, the policies underlying the First Amendment (given NSI's governmentally-conferred monopoly position) could provide a basis for a decision by Congress to subject NSI to free-speech constraints.



poses a significant barrier to such restrictions. As Justice Harlan explained in *Cohen v. California*, 403 U.S. 15 (1971), government may not seize upon particular words and remove them from the public discourse. "Surely," he wrote,

the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to [hold that government can proscribe particular words as offensive]. For, while the particular four-letter word being litigated here is perhaps more distasteful than others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric.

*5. Does the Department of Commerce have the authority to recompute the .com, .net and .org registries? How would such recompetition affect the Internet's stability and competition for domain name registration and related services?*

The Department of Commerce does have the authority to recompute the .com, .net and .org registries. NSI's argument to the contrary is based largely on its claim that it owns the underlying registry data. Its arguments supporting that proposition, as set out in Mr. Rutt's August 11 letter to Chairman Bliley, however, are remarkably weak. NSI first points to the fact that its relationship with the U.S. government has been governed by a cooperative agreement. Under 31 U.S.C. §§ 6303-05, NSF chose the device of a cooperative agreement, rather than a procurement contract, because it was paying NSI in return for NSI's "carry[ing] out a public purpose of support or stimulation," rather than in return for NSI's provision of services "for the direct benefit or use of the U.S. government." The difference, though, has little bearing on the Department of Commerce's ability to recompute the registries.

NSI argues that U.S. law allows awardees to retain rights in the intellectual property they create pursuant to cooperative agreements. The provisions that it cites in support of that proposition, though, are inapposite to this situation. They contemplate the case in which the recipient of a government grant, or the awardee under a cooperative agreement, engages in scientific research and then writes a journal article describing the research. The provisions NSI cites make clear — uncontroversially — that the copyright in the journal article rests in the awardee, not in the U.S. government. Nothing in those provisions, however, even remotely indicates that when the U.S. government contracts with an outside firm to maintain and update a central Internet database, for a limited period, on the basis of information supplied by third-party registrants, that the contents of that database magically become the sole property of the outside firm hired to do the maintenance, so that the government is forbidden to authorize any other entity to access or modify the database.

NSI's argument is flawed, moreover, on a more fundamental level. NSI's argument that it owns the contents of the registry databases is ill-taken because those databases do not constitute intellectual property in the first place. That is, no body of intellectual property law allows the

contents of the registry databases to be "owned" by anyone. NSI appears to concede that the database contents are not protected by any federal intellectual property statute. In particular, they are not protected by copyright. See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).<sup>5</sup> Rather, NSI appears to argue that it can assert rights in the database contents under Virginia trade secret law. This is misguided. The essence of a trade secret is that the material be, well, secret. See, e.g., *Zocon Industries v. American Stockman Tag Co.*, 713 F.2d 1174, 1179 (5<sup>th</sup> Cir. 1983) ("a customer list of readily ascertainable names and addresses will not be protected as a trade secret"). The contents of the registry databases, far from being secret, have been available to the public from the beginning. (Indeed, NSI committed to make the contents of the databases available to the public, via whois, as part of the proposals pursuant to which it entered into the cooperative agreement.) In short, the registry databases do not constitute intellectual property, and they cannot be "owned" by NSI or anyone else.<sup>6</sup>

Nor can NSI argue that something else in the cooperative agreement precludes the U.S. government from recompeting the .com, .net and .org registries. In order to understand the cooperative agreement, it is useful to remember the situation in 1992 when that agreement was first signed. NSI, pursuant to the cooperative agreement, took over the existing non-military registry databases, which had for the previous eight years been maintained by SRI International, a Silicon Valley research institute. The agreement did not permit NSI to charge registrants at all; rather, NSF paid NSI on a cost-plus basis.<sup>7</sup>

What did the parties contemplate might happen at the expiration of the cooperative agreement? Plainly, since NSF was paying the bills directly, it could choose not to renew and that would end NSI's revenue stream. NSI seems to be arguing that NSF intended in 1992 that it should be forbidden from transferring the registries to a new entity when the agreement expired. This makes no sense, though (quite aside from the fact that it finds *no* support in the text of the cooperative agreement itself, and would be inconsistent with the history under which NSF had transferred the registries to NSI from SRI International in the first place). Why would NSF have had such an intention? It would mean that at the close of the cooperative agreement, NSF would have no choices other than to continue renewing the agreement in perpetuity (and thus to continue paying NSI in perpetuity), or to shut the .com, .net and org registries down entirely.

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<sup>5</sup> Under *Feist*, while the original expression manifested in the selection and arrangement of data may be subject to copyright protection, the data themselves are not. *Id.*

<sup>6</sup> The fact that the contents of databases generally do not constitute intellectual property is precisely the issue addressed by the currently pending H.R. 1858, the Consumer and Investor Access to Information Act, and H.R. 354, the Collections of Information Antipiracy Act. Even without any express exclusion of DNS data from the protections in those bills, though, enactment of those bills would not retroactively transform the registry databases into property for purposes of construing the 1992 cooperative agreement.

<sup>7</sup> NSI and NSF executed an amendment to the cooperative agreement in 1995 substituting a direct charge to registrants by NSI for NSF's cost-plus payments.

Nor does it make sense to say that the parties contemplated that at the close of the cooperative agreement, NSF's only legally permissible and practically realistic option would be to allow NSI to charge registrants directly and take independent control of the databases. For this argument to succeed, there must be (a) convincing support for the position in the text of the cooperative agreement; and (b) convincing reason to suppose that the parties in fact had such an intention. There is no support for NSI's position on either front.

It seems plain, thus, that the Department of Commerce does have legal authority to recompute the registries. At the same time, though, NSI's response to any such recompetition could have a significant destabilizing effect on the domain name system. NSI might respond to recompetition in two ways. First, and most obviously, it would challenge the recompetition in court. Even though its arguments are not legally sound, the filing of a lawsuit could keep the question of who was the "real" proprietor of the registry databases unresolved for a matter of years. This would be problematic; it is central to the operation of the domain name system that users know where the authoritative .com database is to be found.

Second, and more troubling, NSI could act to "break the root." It could do so by encouraging and funding the formation of a new, alternate set of root servers, that continued to recognize it as the proprietor of .com. Under this scenario, there might end up being two sets of root servers: one taking direction from ICANN, recognizing a new entity as the operator of the .com registry, and one taking direction from an ally of NSI, recognizing NSI as the operator of the .com registry. This would be extremely disruptive and inefficient; registrants in .com might end up having to pay registration fees to *both* registries in order to ensure that their sites were visible to the Internet at large. Where the two registries disagreed as to the owner of a particular domain, users typing the same domain name into their browsers might get different sites, depending on which root servers their queries went to (and users typing the same electronic mail addresses might find their messages going to different recipients).

*6. Regarding domain name disputes among legitimate trademark holders, is this an appropriate area of policy for ICANN to consider? Are such policies needed by the entire Internet community, and not merely by the trademark or business community?*

ICANN has no legitimate basis for requiring domain-name holders to participate in administrative dispute resolution (ADR) procedures designed to settle the disputes described in the question. Designing such a process is not one of ICANN's jobs. Resolution of these disputes has no technical component, and is not necessary to administration of Internet identifiers. Such a mandatory alternative dispute resolution process, in any event, is not needed by the entire Internet community: These disputes can be handled satisfactorily through ordinary trademark-law litigation (as they have been to date), without any threat to the stability of the domain name system.

Mandatory alternative dispute resolution, further, seems like a remarkably bad idea in cases in which both parties have legitimate claims to the domain name. It would likely not work

well, since it would require the decision-makers to parse fine points of law and to balance competing equities. Moreover, any dispute-resolution procedure under which a trademark owner can force a legitimate domain name holder into binding ADR at any time simply by filing a challenge raises the possibility of serious abuse.

*7. There has been much discussion about the role of the Governmental Advisory Committee ("GAC") to ICANN. Regarding the GAC:*

- a. Has the GAC taken any actions to date that are inconsistent with its official role?*
- b. Is the GAC subject to its own rules or to the rules of ICANN?*
- c. What reforms to the GAC, if any, should be made to ensure that it will act only as an advisory body to ICANN and not as a policy-making body?*

ICANN's By-laws provide:

There shall be a Governmental Advisory Committee. . . . Members of the Governmental Advisory Committee shall be representatives of national governments, multinational governmental organizations and treaty organizations, each of which may appoint one representative to the Committee. The Governmental Advisory Committee should consider and provide advice on the activities of [ICANN] as they relate to concerns of governments . . . The Board will notify the chairman of the GAC of any proposal [it is considering that will substantially affect the operation of the Internet or third parties] and will consider any response to that notification before taking action.

The Bylaws establish the GAC as an advisory body. I am aware of no instances in which the GAC has taken any action vis-a-vis ICANN other than issuing requests and recommendations, and "call[ing] on" ICANN to take various actions. The GAC is subject to its own rules to the extent that those rules are consistent with ICANN's Bylaws.

The GAC's current organization, however, seems to me to violate ICANN's Bylaws. The ICANN Bylaws provide that the members of the GAC shall be "representatives of national governments" — that is, the members shall be individuals, who participate in the GAC's deliberations as delegates of their respective governments. Article IV of the GAC's Operating Principles, on the other hand, provide that the Members of the GAC shall be the national governments themselves. Each such Member is to name an official to physically represent it in the GAC meetings. The distinction is subtle, but, I think, important. Under the formulation in the ICANN Bylaws, the GAC is a committee of individuals who represent national governments. Under the formulation in the GAC's own Operating Principles, the GAC is a full-fledged intergovernmental organization within ICANN. This does not seem like a desirable change.

The White Paper emphasizes: "While international organizations may provide specific expertise or act as advisors to the new corporation, . . . neither national governments acting as

sovereigns nor intergovernmental organizations acting as representatives as governments should participate in management of Internet names and addresses.” The White Paper notes that ICANN should not “preclud[e] governments and intergovernmental organizations from participating as Internet users or in a non-voting advisory capacity.” This comment reflects the reality that many governments are themselves major Internet users, and thus are Internet stakeholders in other than their sovereign capacities. In order to be true to this philosophy, though, ICANN should seek to minimize the extent to national governments formally participate in its processes *as sovereigns*, even without direct policymaking authority. The GAC is problematic in part because it presents itself as an organization of sovereign governments, acting in their sovereign capacities, giving instruction to ICANN. If the GAC were downgraded to a committee of government representatives with expertise on Internet matters, it would more nearly accord with both the White Paper and ICANN’s Bylaws.

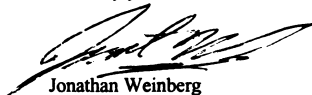
8. *If ICANN ultimately does not charge its now-suspended \$1 per domain-name fee, how should ICANN fund its operation?*

It is essential that ICANN have a stable and sufficient funding source that does not leave it beholden to a particular set of large contributors. It makes sense for the funding mechanism to reflect actual usage of IP addresses and domain names; that seems both fair and economically efficient. As a practical matter, I think, such funding must be provided by (or channeled through) the domain name registries and registrars, and the regional Internet registries that distribute IP addresses. Any long-term funding solution, thus, will probably look not too different from ICANN’s now-suspended plan. It will likely involve payments by registrars tied to the volume of their domain name registrations; payments by registries tied to the number of second-level domain registrations they maintain (or to the total fees they charge for registry services); and/or payments by regional IP registries tied to the size of the IP address blocks they distribute.

Much of the concern over ICANN’s funding plan derives from the fact that it seems to make it *too* easy for ICANN to raise money. Nonprofit organizations are not known for their restraint when they have a ready supply of other people’s money to spend on their internal operations. As a practical matter, though, this concern is probably best addressed through public scrutiny of ICANN’s finances, and a separate mechanism for review of ICANN’s spending.

I hope these answers have been helpful to you. Please let me know if I can provide you with any further assistance.

Sincerely yours,



Jonathan Weinberg  
Professor of Law

cc: The Hon. Ron Klink

## DNRC Submission in Response to Questions From the Committee

August 27, 1999

1) I understand that you participated in the Boston Working Group, who submitted a proposal to the Department of Commerce in response to the White Paper. When the Department of Commerce announced its acceptance of ICANN's proposal, it also said that there were portions of other proposals, including the Boston Working Group's which the Department felt might be integrated into ICANN's governing documents. Do you think that ICANN sufficiently altered its articles and bylaws to reflect the changes requested by the Department of Commerce?

Unfortunately, the bylaws and articles were hardly changed at all in response to the recommended changes, and those changes that were adopted have been largely ignored in practice.

Many of the fears that both the Boston Working Group, and the Open Root Server Confederation expressed have indeed come to pass. Today, despite ICANN's telling Congress that the Santiago Board Meeting would be open, other board meetings remain closed.

ICANN does not provide nearly enough prior notice or comment periods before adopting by-laws changes or other substantive changes.

The ICANN board has failed to establish "on the record" voting.

ICANN picks and chooses between constituencies and its executives make defamatory statements about those who attempt to participate in the process. (This writer is among those who have been subjected to such abuse.)

ICANN has failed to replace the interim board with an elected board. Even worse, ICANN's board now proposes to continue the unelected interim board until September of 2000. In fact, it posted its proposal to do so only few days prior to the Santiago meeting.

Perhaps most damning, however, was the utter failure of the ICANN board to address the creation of an individual constituency, or to mandate that individuals be allowed to participate in other, already formed and provisionally approved constituencies. Neither individuals, nor non-commercial entities have any voice whatsoever in ICANN. Both the BWG and ORSC bylaws clearly mandated that ICANN fully admit individuals and non-commercial entities.

But it goes further, the ASO (Address Supporting Organization) and PSO (Protocol Supporting Organization) exclude any but a few select entities, entities which have not public accountability, are largely neither transparent nor open. Given that ICANN has repeatedly mentioned the possibility of charging for address allocations, a closed ASO could become even more non-competitive and dangerous than the irresponsibility shown by ICANN regarding the DNSO (Domain Name Supporting Organization)

The new ICANN Board ignored the concerns of BWG and the ORSC. Commerce wrote the following email to the ICANN regarding the desire that ICANN work with both groups to achieve a consensus document:

October 20, 1998

Dr. Herb Schorr, Executive Director  
USC Information Sciences Institute  
4676 Admiralty Way  
Suite 1001  
Marina del Rey, California 90292-6601

Re: Internet Corporation for Assigned Names and Numbers (ICANN)

Dear Dr. Schorr:

On October 2, 1998, the Internet Assigned Numbers Authority (IANA) made a submission on behalf of the Internet Corporation for Assigned Names and Numbers (ICANN) in response to the National Telecommunications and Information Administration (NTIA) Statement of Policy entitled "Management of Internet Names and Addresses" 63 Fed. Reg. 31741 (June 5, 1998) (hereinafter the "Statement of Policy" or "White Paper"). The White Paper invited the private sector to come together and form a new, not-for-profit corporation to administer policy for the Internet name and address system (the "domain name system" or "DNS").

Based on a review of ICANN's submission, other public submissions, and on public comments on those submissions, the Department of Commerce regards the ICANN submission as a significant step towards privatizing management of the domain name system. Overall, the submissions we received supported moving forward with the ICANN structure. We note, however, that the public comments received on the ICANN submission reflect significant concerns about substantive and operational aspects of ICANN. We strongly recommend that you review and consider the many thoughtful and constructive comments posted at [www.ntia.doc.gov](http://www.ntia.doc.gov). The submissions of the Boston Working Group and the Open Root Server Confederation, among others, articulate specific concerns, many of which we share. As you refine your proposal, we urge you to consult with these groups and others who commented critically on your proposal to try to broaden the consensus.

The White Paper contemplates that the United States would enter into an agreement based on the principles of stability, competition, private bottom-up

coordination and representation. The public submissions and comments indicate that there are remaining concerns in the area of accountability (representational and financial), transparent decision-making processes, conflict of interest, and ICANN's proposed role with respect to country-code top level domains (ccTLDs). These concerns are described below in greater detail.

Under your submission, the Interim board is encouraged but not required to establish an open membership structure. Many commenters expressed the view that the principles of private, bottom-up coordination and representation set out in the White Paper are unlikely to be achieved in the absence of some type of membership-based structure. We believe ICANN should resolve this issue in a way that ensures greater accountability of the board of directors to the Internet community.

Commenters also pointed out that the ICANN submission does not describe a mechanism to ensure financial accountability to the members of the Internet community who will be funding the organization. The absence of transparency and controls in the budget process could impose unnecessary burdens on Internet users and endanger the long term viability of ICANN and thus the stability of the Internet. We are interested in knowing how you plan to address these concerns.

The White Paper envisions that the United States would enter into an agreement with a corporation that is governed on the basis of a sound and transparent decision-making process, which protects against capture by a self-interested faction. Commenters applauded your decision to provide notice of and seek public comment on any policies that substantially affect the operation of the Internet or third parties. But many submissions urged that the Board also regularly explain decisions that do not reach the level of "substantially affecting the interests of the Internet or third parties" suggesting, for example, that such explanations could be included in promptly published minutes of the board and other decision-making meetings.

In general, commenters emphasized the importance of establishing and guaranteeing open and transparent processes and avoiding the appearance of conflicts of interests with respect to the supporting organizations described in the ICANN proposal. For example, some commenters suggested that a system that permits officers and employees of the supporting organizations to serve on the ICANN board of directors threatens the independence of the board and should, accordingly, be prohibited.

The White Paper indicates that the United States is prepared to enter into an agreement with an organization that reflects the geographic and functional diversity of the Internet community. A number of commenters expressed concern about the proposed interim board of directors and called for the establishment of mechanisms to ensure equitable representation of the Internet community, including developing regions, based on a transparent and democratic election process. We are interested in hearing how ICANN intends to address these concerns as additional interim board members are selected and as the process for electing the permanent board is adopted.

One final issue raised relates to our assumption that national governments would continue to have authority to manage and/or establish policy for their



own ccTLDs (except, of course, insofar as such policies adversely affect universal connectivity on the Internet). The ICANN submission, however, is silent with respect to ccTLD management, and we would appreciate an elaboration as to ICANN's intentions in this area.

We hope that ICANN is prepared to address the concerns listed above in a manner that is consistent with the principles of stability, competition, bottom-up coordination and representation. The United States intends to move carefully but expeditiously to privatize DNS management. We therefore look forward to hearing ICANN's response to the concerns expressed during the recently completed comment period, and to meeting with you to discuss these issues.

Assuming that the concerns described can be resolved satisfactorily, we would then like to begin work on a transition agreement between the United States and ICANN. In keeping with our commitment to the principles of openness and transparency, we plan to continue to facilitate public participation in the transition process.

Sincerely,

J. Beckwith Burr  
Associate Administrator (Acting)

Unfortunately, specific points made by the BWG went ignored by ICANN. These points include the following:

BWG Points	ICANN Response
<b>Added Preamble and Statement of Purpose</b>	Rejected by ICANN
<b>Removed text that established the purpose of the corporation to be solely for "lessening the burdens of government"</b>	Rejected by ICANN
<b>Mandated that the Interim board create a membership structure, without exception</b>	Has not occurred almost a year later and may never occur or be so gutted as to lose the original intent

<b>Defined "fundamental" assets expected to be received from the US and added constraints upon what the corporation can do with those assets.</b>	Rejected by ICANN
<b>Removed President from the Board of Directors</b>	Rejected by ICANN
<b>Re-cast Supporting Organizations to be essentially permanent advisory committees with very strong role in initiating and defining corporation policies.</b>	Rejected by ICANN
<b>Eliminated Supporting Organizations' ability to appoint Directors to either the Initial or the Final Board</b>	Rejected by ICANN
<b>Clarified that individuals may be members of Supporting Organizations</b>	Initially partially accepted by ICANN, then amended out of their organic documents
<b>Added "On-The-Record," role call voting on matters before the Board</b>	Rejected by ICANN
<b>Added additional public access</b>	Partially accepted by ICANN, but in practice ICANN is operated as an opaque and unaccountable body with no true public input despite assurances by ICANN to the House Sub-Committee to the contrary
<b>Broadened rights to Board Reconsideration</b>	Rejected by ICANN
<b>Eliminated special and unique recognition of contracts between the US and NSI and between the US and the University of Southern California</b>	Accepted by ICANN
<b>Added a more robust business planning and cost recovery model</b>	Partially accepted by ICANN, but as the current massive debt and near insolvency demonstrate, they have not implemented any of it

**Required that conflict-of-interest statements be made public subject to reasonable privacy limitations.**

Rejected by ICANN

**Recommended the reduction in the number of officers to the legal minimum, as well as other minor matters of clarification of language and structure**

Rejected by ICANN

When it became apparent that ICANN would not seriously entertain making any of the changes recommended by BWG and ORSC, Commerce decided to give ICANN the go-ahead, and issued an MoU (Memorandum of Understanding) between them to provide for continuing oversight. Unfortunately, there was seemingly no substantive oversight being performed, and both groups became very discouraged. While Commerce was telling BWG and ORSC that it was not yet ready to "turn over the reins" to ICANN, another hand attempted to transfer authority through a single source offering through NIST that was added to the docket during the holiday season. Curiously, this was authority over the IANA functions that Mike Roberts had already announced were under ICANN's control in November of 1998 at the first ICANN meeting in Boston.

Formal complaints regarding this process, and the lack of Commerce Department supervision as described in its MoU went largely unanswered. Here is one example:

```
>Date: Fri, 05 Feb 1999 01:45:19 -0500
>To: Becky Burr <bburr@ntia.doc.gov>
>From: Jay Fenello <jay@iperdome.com>
>Subject: Re: ICANN Jan. 17 minutes
>Cc: Vice.President@whitehouse.gov, lirving@ntia.doc.gov,
> C.Pickering@mail.house.gov, tell.bill@mail.house.gov,
> paul.scolese@mail.house.gov, mark.harrington@mail.house.gov,
> Esther Dyson <edyson@edventure.com>, mmmr@darwin.ptvy.ca.us,
> IFWP Discussion List <list@ifwp.org>, domain-policy@open-rsc.org
>
>
>Hello Becky,
>
>Please consider this a formal complaint wrt to
>the recently released meeting minutes of the ICANN
>Board of Directors' Meeting held on January 17th.
>It would appear that ICANN is not fulfilling its
>mandate as outlined in the White Paper, in the MoU
>with your department, nor in its own By-Laws.
>
>Specifically, the meeting in question was conducted
>without the required public notice, and without the
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>required public comment period as outlined in Article  
>3, Section 3 of the ICANN By-Laws. How else will the  
>Internet community have an opportunity to comment on  
>decisions likely to affect them?

>  
>Furthermore, it would appear that decisions were  
>made to approve actions that had already been taken  
>by Mike Roberts. These decisions have resulted in  
>a situation whereby Mike Roberts now has autonomous  
>authority to bind ICANN without any further review  
>from the ICANN Board, and without any comments  
>from the Internet community.

>  
>Finally, I object to the concept that meeting minutes  
>are somehow sufficient to inform the Internet community  
>about such important decisions. These meeting minutes  
>certainly highlight my concerns!

>  
>Since ICANN is clearly not willing to have open Board  
>meetings, and since ICANN is clearly not willing to  
>abide by the terms of the White Paper, the MoU, nor

>its own By-Laws, it is clearly up to the Commerce  
>Department to address this situation.

>  
>And if Commerce is unable or unwilling to provide this  
>"adult supervision", then the Internet community will  
>have little choice but to escalate these issues to the  
>appropriate members of Congress and/or the Executive  
>branch.

>  
>Respectfully,

>  
>Jay Fenello  
>President, Iperdome, Inc.  
>404-943-0524 <http://www.iperdome.com>

>  
>  
>At 2/3/99, 06:06 PM, Gordon Cook wrote:  
>>well well well isn't that just delightful. On January 14 I made the first  
>>public report of the leasing out of the IANA employees via Mike roberts  
>>cosy little actions last september and continuing down through the  
>>explanation of the december 24th "deal" to extend the process beyond  
>>january 1.

>>  
>>THREE DAYS LATER the board has a special teleconference to catch up on  
>>things and decides to grant Roberts ex post facto blessing for what he has  
>>done....

>>  
>>Gotta like that ICANN "open" style

>>  
>>and it then takes almost 3 weeks to get minutes posted.... thats sim's  
>>definition of timely or is it Roberts?

>>

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>>
>>>FYI, the draft minutes of the Jan. 17 special meeting of the ICANN board
>>>are now posted at http://www.icann.org/minutes-17jan99.html.
>>>
>>>Molly Shaffer Van Houweling
>>>Senior Advisor
>>>ICANN
>>
>>*****
>>The COOK Report on Internet | New handbook just published:IP Insur-
>>431 Greenway Ave, Ewing, NJ 08618 USA | gency & Transformation of Telecomm.See
>>(609) 882-2572 (phone & fax) | http://cookreport.com/insurgency.html
>>
>>cook@cookreport.com | Index to 7 years of COOK Report, how to
>>subscribe, exec summaries, special reports, gloss at http://www.cookreport.com
>>*****

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For a more graphic representation of the difference between the BWG proposed bylaws, the ORSC proposed bylaws, and the first set of ICANN bylaws, I have attached Ellen Rony's<sup>1</sup> analysis located at **Error! Bookmark not defined.**<sup>2</sup> Ms. Rony is co-author of "The Domain Name Handbook," an authoritative text in the field of Domain Names. Ms. Rony's work is a side by side comparison of the three sets. Please note that after this first set of bylaws was promulgated, ICANN made significant changes behind closed doors and without accountability, bringing their bylaws even further out of line with those proposed by BWG and ORSC. Ms. Rony has also created a comparison of the US Government DNS Policy Statements (including the Commerce Department's MoU and the ICANN bylaws located at **Error! Bookmark not defined.**<sup>3</sup>

## 2) How are individual and non-profit domain name holders impacted by ICANN's dispute resolution policies?

Individual and non-profit domain name holders are impacted in a significant and negative manner.

Both have been placed at significant risk of expropriation of their existing domain names, without compensation and without benefit of any form of legal hearing or due process. And both have been placed in a position of being second-class citizens when attempting to obtain new domain names.

Neither yet has any position with any meaningful voice within ICANN's structure: ICANN has explicitly rejected the participation of non-commercial interests and has

<sup>1</sup> "The Domain Name Handbook: High Stakes and Strategies in Cyberspace" Copyright © 1998 Ellen Rony and Peter Rony.

<sup>2</sup> Reproduced as Appendix I

<sup>3</sup> Reproduced as Appendix II

taken multiple steps to prevent individuals from having any meaningful voice at any level of ICANN.

DNRC feels that ICANN, as a body of technical administration, has no business mandating domain name dispute policies in any way, especially given the lack of representation for individuals, non-commercial entities, and others. A petition formulated prior to the Berlin ICANN meeting and signed by 85 individuals (many having been deeply involved with Internet policies in the mid 80s) was presented to ICANN asking them to postpone consideration of the WIPO proposals until non-commercial entities and individuals were more represented. This petition was ignored.

Although ICANN's specific dispute resolution policies have not yet been chosen, DNRC has reviewed the latest draft that has been circulated and offers the following specific comments:

- 1) There has been no consensus of the Internet community that a uniform dispute resolution policy is necessary, workable or even desirable. Generic Top Level Domains (gTLDs) have been created with specific purposes in mind. Currently, we have .com, .org, .net as multi purpose gTLDs subject to dispute policies. .Org is purportedly used for non profit organizations. As such, a policy premised on use in commerce would be an overreaching of the Lanham Act which regulates commerce. .Net, while mostly commercial, could also be used for non-commercial networks. As such, a commercial policy would miss the non-commercial speech elements that are inherent in domain names. New proposed gTLDs include those that will be populated largely with individuals promoting non-commercial thoughts and ideas, artistic organizations and individuals also in non-commercial areas, as well as different types of commercial entities. Of course, these guidelines for gTLD usage are by no means universal. Many commercial entities are using both .org and .net domains, as many non commercial entities and individuals are using .com. Much of the reason for this is the lack of available domain names in the current system, which would be alleviated by the addition of new gTLDs. However, it is rather clear that one uniform dispute policy will not address the plethora of uses that the Internet can be and has been put to.
- 2) This "voluntary" dispute policy is voluntary only at the registrar level, and not at the domain name holder level. Given that to date ICANN has stated that all potential registrars *must* adhere to this "voluntary" policy, even the registrars will have little choice in the matter.
- 3) The definition of "bad faith" in ICANN's dispute policies (written largely by WIPO, the World Intellectual Property Organization) is flawed and should be revisited. There are still many cases under this definition, where an innocent domain name holder operating legitimately can be charged with being a "cybersquatter" and/or having registered the domain name in "bad faith"

triggering this dispute policy. As an example, "bad faith" charges may be triggered by something as innocent as a domain name holder's wish to avoid litigation costs by settling a claim. If the domain name holder offers to sell the name to avoid conflict, or even asks for reimbursement of registration fees, this is 'bad faith.'<sup>4</sup> This policy inherently harms small entities and benefits large ones.

- 4) ICANN's latest proposed dispute policy mandates that the domain name holder can be challenged and subjected to this dispute policy on a mere allegation of "bad faith conduct" by a challenger. The chosen arbitrator could then mandate that the domain name be canceled or transferred, forcing the domain name holder to go to court to get it back. The domain name holder has ten days after the arbitrator's decision to obtain an attorney, and file a lawsuit to get the domain name back, else the name will be canceled, destroying the domain name holder's business or message. Meantime, the challenger has no downside. Even an improper, retaliatory, or frivolous charge of bad faith will be investigated, and will subject the domain name holder to cost in time and fees. The domain name holder has no recourse against the challenger in these cases.
- 5) Arbitrators can, in their sole discretion, "seal" their decisions, thus depriving the public of important precedents in a new and growing field of law. Mandatory publication should be the rule, with minor exceptions allowed for highly unusual cases.
- 6)
- 3) **What are the impact of ICANN's dispute resolution policies on the First Amendment rights of domain name holders?**

ICANN's dispute resolution policy could stifle political speech, parody, and criticism. If a trademark or service mark is used as part of the domain name, or the domain name is thought in any way to be similar to a trademark or service mark, the ICANN policy may call this "bad faith" and subject the domain name holder to cancellation and/or transfer the name to the challenger.

This is significant when you consider that critics, political pundits, religious groups and others with significant non-commercial messages are seeking the very same audience as corresponding trademark, service mark, or other intellectual property holders. The *only* way to reach this audience is often to draw the reader's attention

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<sup>4</sup> This seems to be as a direct result of the "Rugrats.com" domain name in which a party had lawfully registered the domain as a means of distributing a personal web page with pictures of her pet rat and pre-school class (known as rug rats.) She was sent a "cease and desist" letter from Viacom. She responded by asking Viacom to refund her domain name registration fees, and ISP fees and she would find a new domain name. Viacom responded by labeling her a "cybersquatter." She transferred the name to another party who DID agree to refund her registration fees. You can see where in this case, Viacom's actions were blatantly unfair and they frankly reaped what they sowed.

via a catchy title, slogan, or in the case of the Internet, through the domain name. While in publishing, one can use a title such as "Microsoft : Why I Don't Like Their Software," the corresponding method on the Internet would be something like "Ihatemicrosoft.com." Under the ICANN dispute policy, if any commercial use whatsoever is found, then the domain name could be canceled or transferred, and the arbitration panel's fees may be charged to the domain name holder. Essentially, this would be a penalty for otherwise protected speech.

While the ICANN policy is said to be predicated on commercial messages, it is important to note that in the case of *Jews for Jesus v. Brodsky*<sup>5</sup> the court found that a mere hyperlink to an organization that sold religious tracts created commercial use, and stripped Steven Brodsky of his domain name. The DNRC is concerned that such twisting of the spirit of the Lanham Act and intellectual property law could be extended to stifle other religious, political, and non-commercial commentary. This would indeed crush the very robust means of communication that has made the Internet so desirable to large corporations.

#### **4) Does the current makeup of the ICANN Domain Name Supporting Organization fully reflect the diversity of the Internet community?**

ICANN's "constituency model" is a model of gerrymandering overwhelmingly in favor of commercial interests. In addition, ICANN has allowed the DNSO to be operated with overt exclusion. Perhaps most importantly, individuals and non-commercial interests are still absent from the DNSO community. Further, virtually an entire Internet community has dropped out of the ICANN process, due to the perceived "fixed" nature of many of the proceedings.

This is most apparent in the current makeup of the DNSO. Instead of some sound representational structures as were proposed in the Paris Draft, the ICANN Board approved a constituency model where the constituencies themselves are arbitrarily defined by ICANN. This is underscored by ICANN's refusal to put a petition by the Individual Domain Name Owners constituency<sup>6</sup> on the agenda for their Santiago meeting. This decision was made in a closed meeting with no accountability. By contrast, the Non Commercial Domain Name Holders constituency's petition was placed on the agenda, even though it was received after the IDNO's. This may well be due to the ISOC friendliness of many key players involved in the NCDNHC. The ISOC (Internet Society) has long been an advocate of a powerful ICANN, and more Internet governance located outside the United States.

The vast non-commercial community of the Internet (a network founded for non-commercial research and speech) is underrepresented in the make-up of the ICANN Domain Name Supporting Organization. For each vote that it has, the commercial

<sup>5</sup> *Jews for Jesus v. Steven C Brodsky US District Court, District of NJ (1999)*

<sup>6</sup> Their webpage and further information is located at <http://www.idno.org>



sector has two, and the service providers have 4. We believe this does not bode well for fair use and free speech issues that will arise in the future before this body. Many of the commercial interests given preferred seats at the table of governance have historically taken positions inimical to the unfettered growth of the Internet and the new technologies and access it represents. This not only disenfranchises individuals and the non-commercial community, but it includes the budding "new wave" of authors and artists, small businesses and new technology developers who, because of their relative political and sociological immaturity have not mobilized their infant resources with the same agility possible for an ITU, a WIPO, or an ETSI.

Further, although the non-commercial community is engaged in a good faith effort to self-organize, it is the most heterogeneous and far-flung group, and has taken a little longer to organize than the commercial interests (who have more resources to dedicate). Nonetheless, the Non-Commercial Domain Name Holders Constituency (the NCDNHC) is now organized and accepting applications and will have elected representatives before the Santiago meeting. The IDNO, likewise, has elected representative, the first Internet based fully functional voting system, and policy statements ratified by its membership. To date, neither have been accepted as a full constituency.

Regardless, ICANN moved forward on the domain name dispute and cybersquatting proposals, a set of substantive law and mandatory arbitration procedures, without elected representation from either the non-commercial organizations or individuals.

We would like Congress to urge the Department of Commerce and ICANN to return these cybersquatting proposals without adoption for review and assessment which includes the non-commercial, small business and individual communities

Instead of defining a basis of representation, with objective standards by which constituencies qualified for recognition, the ICANN approach was to approve 7 constituencies, 6 of which were recognized in Berlin. All 6 had a large business bias. The resulting DNSO is a captured organ, composed of former gTLD-MoU supporters, and a very few remaining members from the at-large Internet community. This DNSO is making substantive policy decisions without any input whatsoever from non commercial domain name holders or individuals, that combined group being the largest number of users of the Internet who will be directly impacted by these decisions. This is ironic Vice President Al Gore's vision for all educational organizations in the United States to be connected to the Internet. While they may become connected, they will have no say whatsoever in the decisions that ICANN has already put into motion.

### **Individuals**

In the drafting process that led up to the formation of the DNSO, one draft (called the "BMW Draft") did not allow for the participation of individual domain name

holders. Another draft (called the "Paris Draft") did allow for the participation by individual domain name owners. This was a major source of contention in the development of the DNSO.

At the Singapore ICANN meeting, there was a compromise in which ICANN acknowledged the Paris Draft principles by writing, in the DNSO formation document: "Individual domain name holders should be able to participate in constituencies for which they qualify." (See, <http://www.icann.org/dnso-formation.html>).

Unfortunately, this concept that has been written out of every single constituency proposal accepted by ICANN to date. The phrase acknowledged by ICANN at the Singapore meeting "Individual domain name holders should be able to participate in constituencies for which they qualify" is now without meaning. Constituency drafters simply viewed that sentence as something to be routed around, and the ICANN Board did not place any pressure on constituency organizers to open their groups.

As a result of this exclusion, a new group of "Individual Domain Name Owners" has now organizing a new proposed constituency. Unfortunately, the IDNO's petition has been "postponed" by the ICANN board at their Santiago meeting. Again it was questioned whether individuals should have any say outside of the dilution of the General Assembly. An independent constituency for individuals is preferable, but if not allowed, ICANN should at least to have mandated that Supporting Organizations may not exclude individuals from the current. Individuals operating a for-profit commercial web site have more in common with the members of the "Business and Commercial Constituency" than they do with individuals using the Internet as a "home page." Individuals holding trademark rights on a name may have more in common with the Intellectual Property constituency than they do with another individual who is operating an informational web site.

The DNRC believes that corporate and organizational interests have excluded individuals from their constituencies not because individuals have no interest in their work, but because they fear they will be outnumbered and outvoted. The distinctions that have been drawn are artificial and should be dropped.

#### **Non-Commercial Interests**

At the creation of the DNSO in Singapore, the ICANN Board recognized seven initial constituencies, one of which was the non-commercial domain name owner constituency.

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<sup>7</sup> See, <http://www.icann.org/dnso-formation.html>

Following Singapore, there was some confusion and debate as to whether this constituency would be for individuals and non-profit entities or non-profit entities alone. By the time of ICANN's Berlin meeting, at which constituency recognition was to be a central issue for the DNSO, competing proposals with very different models were presented for this constituency. Because the parties could not reach agreement themselves, the ICANN Board declined to recognize any constituency in this area.

Despite the absence of any non-commercial interests on the DNSO Names Council, the ICANN Board directed work to begin in the DNSO.

The DNRC believes that ICANN should have shown the same leadership that it did in Singapore in bringing two competing DNSO drafts together for developing a compromise in Berlin on the two non-commercial interest proposals. The decision to approve "no constituency" has left us with an incomplete DNSO charged with developing policy recommendations on some of the most contentious issues facing ICANN (dispute resolution and trademark issues).

**4) Does Network Solutions Incorporated ("NSI") have a sufficient dispute resolution policy, or are there reforms that NSI needs to make?**

NSI's dispute policy is fatally flawed, and in serious need of reform. In a nutshell, the problem with the Domain Dispute Policy are as follows:

- Language that indicates it is not a policy, but more of an arbitrarily, retroactively changeable whim.
- Special privileges for trademark holders above and beyond those they would receive in a court of law.
- The policy was created without consulting the Internet community at large, and without following any known and potentially required procedures.
- Most burdens are placed on the domain name holder.

**Use of "May" Instead of "Will"**

NSI calls the document on which it explains its position, the "Domain Dispute Policy." However, a policy is generally a document which lays out the steps an entity will take when faced with particular situations. The new NSI "policy" states specifically that NSI "may" use this policy to handle domain disputes. This, of course, means that they also may not. Needless to say, this is hardly something most

businesspeople would wish to stake their business identity upon. There are other significant problems with the domain dispute policy:

#### **Lack of Procedure**

One of the most damning criticism of Network Solutions, Inc's domain dispute policy is that it was created without normal procedures. On the Internet, when one wishes to make a dramatic or sweeping change that affects the net "across the board," one at least used to employ the RFC process (pre-ICANN, that is). RFC stands for "Request for Comment" and is the general method used to inform the Internet community what you wish to do, ask for comments and suggestions, and solicit cooperation for your plan. NSI, on both occasions that it has implemented its domain dispute policies, has released them only after they were "done deals." Although David Graves of NSI has said that comments and suggestions were taken into consideration for the formulation of the second domain name dispute policy<sup>8</sup>, the community as a whole was given no notice of any discussions being held by NSI, or of any coordinated method for providing suggestions or comments.

#### **NSI Is Not the Arbiter of Disputes**

NSI has attempted to make it very clear that they do not desire to be brought into the middle of domain name disputes. They have gone so far as to state twice in their new policy, once up front and once in the middle, that they do not act as arbiter of disputes between "Registrants and third party complainants." However, the policy itself removes control of a domain from the original domain name holder, and puts it "on hold" while the dispute is settled by a court, or settled under the NSI policy. In these cases, the domain name holder is automatically penalized, and the challenger succeeds in depriving a domain name holder of business opportunities merely because they hold a trademark and have sent a letter alleging infringement and harm. Unlike the court system, the challenger does not have to prove infringement and harm in order for the domain name holder to have been deprived of his or her property. As has been noted, being deprived of one's domain name, even for a short period of time, can have serious business consequences.

As much as NSI wishes to claim that it is not arbitrating disputes, it is very clear that regardless of the outcome, a domain name holder must either file a lawsuit to keep the name, or hope that the trademark holder files a suit. If the trademark holder's goal is merely to prevent use of the name, it is in their best interest \*not \*to file suit, since the domain name holder's only recourse would then be to hire a lawyer and file their own lawsuit, prior to NSI putting the domain on hold. Given that the domain name holder only has 30 days in which to respond, the legal costs for filing will be much higher since any time you wish an attorney to work quickly, you will probably pay extra for it.

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<sup>8</sup> The text of David Graves' speech at ISPCon in August of 1996 is at <http://domain-name.org/graves-ispcon.html>

Ironically, the policy as written also acts as a deterrent to arbitration of the dispute rather than taking it to court. The policy specifically states that the domain name will not be put on hold if one of the parties files suit. It does not say that the name will not be put on hold if the parties seek arbitration. The policy also does not provide for instances where the challenger may agree (although it may be against their best interests) to allow for continued use of the domain name by the domain name holder while the dispute is settled. Perhaps this is one of the areas where NSI may use its "may" provisions of the policy.

### **Notice of Policy Changes**

Most contracts between parties contain a "notice" provision. The notice provision generally tells people where and how they must send notice to the other party, generally when some sort of action is required to be performed. Most contracts also provide that the contract can only be changed by a writing signed by both parties, but it is clear that NSI did not wish to grant that authority to domain name holders.

Both domain name policies promulgated by NSI provide that the only notice that needs to be given of contract changes, is by making a file available on NSI's FTP site. This means that unlike other contracts, where the onus is on the person who wishes to change the contract, the people being affected by a unilateral decision are required to take the affirmative action of periodically checking the NSI FTP site.

### **Trademarks and Domain Names**

The purpose of a trademark is to identify the maker of a good or a service. The mark is to be displayed on brochures or on labels, or on the goods themselves to keep from confusing the consumer as to where a product was made.

While more information about trademarks and how to obtain them will be provided in a subsequent article in this series, here is an overview of the trademark process and its costs:

1. Determine what product(s) or service(s) you wish to apply a name to.
2. Find a name that is not generic (such as Band-Aid for bandages) descriptive (such as Brown Table for a wooden table), or substantially similar to another name someone else has come up with for the same or similar products or services.
3. Contract with a lawyer or a search company to do a search on the proposed mark to see if someone else already has the name you thought you dreamed up.
4. If no one else has the name in the category of product or service you want, have the lawyer fill out the trademark application, complete with specimens, drawings, and a \$245.00 filing fee. If you like government forms, you may wish to

fill out the application yourself, but realize it may be bounced back several times until you find the "magic words" that the Patent and Trademark Office want to see.

5. Wait for approximately four months for an examiner to even look at the application.
6. Expect a few iterations back and forth between you or your attorney and the examiner before everything is just right.
7. Receive a trademark registration. Now you can use the symbol ® next to the trademark name. Note that your trademark is only valid for the goods or services you specified in your application.

This whole process can take anywhere from 8 months or so to years. During this time, you may have a "common law" trademark if you were the first person to use the name. You can also apply for a state trademark, giving you certain rights in that state. However, neither a common law trademark, nor a state trademark will help you with the InterNIC. It is quite interesting, however, that NSI's first domain name dispute policy did not specify that trademarks would have to be federal. This change did not occur until the policy of November, 1995.

#### **The InterNIC and Trademarks**

It is curious that in a recent speech, David Graves of NSI stated that there was no known correlation between trademark law and domain names. A domain name is a verbal address that is used by humans in place of the numeric IP address that computers and network routers care about. As such, a domain name is much more an identifier than a mark one would place on a good or service to determine its origin. Congress has not as yet spoken to some trademark holder's claims that ownership of the trademark made automatic their ownership of a domain name, regardless of whether someone else had registered that name.

Regardless of the lack of legislative action, and the normal workings of the law in trademark disputes, NSI has decided that trademark can be used as a sort of "trump card," ensuring that trademark holders receive special treatment with regard to domain name holders. In all other legal situations, in order for a trademark holder to stop someone from using a similar or identical name, the trademark holder would have to show that its mark was being infringed. That is not necessary in NSI's policy. In order to get a domain name taken away, essentially all that is needed is for a trademark holder to send a domain name holder a letter *alleging* that that mark is being infringed. The domain name holder is then put on the defensive, and risks significant chance of losing the domain name regardless of what actions are taken.

In US trademark law, many different people can have the same name trademarked for different purposes, or in different "classes." A "class" consists of a grouping of similar products, such as class 10 for surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopedic articles and suture materials. Since the primary purpose of trademark law is to protect the consumer from being fooled as to the source of a product, these class designations make sense. It would be difficult for most people to believe the Cadillac cars also made Cadillac cat food. This branch of law was clearly created to protect the less sophisticated consumer from making errors of this type.

In the normal course of business in trademark law, in order to succeed with a claim of infringement, a trademark holder must show infringement *in the class in which the trademark is held*. This is, of course, impossible in an arena where there are no classes, such as the Internet. Applying trademark law to the Internet immediately raises two important distinctions. The first is that on the net, there is only one possible use for any given name in the .COM domain. Since .COM is the most used and therefore most coveted address, competition between US federally registered trademark holders and foreign registered trademark holders, will surely make for an impossible situation if NSI insists on its current procedure of using federal trademark as a "trump" card. The second is that domain names are not necessarily used for goods or services, which are the only two categories which the Lanham Act speaks to.

Given that NSI itself feels that there is no real correlation between trademark law and ownership of domain names, and the ill fit between trademark law and domain identifiers from both a legal perspective as well as a technical one, NSI's insistence on providing certain trademark owners (arguably the first who comes along) with the *de facto* authority to have a domain made unavailable to its registrant is largely incoherent and without foundation in either law or logic.

#### **International Issues**

NSI is responsible for registration all domain names in the most coveted .COM domain. Of course, this includes international commercial entities as well. However, trademark law is not international. Each country's trademark laws differ enough that many trademark lawyers specialize in specific countries for companies dealing multi nationally. Large US corporations may hold trademarks in 10 or more different countries, each with differing expiration dates, requirements for maintaining the trademark, quirks in the registration process, etc.

#### **6) Regarding the possible addition of new generic Top Level Domains ("gTLDs"):**

- a. What concerns do you think trademark holders have regarding the addition of new gTLDs?

The purported concerns that trademark holders have regarding the addition of new gTLDs are threefold. First, they are concerned about policing their trademarks. Second, they wish a uniform dispute resolution policy prior to addition of new gTLDs. Third, they say they are concerned with "cyberpiracy." I will address each of these in turn.

### **Policing Trademarks**

Given current search technology and Internet search companies that routinely scan the Internet for trademark violations, additional gTLDs will make that job no different. There are currently over 275 TLDs in use worldwide. Search robots and other technology is gTLD independent. It would work whether there are 275, or 275,000 TLDs. The trademark argument makes no more sense than it would in the physical world were there to be concern about the number of print publications allowed because it would be more difficult for intellectual property owners to search through the greater number of publications to police their trademarks. Communication should not be stifled for the convenience of a small faction of the business community.

### **Uniform Dispute Policy**

I have already stated DNRC's concerns regarding uniform dispute policies in the answer to Question 2 above. I would like to reiterate here that the trademark interests are again asking for more protection on the Internet than they have in any other medium. Further, the trademark interests who purport to speak for all trademark holders are generally a small group who have not even consulted with their membership to find out the prevailing opinion.

### **Cyberpiracy**

No "cyberpirate" has ever prevailed in any court in the world against a trademark holder. DNRC feels that this argument is solely a means to the end of getting further trademark protection than currently exists, and an in road to obtaining greater protection for all intellectual property. The current Intellectual Property constituency (of which I am a member) is made up of trademark attorneys as well as copyright attorneys and organizations. There are no representatives for small business, none for individuals, and exactly one for the public interest community (DNRC.) ASCAP and BMI are taking the lead in much of the discussions and deliberations of the Intellectual Property Constituency. DNRC feels that this is the first step towards content control. Groups like ASCAP and BMI stand to lose tremendous power if artists can go directly to the public via the Internet.



Attached is a copy of DNRC's dissent to the testimony provided to the Committee from the Intellectual Property constituency. This will provide further explanation for our positions<sup>9</sup>.

**b. How would the addition of new gTLDs increase competition in the registration and use of domain names?**

Currently, there are three gTLDs that are available to individuals, small businesses, and corporations: .net, .org, and .com. While there can be dozens, if not hundreds of entities that wish to use a certain domain name, there is only one .com, one .net, and one .org. Increasing the number of gTLDs, especially if they become meaningful markers that assist consumers and others to find what they are looking for, will do nothing but assist both the communicative and commercial interests of the Internet. Examples of the useful markers include .per for personal domains, .arts for artistic domains, .auto for automobile dealers, manufacturers and part suppliers, .air for air freight, airlines, and other aircraft related industries, .firm for legal and consulting firms, .etc. This would serve the purpose of allowing different registrars for different gTLDs, or assist in "carving up the pie" so that more registrars and registries could operate in consort across multiple gTLDs. An increase in product would help fulfill the demand<sup>10</sup>.

**c. Does ICANN presently have the authority to add new gTLDs?**

As far as DNRC is aware, the Commerce Department has not relinquished their claimed authority to perform this function to ICANN. We say "claimed authority" in part due to the following letter that was received by Karl Auerbach of the Boston Working Group from the NSF:

December 24, 1997

Mr. Karl Auerbach  
218 Carbonera Drive  
Santa Cruz, CA 95060-1500

Dear Mr. Auerbach:

Thank you for your patience in awaiting our response. We felt it was important, however, to answer fully your November 16, 1997 letter, especially since it is not uncommon for individuals unfamiliar with federal disclosure statutes to confuse the Privacy Act with the Freedom of Information Act (FOIA). For example, you mistakenly maintain that the statutory response dates applicable to FOIA requests similarly apply to the Privacy Act, and that clearly is not the case. Although National Science Foundation regulations

<sup>9</sup> Attached as Appendix III

<sup>10</sup> For further information on this subject, see **Error! Bookmark not defined.** for Karl Auerbach's treatment of the possibility of multiple roots and multiple new gTLDs.

certainly state that the agency will attempt to respond to Privacy Act requests within ten working days, there is no statutory deadline. And I am sure you appreciate the legal and factual difference between asking for whether records exist and seeking to amend a Privacy Act record pertaining to you.

Specifically, you ask us to inform you "of the existence of records pertaining to [you]" in what you assert to be a Privacy Act system of records referred to as the "domain name database." NSF maintains no such system of records and, consequently, cannot have "failed to publish notice of this system of records in the Federal Register" as you incorrectly state.

The Privacy Act's provisions apply to systems of records maintained by a Federal agency. 5 U.S.C 552a(e). A "system of records" includes only records under the control of the agency from which information is retrieved by an individual identifier. 5 U.S.C 552a(a)(5). The Privacy Act's definition of "agency" at 5 U.S.C 552a(a)(1) is the same as is defined in the Freedom of Information Act. See 5 U.S.C 552(f)(1)

The United States Supreme Court in *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), established a two-pronged test for determining whether material constitutes an agency record". First, a federal agency must "either create or obtain" the materials. *Id.* at 144, citing *Kissinger n Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), and *Forsham v. Harris*, 445 U.S. 169 (1980). Second, the agency "must be in control of the requested materials at the time the FOIA request is made." *Tax Analysts*, 492 U.S. at 145. Moreover, the Court held, "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Id.*

Network Solutions, Inc. (NSI) maintains records for its own use in administering certain domain names under a cooperative agreement with NSF, NCR-9218742. The so-called domain name database to which you refer consists of information collected, maintained and used by NSI pursuant to that cooperative agreement, which is a type of federal assistance award made by NSF under the Federal Grant and Cooperative Agreement Act of 1977, 4 U.S.C. 503, where the agency transfers money to the recipient to accomplish a public purpose of support or stimulation. NSF Grant Policy Manual 210.

NSF has neither created nor obtained the records NSI uses in day-to-day administration of domain name registration activities. The agency does not possess the database and cannot access it electronically (except in the same manner that is available to you and the general public through the Internet). Neither does NSF control the requested database. NSF has never acquired the database and, accordingly, has never integrated the database into NSF's files. Neither does the agency nor its employees retrieve, use, or rely on the data in

conducting official agency duties or accomplishing any agency function. Thus, the requested database is not an agency record. See *id.* at 145-47.1

Private organizations like NSI that receive federal financial assistance grants are not within the definition of "agency," *Forsham v. Harris*, 445 U.S. 169, 179 (1980), and the documents created by a grant recipient are the property of the recipient, not the Federal Government. *Id.* at 180-81.2 The "written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not 'agency records' within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA." *Id.* at 171. Nor does the agency's right of access to the materials change this result. *Tax Analysts, supra* at 144. Rather, "the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Id.* at 186 (emphasis in original).3

Similarly, the records of recipients of federal grants fall outside the purview of the Privacy Act. General federal supervision of grantees remains insufficient to establish the substantial federal control and supervision necessary to characterize the grantee as a "federal" entity or instrumentality. *Dennie v. University of Pittsburgh School of Medicine*, 589 F. Supp. 348, 352 (D.V.I. 1984), *aff'd*, 770 F. 2d 1068 (3d Cir. 1985) citing *Forsham*. Applying *Forsham* to a claim under the Privacy Act, the *Dennie* court concluded that "absent extensive detailed and virtually day-to-day supervision" — the standard of *Forsham*, "the recipient of public funds does not become a federal instrumentality" for Privacy Act purposes. Thus, the Federal agency has no obligation to insure that records held by its grantee are maintained in compliance with the Privacy Act. *Id.* at 352-53.4

NSF maintains no such supervision and control over NSI databases. The terms of the cooperative agreement make clear that NSI — as the awardee — has primary responsibility for carrying out the agreement while NSF conducts oversight, monitoring, and evaluation of the awardee's performance. As in *Forsham, supra* at 172-73 and *Dennie, supra* at 352, NSF exercises limited oversight over the funded activity including review of periodic reports submitted by the grantee and agency approval of major program or budgetary changes, while NSI conducts the day-to-day administrative activities under the agreement. NSF's general oversight does not establish agency control of the database. See *Forsham* at 182 and *Dennie* at 352-53.

Thus, your assertion that the "domain name database" is an NSF system of records is incorrect, and NSF maintains no system of records responsive to your request.

Sincerely,  
Herman G. Fleming

## Privacy Officer

1 Compare *Tax Analysts, supra* at 145-148 (agency had records in its possession at the time of the request, had placed them in its official case files, and was routinely using the records in the performance of its official duties); *Burka v. HHS*, 87 F.3d 508,515 (D.C. Cir. 1996) (agency exercised control over data tapes in the possession of its contractor sufficient to render them "agency records" for FOIA purposes where the agency ordered creation of the records, plans to take physical possession of the tapes at the end of the project, has indicated it will disclose the information after the agency's publication schedule is completed and prohibited the contractor from making any independent disclosures, and has read and relied significantly on the information in writing articles and establishing agency policies); and *St Paul's Benev. Educ. Inst v. U.S.*, 506 F. Supp. 823, 829 (ND. Ga. 1980) (computer tape possessed by the agency; facts reveal the agency did "create or obtain a record," which is now in its possession, and that it may certainly rely or use this record in the future because of the importance of the data).

2 Compare *Hurcules Inc. v. Marsh*, 839 F.2d 1027(4th Cir. 1988) (where an agency directory prepared by a contractor for the agency and marked as the property of the government agency was held to be an agency record).

3 See also *Animal Legal Defense Fund v. Secretary of Agriculture*, 813 F. Supp. 882 (D.D.C. 1993) (regulated entities' plan stored "on-site" does not constitute an "agency record" under the meaning of the FOIA).

4 See also 5 U.S.C 552a(m)(1) and Office of Management and Budget Guidelines, 40 Fed. Reg. 28,948, 28,951,28,975 76 (July 9, 1975) (Privacy Act applies only to a system of records controlled by an agency within the terms of the Act, i.e., to those systems operated under a federal procurement contract "by or on behalf of the agency ... to accomplish an agency function". "The qualifying phrase 'to accomplish an agency function' limits the applicability of subsection (m) to those systems directly related to the performance of Federal agency functions by excluding from its coverage systems which are financed, in whole or part, with Federal funds, but with are managed by state or local governments for the benefit of state or local governments." Similarly, "[t] was not intended to cover private sector record keeping systems" including those of federal grantees funded to support a public purpose.)

It is our interpretation of the above letter that NSF did not have the authority to give the Commerce Department in the first place, making any claims regarding the chain of authority from Commerce to ICANN dubious at best. If NSF has totally and completely relinquished ownership control of the whois database to NSI, it will be difficult to put that genie back in its bottle.

Further, Glen B. Manishen, Esq. Has done his own analysis of the DOC's ability to give ICANN authority. What follows are excerpts from an interview Mr. Manishen conducted with Gordon Cook and published in the May 1999 "Cook Report"<sup>11</sup>

The basic problem with the approach of the Department of Commerce (DOC) to privatization of DNS is that DOC lacks any recognized legal authority either over the global Internet or the Internet's Domain Name System. DOC's communications-related functions are limited by statute to policy development, and (except for the assignment of domestic telecommunications frequencies) do not include any regulatory or rulemaking powers. The DOC White Paper is not, as DOC emphasized, a mandatory rule, but rather only a general statement of policy without the force or effect of law.

There is thus substantial doubt as to the legal authority of DOC and the National Telecommunications & Information Administration (NTIA) to direct, regulate or supervise the operations of ICANN. The Memorandum of Understanding (MOU) between DOC and ICANN asserts that "DOC has authority to participate in the DNS Project with ICANN" under 15 U.S.C. 1512, 1525 and 47 U.S.C. 902. Yet even a superficial examination of these statutes shows that they do not empower DOC to control the Internet's DNS system or to regulate a US non-profit corporation (such as ICANN) in setting rules for international competition for Internet domain names.

As an executive branch agency, DOC's powers are controlled by its so-called "enabling statute." 15 U.S.C. 1512 authorizes DOC to "foster, develop and promote foreign and domestic commerce." 15 U.S.C. 1525 permits DOC to engage in "joint projects . . . on matters of mutual interest" with nonprofit organizations. Even if the international nature of gTLDs were within the scope of DOC's powers over "foreign" commerce - an extra-territorial application of U.S. law that appears to have no precedent - these general provisions do not authorize DOC to promulgate rules for DNS, either directly or by delegation of that power to a private corporation. The fact that DOC and ICANN styled the MOU as a "joint project" cannot be bootstrapped into the power to control DNS, for example by ordering NSI to transfer the Root A server to ICANN.

A review of the DNS proceedings before DOC reveals that, until recently, DOC itself appears to have agreed that it lacks the affirmative power to regulate DNS operations on the Internet. The February 1998 Green Paper initially proposed that DOC would promulgate rules opening up new gTLDs and would order NSI to transfer the root to a neutral third-party. Yet the June 1998 White Paper did not establish any rules, and was issued solely as a "general statement of policy." This is entirely consistent with the limited scope of NTIA's statutory powers. As a part of DOC, NTIA is charged with performance of DOC's "communications and information functions." 47 U.S.C. 901(b)(1). These include:

1. Serving as "the President's principal advisor on telecommunications policies;"
2. Developing "telecommunications policies pertaining to the regulation of the telecommunications industry;" and
3. "Coordinating the telecommunications activities of the executive branch and assisting in the formulation of policies and standards for those activities."

<sup>11</sup> Page 21, Cook Report, Vol 8 No. 2 (May 1999)

47 U.S.C. 901(b)(2)(C)-(I). Except for frequency assignment, NTIA therefore does not create rules or regulations for and telecommunications provider or industry segment. It's role is advisory and policy development, not substantive regulation.

The history of DNS development over the past several years merely underscores that until entry of the ICANN MOU, neither DOC nor NITA, like their predecessor NSF, has asserted any substantive powers to direct operation of the DNS system. In the 1998 *Thomas v. NSI* case, NSF stated that the Cooperative Agreement, the NSI contract that has since been transferred to DOC, requires NSI to "follow the policy guidance of a non-governmental body [IETF] in consultation with the Internet Assigned Numbers Authority, another non-governmental entity." Likewise, the White Paper took pains to emphasize that it was not "a substantive regulatory regime for the domain name system . . . [It] is not a substantive rule, does not contain mandatory provisions and does not itself have the force and effect of law." 63 Fed. Reg. at 31748. It is thus quite curious, to say the least, that the MOU describes the White Paper as providing legal authority for DOC to "transition DNS management to the private sector."

When an agency acts in ways that exceed its statutory authority, the Administrative Procedure Act (APA) allows the federal courts to enjoin or set aside the agency's actions. The concept of a "general statement of policy" is established by the APA, and an agency's application of such a policy statement as a binding rule is clearly unlawful. Should DOC attempt to transfer operations of the DNS root to ICANN, therefore, it would be acting "ultra vires," or beyond its legal powers. Moreover, in the event an APA challenge to DOC's actions were initiated in a federal district court, the court would have ample authority to prevent transfer of the root in order to preserve the status quo pending the court's decision on the merits. (In contrast, a newly initiated lawsuit aimed solely at securing a preliminary injunction against transfer of the root would be more difficult to win, because the law requires a plaintiff to show "irreparable injury" before the grant of preliminary injunctive relief.)

We also think those who say ICANN must be made to succeed because, if it does not, the governments will step in, are misguided. ICANN is acting as a black box through which governments can already exert policy influence on critical parts of the internet in such a way as to avoid all public responsibility for their actions. Out of one side of ICANN's mouth come anti-regulatory sentiments while, on the other side, the moves taken under ICANN aegis restrict and control in the best regulatory manner imaginable.

**7) Regarding the registration of one of the so-called "seven dirty words" as part of a domain name:**

**a. Should registrars have the right to refuse to register domain names containing any of these words?**

No. This doctrine is not applicable to the Internet. The Internet is not a broadcast medium, and is much more like publishing a newspaper or a magazine. Registrars should not be allowed to determine what is appropriate or inappropriate registration. Given the international nature of the Internet, some words and/or parts of words that Americans may find offensive may be descriptive words in other languages.

**b. Should registries have the right to refuse to accept a registration containing any of these words?**

Please see the response to part "a" of this question. DNRC feels that registries should be under the same obligation as registrars to register domain names without subjective determinations of appropriateness.

**8) Does the Department of Commerce have the authority to recompute the .com, .net and .org registries? How would such recompetition affect the Internet's stability and competition for domain name registration and related services?**

The Department of Commerce has no known authority to be involved in Internet matters other than developing policy recommendations for the Executive Branch - nor should it have such authority. The Department's Internet related activities have occurred through the NTIA - which was created by and historically served to represent the interests of the Executive Branch and the White House, not the interests of the private sector or industry.

The latter role, regarding the interests of the private sector and industry, is that of the FCC which has long taken a "hands off" policy with respect to the Internet under its Computer I, II, and III policies. This policy significantly enabled and fostered the development of the Internet, in the face of actions by the Dept of Commerce which was attempting to force acceptance of other networking technologies such as OSI.

Further, if one agrees that the Internet is, by definition, an international activity, one would have to question the ability for the United States government to "compete" an award for this type of operation. Even assuming that there was USG authority, we would have to question the mechanics for determining a "responsive and responsible" offeror in parts of the world away from the U.S.

There is no technical reason why any number of TLD registries cannot be created immediately for what is generically a simple Internet host tagging service using a distributed domain database architecture for resolving tags. The COM, ORG, and NET business and intellectual property was acquired by NSI through an NSF award - in the same fashion as 820 awardees have acquired similar assets through 5,280 projects over the past fifteen years. Virtually every major contemporary Internet business sector today was build on such awards.

**9) Regarding domain name disputes among legitimate trademark holders, is this an appropriate area of policy for ICANN to consider? Are such policies needed by the entire Internet community, and not merely by the trademark or business community?**

The Internet community has been consulted on numerous occasions regarding the need for a domain name dispute policy. In each consensus call at each IFWP meeting, no consensus was achieved as to the necessity of these policies. Court systems in most countries have extensive experience in trademark dispute issues.

They are best qualified and experienced to address these disputes. Please note that WIPO has done exactly zero domain name dispute arbitrations to date.

**10) There has been much discussion about the role of the Governmental Advisory Committee ("GAC") to ICANN. Regarding the GAC:**

**Has the GAC taken any actions to date that are inconsistent with its official role?**

Yes, the GAC both in its creation and its conduct has taken numerous actions inconsistent with the intended role of governmental representatives. An example published 8/25/99 from the ICANN Santiago meeting is as follows:

**B. With regard to principles for the delegation of management for country code top level domains:**

1. The Committee reaffirmed its May resolution that the Internet naming system is a public resource and that the management of a TLD Registry must be in the public interest.
2. Accordingly, the GAC considers that no private intellectual or other property rights inhere to the TLD itself nor accrue to the delegated manager of the TLD as the result of such delegation<sup>12</sup>.

Point #2 is especially troublesome to countries that already have a strong tradition of protecting intellectual property rights, regardless of where they may be found. This provision would essentially create new law with no accountability or legislative review, and would strip countries like the United States of any proprietary rights in their Top Level Domains, including the .US domain. This was done despite J. Beckwith Burr's involvement as the United States representative to the GAC.

The basis for a GAC was established in the Dept of Commerce White Paper requirement that "governments and intergovernmental organizations [should participate] as Internet users or in a non-voting advisory capacity." As such, it was expected that individuals employed with government agencies or intergovernmental organizations worldwide would participate independently in some fashion in ICANN's various activities as "users." Furthermore, it is not apparent what other legitimate interest governments might have in the coordination of network names and addresses among the millions of private networks that constitute the Internet, other than as users.

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<sup>12</sup> GAC Communiqué located at <http://cyber.law.harvard.edu/icann/santiago/archive/GAC-Comminuque-mtg3.html>



However, at the initiative of the European Union, certain provisions were placed in ICANN's Articles of Incorporation and Bylaws that created the GAC as an autonomous global intergovernmental body nominally within ICANN, and invested it with the power to make "findings and recommendations...on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements."

This role was further enhanced by an explicit interlocking requirements in ICANN's Articles of Incorporation that "the Corporation shall operate..., carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law."

ICANN's Bylaws actually require that prior to making any substantive decision, "the Board will notify the chairman of the Governmental Advisory Committee...and will consider any response to that notification prior to taking action." Thus, the ICANN Board is obliged to constantly interact with this new intergovernmental body and obtain its findings and recommendations on all substantive matters.

The GAC was constituted in early 1999 by appointing the head of Australia's central telecom and information network regulatory body, who in turn used the membership contact list of the UN intergovernmental telecom ministry and regulatory organization - the International Telecommunication Union - to constitute the GAC membership. The European Union appointees to the ICANN Board - Eugenio Triana and Hans Kraaijenbrink - have served as the Board liaisons to the GAC since its inception. Kraaijenbrink also an Executive Board member of the European organization of public telecommunication providers.

From its inception, the GAC Chair has repeatedly asserted that the GAC provides ICANN with its "legitimacy," has the right to act autonomously and has done so in defining its jurisdiction, authority, and members, in adopting its own rules of procedure and membership requirements, and in promulgating general DNS related norms as Operating Principles. The last makes the rather extreme finding that "the Internet naming and addressing system is a public resource."

The GAC has adamantly opposed any open activities except an occasional open PR briefing, claiming that this secrecy is necessary for effective collaboration among governments. It has also self-asserted its existence as an intergovernmental body by amending its membership requirements to constitute only nations, and ejecting from its meetings, those who did not meet the requirements of being a plenipotentiary of a nation State.

**Is the GAC subject to its own rules or to the rules of ICANN?**

The GAC asserts that it is subject to its own rules.

**What reforms to the GAC, if any, should be made to ensure that it will act only as an advisory body to ICANN and not as a policy-making body?**

The GAC is not needed and should never have been created. Most parties assumed that the White Paper participatory statement would simply be met by "government users" participating in policy committees and discussion groups like everyone else.

Assuming its continued existence, the GAC should not exist as an intergovernmental body (i.e., its members constituting nations), but as an advisory committee of individuals having an association with or otherwise representing expertise or interests of governmental and intergovernmental entities.

The GAC should not be allowed to make formal findings and recommendations as an intergovernmental body on matters of international and domestic law.

The GAC should not be allowed to be autonomously chaired by a government official who determines and accredits its membership and maintains its secretariat.

The GAC should not be allowed to be conduct any of its activities or maintain documents in secret, and operate fully in the open. A representative from Ralph Nader's consumer organization was ejected from the GAC meeting in Santiago, despite GAC's decision to allow observers from the World Intellectual Property Organization.

**11. If ICANN ultimately does not charge its now suspended \$1.00 per domain name fee, how should ICANN fund its operation?**

First of all, ICANN must get its expenses under control. ICANN's role and practices are potentially subject to enormous abuse as a non-profit organization. If it played the minimalist coordinating role of its predecessor IANA Secretariat, ICANN would need only sufficient money to pay two part-time researchers.

The Internet community was told that Jones Day was providing legal fees on a "pro-bono" basis. Imagine our surprise when we found that \$500,000 was owed in back legal fees. Further, a salary of \$18,000 per month for a CEO with no relevant experience, in a position that both BWG and ORSC proposed to cut out of the ICANN bylaws is grossly excessive.

Once ICANN's costs are under control, one way to control ICANN's potential adverse and abusive behavior is to insist on a funding arrangement that derives from services actually directly performed that its clients will pay for. The worst approach is what they have attempted - simply assess an arbitrary tax on their clients' assets.

We propose that ICANN draw up a neutral, non-discriminatory schedule of fees for specific services that reflects ICANN's actual costs. This cost should then be passed on to its client base. Unfortunately, ICANN has shown a complete inability to keep costs under control that would have sunk any other start-up company without the significant favoritism that has been shown to ICANN. As a co-founder of a successful Internet start-up, I am personally highly concerned regarding some of ICANN's expenditures. A small group is all that is necessary to manage the function of "technical coordination." Further, a technical group charged with

management of Internet assets should utilize the medium it is managing for all meetings. There is no need for the lavish expenditures necessary to fly board members, technicians, and their outside counsel to expensive locations around the world.

Perhaps the most confusing expenditures, however, are those for a public relations firm, over \$500,000 for an anti-trust attorney who has stated he has no corporate experience, and \$18,000 for a CEO. If my company, InterCon Systems Corporation, had attempted to contract for these types of expenses, its would not have lasted 2 months. It would never have received loans from companies such as MCI and Cisco, would never have received over half a million dollars in "credit" from the Jones Day law firm (since paid through the loans from MCI and Cisco), and would never have been able to afford a public relations firm. Such an insolvent company would never have received a US government contract to control such a vast and important resource as the Internet.

Further, ICANN has largely ignored the mandates of the Department of Commerce in the White Paper, and its subsequent letters calling for consensus with BWG and ORSC would have brought the contract itself into question. Under ordinary US Government contracting procedures, ICANN would be considered to be in violation of the terms of its contract in a manner requiring the contracting agency to assume direct, immediate control of the activity or else to determine the continuing availability of competing bidders to take immediate control of the work in a manner that ensures full contract compliance.

ICANN's mismanagement of funds, inability to keep its cost down to a reasonable level, and inability to perform the functions it was contracted to do, should call for an immediate recompetition of the contract. The concept of ICANN is a good one. This particular implementation is so badly flawed that it would be far simpler to start over than to attempt to salvage this organization.

Respectfully submitted,

Michaela (Mikki) Barry

President  
Domain Name Rights Coalition

Elected Steering Committee Member  
Individual Domain Name Owners

Core Member  
Boston Working Group

Member  
Open Root Server Confederation

Member  
Intellectual Property Constituency of ICANN

Member  
International Trademark Association (INTA)

Member  
American Bar Association - Intellectual Property Section

## FOOTNOTES

1. "The Domain Name Handbook: High Stakes and Strategies in Cyberspace" Copyright ) 1998 Ellen Rony and Peter Rony.
2. This seems to be as a direct result of the "Rugrats.com" domain name in which a party had lawfully registered the domain as a means of distributing a personal web page with pictures of her pet rat and pre-school class (known as rug rats.) She was sent a "cease and desist" letter from Viacom. She responded by asking Viacom to refund her domain name registration fees, and ISP fees and she would find a new domain name. Viacom responded by labeling her a "cybersquatter." She transferred the name to another party who DID agree to refund her registration fees. You can see where in this case, Viacom's actions were blatantly unfair and they frankly reaped what they sowed.
3. *Jews for Jesus v. Steven C Brodsky* US District Court, District of NJ (1999)
4. Their webpage and further information is located at <http://www.idno.org>
5. See <http://www.icann.org/dnso-formation.html>.
6. The text of David Graves' speech at ISPCON in August of 1996 is at <http://domain-name.org/graves-ispcon.html>
7. See <http://www.domain-name.org/dissent723.html>
8. For further information on this subject, see [http://www.cavebear.com/cavebear/growl/issue\\_2.htm](http://www.cavebear.com/cavebear/growl/issue_2.htm) for Karl Auerbach's treatment of the possibility of multiple roots and multiple new gTLDs.
9. Page 21, Cook Report, Vol 8 No. 2 (May 1999)
10. GAC Communiqué located at <http://cyber.law.harvard.edu/icann/santiago/archive/GAC-Comminuque-mtg3.html>
11. For more information on Mr. Manishin and his qualifications, we refer you to his web site at: <http://www.clark.net/pub/gbm/legal.html>. Mr. Manishin is a partner at Blumenfeld & Cohen - Technology Law Group, and is lead counsel on *Name.Space, Inc. v. NSI and NSF*, presently on appeal to the U.S. Court of Appeals for the 2nd Circuit. He can be reached via e-mail at [glenn@technologylaw.com](mailto:glenn@technologylaw.com)



THE BERKMAN CENTER FOR INTERNET & SOCIETY  
 A T H A R V A R D L A W S C H O O L

Charles Nesson, Director  
 Jonathan Zittrain, Executive Director

August 24, 1999

The Honorable Fred Upton  
 Chairman  
 Subcommittee on Oversight and Investigations  
 Committee on Commerce  
 U.S. House of Representatives  
 Room 2125, Rayburn House Office Building  
 Washington, DC 20515-6115

Dear Chairman Upton:

Here are my answers to your followup questions for the record in response to my testimony before your subcommittee on July 22, 1999, concerning ICANN and the management of the prevailing Internet domain name and IP numbering system.

1. **In your opinion, what would be the impact of the failure of ICANN on the domain name system transition process? What different scenarios do you foresee for transition of domain name system management if ICANN were to fail?**

In the short term, the failure of ICANN would extend the status quo through a halt to the domain name system transition process; no growth in the number of open generic top level domains; a continued paralysis in the evolution of certain critical aspects of the namespace; and the continued absence—for better or worse—of contractually-enabled substantive policies such as alternative dispute resolution for domain name challenges.

Over a longer term, as described in my testimony, plausible alternative options are these:

- (a) **Creation of a “Son of ICANN”** to build a new organization improving on that which ICANN had not done so well. This strikes me as unlikely, particularly if the failure were seen as structural, since the interested parties would doubt a successor organization could do any better. Further, any parties who feel disadvantaged as a result of the actions of ICANN—or its very existence—could perpetually undermine the organization in hopes that the next incarnation (or the status quo of none) might be more advantageous.
- (b) **An international treaty organization.** One could imagine an attempt to assert management over top-level Internet names and numbers by individual sovereigns (most likely the United States) or, with sovereigns’ acquiescence, a treaty

organization such as the International Telecommunications Union. The governments represented through ICANN's "Government Advisory Committee" (GAC) have already agreed that the Internet naming system is a public resource to be managed in the public interest. (See, for example, the GAC statement of August 24, 1999, at <http://cyber.law.harvard.edu/icann/santiago/archive/GAC-Comminuque-mtg3.html>.) Such an approach is directly contrary to the current U.S. government policy of transition to non-governmental management, but it is this policy which would be most called into doubt were ICANN to fail.

Orchestrating the cooperation of a critical mass of non-governmental system administrators and "mirror" root zone server operators (see my answer to 2(c), below, for details) would be delicate, and might encourage the coordinated (but unincorporated) Internet engineering community, along with commercial software developers, to hasten work on integrating completely different technical architectures for naming.

- (c) **Market left to its own devices.** In the absence of alternatives (a) and (b), above, a battle would be fought by existing market players for control of the current root. Either through technical or legal maneuvering, some private party would end up running the root, and it would likely not be structured as self-consciously intending due process, checks and balances, and consensus building the way ICANN had been in the ideal. (In other words, the winner would be truly "private," rather than "private, public trust.") Network Solutions would likely continue to operate the .com, .net, and .org top level domains.

The new "owner" of the existing root would then compete against the for-profit and non-profit entrepreneurs who are experimenting with alternative naming schemes. These schemes would also substitute their respective proprietary decisionmaking for "public trust" authority in allocating names to a particular entity or site.

Internet users and their respective Internet service providers can specify where they want to get their domain name information and they can choose any alternative root authority that the market might offer; or they can choose to adopt entirely separate directory and naming architectures that work entirely independently of the domain name system. The problem is that there is such enormous benefit in having a single repository that it is difficult to switch out of a system that nearly everyone—and everyone's software—has inherited. Because of this, what would likely happen is either a continued dominance of the legacy system (and the private party controlling it), or "tipping behavior" through which a new naming scheme would predominate, and a different private party would end up with control of a new root. Either way, Internet naming would thus be run by a private actor presumably answerable only to itself or its shareholders, insensitive to market forces to the extent that its dominance is locked in through everyone's use of the system. Enforcement of individual countries' antitrust laws or other ad hoc mechanisms would be the primary instruments of preventing abuse of this new de facto "essential facility."

## 2. Regarding the possible addition of new generic Top Level Domains (“gTLDs”):

### a. What concerns do you think those trademark holders have regarding the addition of new gTLDs?

It might be useful to consider the interests of famous mark holders separately from other trademark holders.

Famous mark holders tend to aggressively seek out all uses of their marks or strings of characters that might be confused with those marks. To many of them, then, new generic top level domains represent yet new areas that will have to be secured for their names. Coca-Cola, for example, might seek to reserve coke.biz, coke.nom, etc.—and might dislike the prospect of having to fight for such names against those who register them first, whether “cybersquatters” warehousing the names for profit and/or others who simply claim equal right to have them.

Holders of nonfamous marks may actually look forward to the introduction of new generic top level domains, since they would allow easier coexistence of easy-to-recognize domain names for overlapping brands. For example, Erol’s Internet could have erols.net, while Erol’s supermarket could have erols.shop. Non-commercial users and ordinary citizens could also benefit from this expanded name space.

Many in the engineering community have pointed out that the use of domain names as first-order marquee identifiers on the Internet—things one types into a browser window after seeing them in magazine advertisements or on the sides of buses—was never fully contemplated by those who designed them. They would like to see directory services or other naming schemes take the place of domain names for marquee purposes, returning domain names to the more limited role of appearing within online browser links or email addresses. Were this to happen, trademark issues wouldn’t go away entirely; rather, they’d shift away from domain names to whatever scheme served as the new marquee—perhaps privately-held naming systems such as RealNames or Netscape and Microsoft’s “browser keywords.” (Try typing in words like “government” or “Congress” to a modern browser window, and the names are mapped to a web site or selection of links by the browser company, rather than by the domain name system.)

Until domain names are eclipsed by other schemes—creating new battlegrounds as the old ones are abandoned—trademark holders represent a powerful interest in the domain name debates, and one of the principal reasons that the evolution of the domain name system generally and the introduction of new top level domains specifically can’t, from a practical standpoint, be thought of as merely technical or ministerial tasks.

**b. How would the addition of new gTLDs increase competition in the registration and use of domain names?**

Competition “within” open gTLDs

Top level domain registries may be best suited to respective administration by single entities. A traditional means of lowering prices is to simply regulate such entities, which are in monopoly positions with respect to the registries they maintain. Thus has Network Solutions’s maintenance of .com, .net, and .org been structured through an ongoing cooperative agreement with the United States government, which originally proscribed any charging of consumers for names, later capped consumer name charges at \$35/year, and most recently allows only \$9/year to be collected by the registry from a limited group of registrars—with market rates determining “add-on” fees charged by those registrars who in turn charge a fee to consumers wishing to register names.

Network Solutions is both a registry and registrar under this model, collecting the \$9 registry fee per name per year registered or renewed by any registrar in .com, .net, and .org (registrars in turn register names for consumers), and currently collecting \$35 per year when used as a registrar by consumers. To the extent that such agreements shift the cost of domain name registration into a competitive environment—customer service and other components are handled by registrars who vie for consumer business instead of a single registry—while reducing registry fees to mere cost recovery, competition is increased.

Under this model, Network Solutions is also proscribed from subsidizing or unduly benefiting its registrar arm through its registry services; in practice, ambiguities in the cooperative agreement seem to have caused disagreement about what does and doesn’t count as a subsidy. It’s also unclear whether Network Solutions claims as its exclusive *registrar* customers the millions of entities who registered (and must regularly renew) names in .com, .net, and .org before the introduction of the shared registry system and the implementation of the registry/registrar distinction.

The cooperative agreement between Network Solutions and the U.S. Government contemplates that ICANN will take on the U.S. Government’s role in the agreement if it meets certain benchmarks; however, there also appears to be a thought that competition through new open gTLDs will lessen or completely eliminate the need for price caps or other oversight of individual registries.

Competition through new open gTLDs

The longer-term plan for competition appears to be through the introduction of new generic top level domains. The theory is that once there are plenty of top level domains to choose among, run by different registries, market competition will minimize registry prices, or at least converge to market-desired combinations of price and service, however service might be defined.



This theory is true to some extent, and new gTLDs seem desirable for a number of reasons, but there are limits to the competitive benefits to be expected. The most important limit is that of domain name portability. Someone choosing a new domain name from scratch can shop among all open TLDs; once the domain name is selected, however, and goodwill is built up around it, it can be difficult to switch. The online merchant Amazon.com, for example, presumably could not lightly abandon its domain name even if Amazon.biz were readily available. Perhaps initial selection of a domain name could take into account what promises a registry is willing to make about the future (“We promise never to charge you more than \$30/year for a name”), but there is already substantial lock-in for existing names, with contracts that to my knowledge make no such promises.

Registries might be asked to at least allow for a time period of domain name forwarding should a consumer registrant wish to switch from one TLD to another; such a policy would promote portability of names and therefore make competition among TLDs more keen. Presumably ICANN would be in a position to seek to make such a policy—and enforce it through contracts with respective registries—but the scope of ICANN’s substantive policymaking power is still untested, and will be determined by an odd hybrid of its own bylaws, any superseding national laws, and the terms of its contracts with registries.

Finally, a drastic increase in the number of gTLDs could render enough so there is one or more gTLD per entity rather than multiple entities sharing space under a single gTLD—AT&T, for example, might have www.att instead of www.att.com. In such a case AT&T (and everyone else) need not be a registrant “under” a TLD, but could be a holder of a TLD that could manage the TLD on its own. My sense of the technical community’s view of this is that a flattening of the domain name hierarchy is difficult from an engineering standpoint, and that at least in the short term new TLDs should number at most in the hundreds rather than the thousands or millions. However, the introduction of at least some new TLDs under the traditional registry model would presumably help reduce technical load on the file that points to registrants within the .com domain, which is by far the busiest.

### **c. Does ICANN presently have the authority to add new gTLDs?**

Questions of legal authority are difficult here, since the system has evolved without a comprehensive treaty-based, statutory, or contractual framework. But the short, literal answer to the question appears to be “no, not without the concurrence of the United States government.”

gTLDs “exist” under the prevailing system because they are reflected in a “root zone file” distributed across thirteen “root zone servers” around the world. As consumers seek to use domain names to get around the Internet, their respective internet service providers typically choose how to “resolve” the name to a unique Internet IP address.

Virtually every internet service provider ultimately consults one of those thirteen root zone servers about whether a particular gTLD exists, and if so who manages it.

The thirteen servers return identical answers because twelve of them mirror a single “authoritative” root—currently operated by Network Solutions wholly apart from its duties as registry (and registrar) of names under .com, .net, and .org. To my knowledge Network Solutions has not claimed “ownership” of this authoritative root zone file, nor the right to make changes to it. In practice, changes had been made at the request of Jon Postel/IANA, at times through the somewhat formal but unincorporated “RFC” processes of the Internet Engineering Task Force, described in my prior testimony. More recently, only ministerial changes to gTLDs have been made to the file, and the October 7, 1998, Amendment 11 to the cooperative agreement between NSI and the Department of Commerce explicitly provides both that (1) NSI will continue to operate the primary root server until instructed by the government to transfer it to ICANN (“NewCo”) or elsewhere; and that (2) NSI will currently only make changes to the root with the written authorization of an “authorized USG official” and that, at some future time, the U.S. government may instruct NSI to accept ICANN’s changes to the root. (See <http://www.networksolutions.com/nsf/agreement/>.)

This is consistent with the Department of Commerce’s policy “white paper” of June 5, 1998, “Management of Internet Names and Addresses,” [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm):

The new corporation ultimately should have the authority to manage and perform a specific set of functions related to coordination of the domain name system, including the authority necessary to [...] oversee policy for determining the circumstances under which new TLDs are added to the root system[.]

The November 25, 1998, memorandum of understanding between the U.S. Department of Commerce and ICANN (see <http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>) contemplates that the two parties will jointly develop processes for “[o]versight of the policy for determining the circumstances under which new top level domains would be added to the root system[,]” and that ultimately this function will be performed solely by ICANN.

In practice, then, the major parties in this area seem to agree that the addition of new gTLDs is something that the U.S. government has the authority to assign; that it currently is sharing these responsibilities with ICANN; and that ultimately—but not presently—ICANN is slated to have the authority to manage the addition of new gTLDs and the custody of the authoritative root zone file.

It is noteworthy that some of the twelve mirror root servers might hypothetically choose to cease mirroring the authoritative root zone file and provide an alternative file, or that internet service providers or even their downstream individual customers

could seek domain name resolution from “alternative” roots not within the IANA/USG/NSI/ICANN chain. This is unlikely thanks to the lack of interoperability such decisions would entail, but I know of no legal authority preventing it.

**3. Regarding registration of one of the so-called “seven dirty words” as part of a domain name:**

**a. Should registrars have the right to refuse to register domain names containing any of these words?**

Registrars’ actual legal rights to refuse registration would be defined by the contracts, if any, by which they enter the registration business—contracts with the registries in which they seek to register names, and accreditation contracts from ICANN, as currently implemented in .com, .net, and .org. Their rights may also be limited by law as developed and enforced by sovereigns who can assert jurisdiction over them. I do not know of any existing restrictions in either category.

To some, the ideal of freedom of speech means that registrars ought not to refuse a request to register a particular name. To others, free speech protection means that private entities (including registrars) can choose to say—or not say—what they like. In practice, allowing registrars the “right” to refuse registration (or renewal) of particular names isn’t controversial so long as there are a variety of them—registrars could individualize their registration policies to allow for differences of opinion on such issues, and chances would be high that sibling registrars will be available to register words that others reject.

**b. Should registries have the right to refuse to accept a registration containing any of these words?**

Registries’ legal rights to refuse registration would be defined by the contracts, if any, by which they were commissioned to undertake their work by whoever manages the root (see 2(c), above). Their rights may also be limited by law as developed and enforced by sovereigns who can assert jurisdiction over them. I do not know of any existing restrictions in either category.

In my view—and this doesn’t represent a legal judgment—registries should not make any judgments of name suitability anymore than a registry of deeds should refuse to register property based on a perceived offensiveness of the title owner’s name. There are many words in many languages that offend natives; enforcement of such concerns should, if it happens at all, be a matter of local law.

To the extent that a multiplicity of registries come to exist, one can imagine amongst registries the kind of competition that diminishes controversy over registrar refusals

to register names in a given domain described in 3(a), above. Indeed, one could imagine a “kids” domain for which certain second-level domains are left unregistered, while anything goes in “.xxx.” Problems with this approach include (1) the apparent distaste for it by the Internet administrators and engineers whose support might be needed to implement it and (2) the fact that Internet content found objectionable by some is truly found much more *within* Internet sites than in the single-string identifiers used to label and find them.

**4. Does the Department of Commerce have the authority to recompute the .com, .net, and .org registries? How would such recomputation affect the Internet’s stability and competition for domain name registration and related services?**

I believe so. As my answer to 2(c) explains, all major parties appear to agree that the U.S. government has authority over the “root” file that determines whether there will be .com, .net, and .org, and if so, who will manage them. (A separate matter is whether the Department of Commerce has the authority to act for the U.S. government in these matters after rather explicit direction from the President’s June 1, 1997 directive on electronic commerce, but absent specific authorizing legislation.)

Redirecting the root file to point to a .com, .net, and .org run by a new entity is not enough. To effectively recompute these registries, the Department of Commerce will have to ensure that most of the existing registry data—for example, what existing names in these domains are already assigned and to whom—are available for seamless transition to a new registry operator. This does not appear to represent a difficult technical problem if Network Solutions were to cooperate in the transition. Absent such cooperation the Department of Commerce might resort to filing a lawsuit to attempt to compel it, or to less certain technical means to “route around” an attempt to withhold the data. If the latter were to occur, Network Solutions might itself file suit to attempt to establish its rights against such circumvention.

I have reviewed Network Solutions’s letter of August 11, 1999 to Chairman Bliley, which describes NSI’s legal claims to registry data which, if upheld in their entirety, would preclude an effective recomputation of the registries NSI operates. I am skeptical of NSI’s position because (1) the data in question appears to fall outside the scope of copyright (see *Feist Publications Inc. v. Rural Telephone Service, Inc.*, 111 S.Ct. 1282 (1991)) and (2) the data in question—at least that data necessary to maintain the technical functioning of the registries—is publicly available and appears to fall outside the scope of trade secret. To be sure, the relevant contracts do not speak directly to the issue, except for the recent Amendment 11 to the original NSI/NSF cooperative agreement—which, as NSI points out, simply affirms an undetermined status quo.

A hastily called-for recomputation—and the brinkmanship between the Department of Commerce and NSI that it might entail—would be a danger to Internet stability. The current agreement between the two parties is now extended through October, 2000; were a recomputation to take place now—with NSI fully entitled to submit a file

for retention—there would likely be sufficient time as a technical matter to ensure that whoever was awarded the new registry contract could effect a transition. Such a move might prompt a lawsuit as described above, which could then require resolution before the recompetition could fully proceed.

The best way to arrive at fair deal promoting long-term stability—with attention to the public interest at stake, and with terms going forward that can incorporate all that has been learned about domain name management since the original cooperative agreement was signed—may be through a competitive bid process rather than through a one-on-one negotiation where the government has not developed a viable alternative to an agreement with its negotiating partner. Neither the government nor NSI should have to settle for any less than what their actual rights are, and continued uncertainty or lack of resolution about these claims could impair the settled expectations and competitive parity desired by additional prospective registries and downstream registrars within .com, .net, and .org. Even a “leisurely” recompetition would, of course, entail administrative, technical, and legal effort among all the parties that is bypassed by longer-term agreement between the Department of Commerce (and perhaps later, ICANN) and NSI.

**5. Regarding domain name disputes among legitimate trademark holders, is this an appropriate area of policy for ICANN to consider? Are such policies needed by the entire Internet community, and not merely by the trademark or business community?**

Name disputes will, in many cases, be less a moral issue than one of simple baseline “ownership”: under some prevailing law, is the challenger entitled to use of the name even if the name holder was first to register it? A uniform dispute resolution policy may make sense generally in a space where disputants can be far from each other both physically and jurisdictionally, and where the commerce affected is global since the domain name at issue is available globally. But the devil will be in the details: what “law” shall the dispute resolvers apply? Wherever arguably applicable substantive law can enhance a party’s rights, the advantaged party will seek to bypass dispute resolution procedures. A mandatory dispute resolution policy (coupled with a waiver of traditional right and remedies) written into domain name contracts could unilaterally limit the rights of the initial domain name holder—who, since the policy is uniform, would have little choice about entering into the contract short of abandoning the name registration to begin with.

What scant data there are suggests that relatively few domain name disputes—in proportion to the millions of names registered—actually proceed to litigation. This may be a fix in search of a problem, or one derived from a legacy problem: initial registrations in gTLDs before the commercial potential of the Net was fully appreciated by those holding trademarks. The real challenge will be to avoid an “Oklahoma land rush” as new gTLDs are introduced; IBM, for example, might seek

privileged registration as “ibm.biz” without having to hope its request for registration is the first one received were the .biz TLD introduced.

In addition to the trademark and business communities, one might think that uniform dispute resolution—were it more accessible and less expensive than litigation—would assist individual domain name owners in arguing their own causes for retention of challenged names they hold. This, again, would depend on the substantive “law” used within the ADR procedure to settle the dispute.

Finally, the registrar and registry communities appear eager to implement uniform dispute resolution policies so as not to be entangled in domain name disputes. However, one could imagine fairly uniform substantive law by which such entities adopt a basic policy—first-come, first-served—and then agree to reassign names on the basis of judicial decrees—a kind of “quasi in rem” proceeding. To be sure, certainly at the registrar level, if there is to be a dispute resolution policy at all it only makes sense as a uniform one; otherwise, domain name registrants will tend to “race to the bottom” to register names with the registrar offering the most generous terms (or no policy at all).

**6. There has been much discussion about the role of the Governmental Advisory Committee (“GAC”) to ICANN. Regarding the GAC:**

**a. Has the GAC taken any actions to date that are inconsistent with its official role?**

None of which I am aware. The ICANN bylaws charter the GAC to “... consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements.” (See <http://www.icann.org/general/bylaws.htm>.) Its chief actions appear to have been holding both closed and open discussions, certifying who is and is not a member of the GAC, and generating communiqués about its collective views on particular domain name issues.

**b. Is the GAC subject to its own rules or to the rules of ICANN?**

ICANN’s bylaws, once establishing that there is to be a GAC and providing for its membership criteria and advisory relationship to ICANN, suggest that the GAC makes its own rules to govern its internal actions, including the selection of its successive chairs. Since the GAC exists under the ICANN bylaws, it technically could be eliminated or altered in character by an amendment to those bylaws; therefore it might literally be subject to rules ICANN could seek to impose. It has no explicit power over ICANN other than as a recognized resource for information and advice, but as a matter of realpolitik it is not difficult to imagine that the governments

of the world expressing their views collectively through the GAC would be difficult for ICANN—new, and at the end of the day, weak—to ignore.

**c. What reforms to the GAC, if any, should be made to ensure that it will act only as an advisory body to ICANN and not as a policy-making body?**

I believe that the current bylaws adequately limit the GAC to offering advice and recommendations, which the Board may adopt at its own discretion. ICANN bylaws [Article VII Section 3(a)] state that the Governmental Advisory Committee should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements. The Board will notify the chairman of the Governmental Advisory Committee of any proposal for which it seeks comments under Article III, Section 3(b) (policy changes that would substantially affect the operation of the Internet) and will consider any response to that notification prior to taking action.

Governments not only have responsibility for protecting their citizens who use the Internet, but they are Internet users themselves. However, ICANN's bylaws (Article V Section 5) prohibit any government official from sitting on ICANN's Board of Directors. An advisory committee, which serves as a conduit for the expression of governmental interests, seems a reasonable compromise. To eliminate the GAC would simply be to shift governmental pressures on ICANN *sub rosa*. Interestingly, the only way to truly limit the GAC's *de facto* influence—since its *de jure* power is technically limited to producing advice that ICANN is free to ignore—would be to cement ICANN's own authority and independence, something many are chary about doing until ICANN has more of a track record. Limiting government influence to that which takes place through the structure of the ICANN bylaws is thus, in practicality, a matter of voluntary abstention by those legislatures and other government authorities in a position to compel or at least affect ICANN's behavior on the basis of something as simple as a phone call.

The U.S. government has a distinct role in relationship to ICANN both because ICANN is headquartered in the United States and because the authority underlying the entire "privatization" of domain name and IP number management has been exercised by the United States. Alone among sovereigns and apart from a simple attempt to exercise raw jurisdiction over ICANN's activities, the United States has an additional formal route by which to express views and apply pressure to ICANN—whatever legitimacy ICANN has at this time flows from the formal recognition and subsequent memorandum of understanding entered into with the U.S. Department of Commerce. The circumstances under which this route might be used are, presumably, to ensure that ICANN's structures remain free from capture, rather than to push for or against specific substantive policies.

**7. If ICANN ultimately does not charge its now-suspended \$1 per domain name fee, how should ICANN fund its operation?**

ICANN (and IANA, such as it is; it is not clear if IANA, never formally incorporated, has been wholly subsumed into ICANN) provides coordination services to different network constituencies and these are also potential sources for revenue. ICANN allocates Internet Protocol addresses to the three current regional Internet registries (RIRs), who charge fees when they assign IP addresses to Internet access providers. A portion of these fees could be paid to cover ICANN's expenses. ICANN's supporting organizations (SOs) and the at-large membership could charge membership fees to cover the expenses of coordinating protocol parameters and providing membership services.

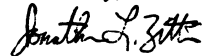
Concern over undue taxation might be alleviated by (1) an explicit cap on the total amount ICANN will, in fact, collect in a given year, limited to cost recovery; should a surplus be collected, ICANN's subsequent fees would be adjusted downward; (2) flat fees rather than per-name taxes. ICANN could simply charge registrars a yearly fee based on some metric calibrated to ability to pay. Individual country-code TLDs, were they to enter into memoranda of understanding with ICANN, might also provide for some contribution to the organization.

Any structure that eliminates the necessity for a per-name per-year fee may be helpful in broadening the possibilities for experimentation with different kinds of registry and registrar fees. As I expressed in my spoken testimony, there is no particular economic reason why Internet users who register a name and then "leave it alone" should have to pay recurring yearly fees to anyone.

\* \* \*

Please don't hesitate to contact me if you have additional questions.

Sincerely,



Jonathan Zittrain





**REPLY OF**

**JAMES R. BRAMSON  
COUNSEL  
AMERICA ONLINE, INC.**

**TO SUBCOMMITTEE QUESTIONS  
REGARDING JULY 22, 1999 HEARING ON THE  
INTERNET DOMAIN NAME SYSTEM**

August 24, 1999

In reply to Chairman Fred Upton's letter request dated August 10, 1999, America Online, Inc. (AOL) is pleased to provide the following responses to questions presented by the Subcommittee on Oversight and Investigations of the House Commerce Committee:

- 1. Why has America Online not yet begun registering domain names, despite the fact it was selected on April 26, 1999, as one of the five test-bed registrars?**

On August 6, 1999, AOL commenced registration services under its CompuServe brand. For additional information on AOL's registration service, please see <http://www02.registrar.aol.com/whois>.

- 2. It is my understanding that the test-bed period for the first five competitive registrars was to run from April 26 to June 26. The testbed period has been extended several times. Why has the testbed been extended? Do you believe that further extensions will be needed?**

Against the backdrop of transitioning a five-year old government-controlled enterprise to a multi-party system, the original sixty-day testbed period proved to be overly ambitious. The Internet Corporation for Assigned Names and Numbers' (ICANN) implementation of a testbed on an aggressive time line has provided a critical opportunity to move the domain name system (DNS) transition to the next level. However, technical hurdles associated with starting up a new registrar service and the issues involved in launching what is essentially an entirely new business operation for some of the testbed registrars required the ensuing extensions.

It is our understanding that an agreement has been executed to extend the testbed period until September 10, 1999, and in addition, to allow new registrars who have signed an accreditation agreement with ICANN to participate in the testbed period. AOL hopes that this extension will permit sufficient time for negotiations between the U.S. Department of Commerce (DOC or NTIA) and Network Solutions, Inc. (NSI) to conclude, and that further extensions will be unnecessary.

**3. What obstacles, if any, has your company faced in getting up and running during the test-bed period?**

In commencing registration operations, there are internal technical issues that a registrar must overcome, as well as collaborative synergies that must be identified and developed among the registrar community and the registry to keep the Shared Registration System (SRS) robust and valuable to registrant users. Beyond the expected business issues that AOL normally addresses in introducing a new service — challenges related to defining, organizing, launching, and marketing a new business compatible with consumer expectations and needs — there have been certain technical obstacles unique to entering the registration market and joining the SRS. These have included coordinating policies in a multi-party system regarding integration of the WHOIS database and the transfer of domain names among registrars. These challenges will continue for the foreseeable future, as will the need for concerted effort by the registration community to agree on solutions so as to ensure that these current obstacles do not become long-term roadblocks to competitive SRS success.

**4. Regarding the dispute resolution process that your company has put in place, do you believe that there should be one uniform policy for all registrars, or that every registrar should be able to select its own policy?**

AOL believes that a uniform dispute resolution policy adopted by all registrars is essential to develop a competitive SRS, to minimize forum shopping, and to maintain stability in the DNS. This uniform policy should be created through voluntary action among registrars. The Internet community will be ill-served if registrants are able to game the DNS system to circumvent established dispute resolution mechanisms and avail themselves of differing registrar policies to the detriment of the broader registration community.

**5. Is the World Intellectual Property Organization's recommended trademark dispute policy necessary in light of the fact that there is already existing trademark law in place to deal with disputes among trademark holders or those using another's trademark improperly?**

The World Intellectual Property Organization's (WIPO) recommended policy does not supplant existing trademark law in any country. National laws will continue to be important for determining trademark rights in each country. The WIPO policy merely provides an alternative

opportunity for low-cost resolution of a narrow category of trademark infringement cases characterized by bad faith registration of domain names. Where existing national laws fail to address novel situations of intellectual property infringement, such as cyber-squatting, the WIPO framework assists in overcoming these frustrations through gap-filling procedures. Even under WIPO-recommended procedures, either disputant may resort to courts of appropriate jurisdiction to secure judicial resolution of an intellectual property conflict.

6. **It is my understanding that your company was required to enter into a non-disclosure agreement with Network Solutions Incorporated ("NSI") as part of the contract to gain access to the Shared Registration System. Could you discuss whether this non-disclosure agreement has slowed the process of working out all of the bugs in the Shared Registration System software?**

AOL believes that there are problems with the non-disclosure agreement (NDA) that testbed registrars were required to sign in order to participate. However, in AOL's experience, the NDA has not been the cause of any delays in bringing competition to the SRS.

7. **What difficulties, if any, has your company experienced with the Shared Registration System software?**

AOL had difficulty connecting its systems to the SRS because the SRS implementation contained an interpretation of the SSL (Secure Sockets Layer) standard -- a protocol used to provide secure communications between the AOL systems and the SRS -- different from that of our SSL toolkit vendor. We discussed the issue with our in-house experts and the SSL toolkit vendor, and AOL concluded that the SRS interpretation of the standard was faulty. NSI, while not admitting to the fault, has agreed to change their implementation in the future. In the interim, we were able to work around the incompatibility with the help of our SSL toolkit vendor.

8. **I understand that there are fees your company must pay each time you register a name in the NSI registry. Are these fees fair, particularly the fees your company must pay when a customer chooses to move his account from one registrar to another?**

AOL is still evaluating the business model for registration services and the attendant costs involved in running a domain name registry. At this time, we do not have an informed opinion as to the appropriateness of the registration fees payable to the registry.

However, the current fee structure relating to the transfer of a domain name by a registrant from one registrar to another is entirely incompatible with the goal of domain name portability among registrars. This transfer fee should be closely scrutinized and revisited.

**9. Are new top level domains, such as .web or .info, necessary in order to create a more competitive environment for domain name registration services?**

It is AOL's belief that additional generic top level domains (gTLDs) are not required in order to have competition in the domain name registration services market. However, it is also our view that additional gTLDs should only be added, if at all, once systems are in place, such as a uniform dispute resolution policy and integrated WHOIS directory, that will permit trademark owners to monitor and protect their intellectual property rights while giving information access to all Internet users.

**10. How important to your business is unfettered access to the WHOIS database?**

An accessible WHOIS database is critical to having a commercially viable and competitive registration business. Whether the chosen WHOIS database model in the competitive DNS world is an accessible single database, or as is technically feasible, multiple databases that "call" each other when a user performs a single query, the key is to secure a cooperative, coordinated system that best serves the registrars' customers, preserves the integrity of the registry, and assists intellectual property owners in policing their trademarks.

**11. I understand that any names that you register are not included in the WHOIS database that is traditionally accessed through the InterNIC site. What problems does that cause for your customers, or potential customers? Will this lead to a fragmentation of Internet directory services? What is the confusion to consumers that results from the multiple WHOIS databases?**

In consultation with the testbed registrars, ICANN and NSI must determine how best to construct a coordinated database of domain name registration information. Consumers and intellectual property owners must have the ability to determine in real time whether a specific domain name has been registered and by whom. In addition, registrants need immediate verification through a single search that a name they believe they have registered has in fact been globally registered—irrespective of their chosen registrar. If this information is difficult to obtain, there is a real risk that consumers' confidence in the DNS may be shaken and the integrity of the DNS will be compromised. In the multiple registrar environment, where each maintains a separate database of registrants, it is critical that there be coordination among all registrars so that the introduction of a competitive DNS system does not take customer service a step backwards.

**12. Does the requirement, as contained in ICANN's registrar accreditation agreement, for prepayment of domain names impact your company's ability to register domain names?**

ICANN's prepayment obligation is appropriate in order to avoid the existing problem of domain name hoarding, which occurs where an individual registers a domain name without payment and merely awaits to capitalize on a future business opportunity. Absent prepayment of domain names, cyber-squatting would be a no-cost business.

**13. What concerns, if any, does your company have regarding specific terms of ICANN's registrar accreditation agreement, such as ICANN's ownership of intellectual property rights and ICANN's ability to terminate a company as a registrar?**

AOL's view is that the specific terms of the registrar accreditation agreement are of less concern than is the need for the accreditation agreement to be non-discriminatory. It is essential in a competitive SRS for each registrar to be governed by the same ground rules.

With respect to ICANN's ownership of intellectual property rights, AOL believes that this level playing field must also directly extend to the openness and availability of all SRS-related components, including the WHOIS database. AOL would be extremely concerned if ICANN could give preference to specific registrars in accessing the intellectual property associated with the SRS.

An additional concern AOL does have is that the registrar accreditation agreement permits ICANN to impose unknown and unknowable obligations based on policies yet to be adopted by the ICANN Board. Since all registrar accreditation agreements are only one-year in duration, the net effect is that the accreditation requirements may be changed by ICANN from contract year to contract year. Any company attempting to build a new business against the backdrop of this uncertainty is severely constrained in its ability to plan more than twelve months in advance.

**14. Has the National Telecommunications and Information Administration ("NTIA") performed sufficient oversight of Network Solutions and ICANN? Are there any specific instances you can cite where proper oversight was lacking?**

NTIA has been dealt a challenging role in this transitional period and has delicately navigated the process as well as could be expected. It is AOL's expectation that the natural result of the DNS transition will entail a diminishing level of NTIA involvement until such time as there is a stable, competitive environment that ensures a fair playing field among registrars.

While we are unaware of any instances of improper oversight, AOL believes that it is very important that NTIA continue and bring to closure negotiations with NSI to promptly resolve NSI's future role vis-a-vis the current testbed and future registrars.

**15. Does NTIA possess sufficient understanding of the technology used in the domain name system? How does their level of knowledge regarding this subject impact NTIA's policy decisions?**

We do not have a sufficient knowledge regarding NTIA's understanding of the technology employed in the domain name system to comment.

**16. What steps could NTIA take to improve its oversight of the transition of the management of the domain name system from the public sector to the private sector?**

As noted above, AOL believes that it is of paramount importance for NTIA to expeditiously facilitate a final agreement with NSI for the benefit of the entire registration community and the evolution of a competitive SRS. Any agreement reached between NTIA and NSI must ensure two fundamental results: that the Registrar License Agreement used by NSI as registry will be a commercially viable framework under which the competitive registrars can operate, and that NSI as registrar will be subject to the same rules of the road as its competitors.

**17. Do you believe that it is important for the root server to remain under the control of the U.S. government?**

Given the current state of technology, the root server can only effectively operate when controlled by a single entity. Distributed database update problems remain a significant technical challenge, and there are no widely accepted solutions currently available. It is important that the root server be reliable, using well-understood and accepted technologies, since it is a linchpin resource for the Internet. So far, competitive private-sector-based processes have not produced Internet standards with reliability, ease of implementation, or lack of proprietary interests comparable to those standards that were developed out of public-sector (or public-sector-sponsored) processes.

AOL believes that U.S. government control of the root server should continue until such time as there is an ability to lift governmental control of the root server without destabilizing or compromising the robustness of the Internet.

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AOL appreciates the opportunity to respond to these questions and to further assist the Subcommittee to oversee the transition to an open and competitive domain name registration marketplace.



August 20, 1999

The Honorable Fred Upton  
Chairman  
Subcommittee on Oversight and Investigations  
Committee on Commerce  
316 Ford House Office Building  
Washington, DC 20515

Dear Mr. Chairman:

Thank you again for the opportunity to testify before the Subcommittee on Oversight and Investigations on July 22, 1999 on the subject of the privatization of the domain name management system. On behalf of register.com, Inc. ("register.com"), please find below responses to the questions set forth in your letter of August 10, 1999.

1. *It is my understanding that the test-bed period for the first five competitive registrars was to run from April 26 to June 26. The test-bed period has been extended several times. Why has the test-bed been extended? Do you believe that further extensions will be needed?*

The test-bed period, which was supposed to end on June 25, 1999, has been extended on three separate occasions since then: June 25 to July 16, July 16 to August 6, and August 6 to September 10. The first extension resulted from technical problems experienced during the test-bed. By June 26, only three of the five test-bed registrars were operating in the

register.com, inc.  
575 Eighth Avenue, 11<sup>th</sup> Floor, New York, NY 10018 • Phone (212) 798-9100

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production environment. On August 6, the last of the five registrars finally came on line. As a result, the test-bed registrars were unable to conduct the large-scale, intensive testing of the system that was required before many other registrars could also begin to compete in this industry. In addition to technical difficulties, the second and third extensions also resulted from the inability of the Department of Commerce and Network Solutions to reach an acceptable agreement for the post test-bed period. Further extensions will be unlikely as long as Network Solutions, Inc. ("NSI") and the Department of Commerce reach an agreement that is acceptable to both parties, to ICANN and to the registrar community.

2. *What obstacles, if any, has your company faced in getting up and running during the test-bed period?*

Register.com was the first of the five test-bed registrars to successfully begin registering .com, .net and .org domain names alongside Network Solutions, Inc. The company faced minor problems in getting up and running during the test-bed period. However, most of these problems were technical in nature, which was to be expected given that we were testing and de-bugging the Shared Registration System (SRS).



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3. *Regarding the dispute resolution process that your company has put in place, do you believe that there should be one uniform policy for all registrars, or that every registrar should be able to select its own policy?*

In light of the potential for forum shopping that would inevitably accompany a system where every registrar crafted its own dispute policy, register.com favors the implementation of one uniform dispute policy for all registrars. Register.com believes that registrars should compete on the bases of price and service. Additionally, without a uniform dispute policy, registrars outside the U.S. may not honor U.S. trademarks which will further complicate the dispute resolution process.

4. *Is the World Intellectual Property Organization's recommended trademark dispute policy necessary in light of the fact that there is already existing trademark law in place to deal with disputes among trademark holders or those using another's trademark improperly?*

Register.com believes that the World Intellectual Property Organization's ("WIPO") recommended trademark dispute policy would be extremely helpful. Currently, cybersquatters benefit from the fact that it is often more costly and time consuming to litigate ownership of a particular

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domain name than it would be to purchase that domain name from a cybersquatter. In comparison, the WIPO policy provides for relatively quick, inexpensive dispute resolution, and should thereby take away this strategy from a cybersquatter.

5. *It is my understanding that your company was required to enter into a non-disclosure agreement with Network Solutions Incorporated ("NSI") as part of the contract to gain access to the Shared Registration System. Could you discuss whether this non-disclosure agreement has slowed the process of working out all of the bugs in the Shared Registration System software?*

The non-disclosure agreement (NDA) that register.com signed with Network Solutions in order to gain access to the SRS did not inhibit our progress in de-bugging the system from a technical perspective. While the NDA prevented us from consulting external sources, we had full access to technical resources at Network Solutions as well as the other test-bed registrars. However, the NDA did prevent us from having open discussions with ICANN regarding other aspects of the test-bed, especially as related to policy and procedure decisions.

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6. *What difficulties, if any, has your company experienced with the Shared Registration System software?*

For most of the test-bed, register.com has not experienced any significant problems with the SRS. However, as more registrars have come on line and the volume of registrations has increased, we have begun to experience performance problems with the Shared Registration System. The system does not appear to be as scalable as it needs to be in order to accommodate the increase in domain name registration volume that will result from increased competition. As a result, the system is often brought down for emergency upgrades, which obviously impacts our performance with our customers. Going forward, this problem needs to be resolved in order to prevent these disruptions in service from continuing.

7. *I understand that there are fees each of your company must pay each time you register a name in the Network Solutions registry. Are these fees fair, particularly the fees your company must pay when a customer chooses to move his account from one registrar to another?*

Register.com must pay Network Solutions \$18 for each two-year registration we process and \$9 for each one-year renewal. We are also

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obligated to pay Network Solutions \$18 each time we transfer a domain name registration to register.com from another registrar, since the SRS treats this as the start of a new two-year registration period. While we recognize there is a cost associated with these transactions, we feel that these fees are excessively high for the work that is done on the part of NSI. Furthermore, these fees must be paid within five (5) days of each transaction. In spite of the prepayment requirement, we are experiencing non-payment issues for domain name registrations in the form of charge backs, which could happen as late as six months after the date of registration. For every charge back we incur, we lose \$18 to the NSI registry. The total value of this loss will become significant over time.

8. *Are new top level domains, such as .web or .info, necessary in order to create a more competitive environment for domain name registration services?*

Register.com believes that new top-level domains would create a more competitive environment for domain name registration services. The more choices that the customer has, the more competitive the market must become. Furthermore, Network Solutions is claiming a proprietary right

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in the .com extension by labeling all of its product and services with a dot com prefix, e.g., the “dot com directory.” Introducing additional TLDs will reduce the focus on .com and create a more equitable playing field for all other registrars. Lastly, register.com believes that increasing the available pool of domain names by adding new top-level domain names could help to alleviate some trademark disputes.

9. *How important to your business is unfettered access to the WHOIS database?*

Unfettered, bulk access to the Network Solutions’ WHOIS database is critical for our business. Until recently, Network Solutions enjoyed a government granted monopoly in the domain name registration industry. NSI is now claiming sole ownership of the data gathered during this time period resulting in an unfair competitive advantage for NSI. The WHOIS data, if shared among all the registrars, can be used to develop third-party value-added products and services, such as a directory of web addresses found on the Internet. These products and services would greatly benefit the consumer and further stimulate competition in the industry.

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10. *I understand that any names that you register are not included in the WHOIS database that is traditionally accessed through the InterNIC site. What problems does this cause for your customers, or potential customers? Will this lead to a fragmentation of Internet directory services? What is the confusion to consumers that results from the multiple WHOIS databases?*

A key issue in this debate is NSI's claim of ownership to the *internic.net* domain name. *Internic.net* and its corresponding trademark are owned by the U.S. Government. For the past seven years, *internic.net* has been considered a public resource for the entire Internet community. All public documents, programming books, marketing links and pre-programmed computers refer to the government owned *internic.net* as the authoritative source for all registration services and domain name registration data. In terms of domain name registration data, the *internic.net* database and corresponding WHOIS services now refer only to domain names registered by NSI, not to those of any other registrars. NSI has thereby caused confusion for consumers, ISPs and many other industry players. A significant number of customer service issues my Company handles are

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caused by this issue alone. Twenty percent of all customer inquiries we have received since the launch of our service have been about this issue. Following is a recent example of customer inquiry to my Company regarding this confusion:

*"I registered my domain name with register.com very soon after they became able to handle such registrations themselves. I found their service to be very good. The one problem I had is that while their site showed my domain in their whois directory immediately, if you searched through Network Solutions (which is where you get if you start with Internic), they did not show it. Thus, we had problems for our first week with some smaller ISPs not showing our site at all (and blaming it on this directory problem) and (at first) even our web host being leery of this new procedure. However, everything seems to be straightened out now, and I would hope this procedure will get smoother as we go along."*

11. *Does the requirement, as contained in ICANN's registrar accreditation agreement, for prepayment of domain names impact your company's ability to register domain names?*

A major requirement incorporated in the ICANN agreement is that

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“registrars shall not activate any registration unless and until it is satisfied that it has received payment of its registration fee.” This requirement does impact our ability to register domain names, although this impact is lessening over time, as consumers become more accustomed to using their credit cards on the Internet. Nevertheless, we support prepayment and believe it will control cybersquatting (registering names with the intent to sell them for a much higher price) among abusive registrants who can register, at no cost, a domain name that infringes another party’s trademark rights. However, we also believe that all registrars should be operating under the same requirements. NSI, because it has not yet signed the ICANN contract, does not require prepayment. While NSI is moving towards prepayment for individuals, they are able to give better payment terms to its own resellers (not requiring prepayment from them) thereby giving NSI a significant and unfair competitive advantage over other registrars who are playing by the rules laid out by ICANN.

12. *What concerns, if any, does your company have regarding specific terms of ICANN’s registrar accreditation agreement, such as ICANN’s ownership of intellectual property rights and ICANN’s ability to terminate*



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*a company as a registrar?*

Register.com does not have any specific concerns related to the terms of the ICANN accreditation agreement. However, we do think it is critical that all registrars operate under the same terms and conditions. NSI in particular does not deserve a better or less restrictive contract than any of the other registrars due to its status as a legacy operator.

*13. Has the National Telecommunications and Information Administration (“NTIA”) performed sufficient oversight of Network Solutions and ICANN? Are there any specific instances you can cite where proper oversight was lacking?*

We believe that the National Telecommunications and Information Administration (“NTIA”) has performed sufficient oversight of Network Solutions and ICANN. However, NTIA must now focus on completing the deregulation process they have begun. Deregulation was intended to create competition in the generic domain name space and to transition the management of Internet names from the U.S. Government to a neutral, not-for-profit, industry developed third party. As management of the domain name system transitions to ICANN, NTIA needs to ensure that

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NSI formally recognizes ICANN and its authority. Without such action, the entire process and the further growth, development and stability of the Internet may be in jeopardy.

*14. Does NTIA possess sufficient understanding of the technology used in the domain name system? How does their level of knowledge regarding this subject impact NTIA's policy decisions?*

Given the large number of issues that have been raised during this process, NTIA has been forced to prioritize its efforts. The department has done a great job on many of the policy issues. However, while NTIA has some understanding of the technology used in the domain name system, the technical issues are becoming increasingly complex. A greater level of technical knowledge in the organization would be very helpful in addressing these issues as new registrars enter the market and we begin to see more large scale testing of the Shared Registration System.

*15. What steps could NTIA take to improve its oversight of the transition of the management of the domain name system from the public sector to the private sector?*

As stated previously, the test-bed period has been extended on three

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occasions, two of which were partly the result of the inability of NTIA and Network Solutions to reach an agreement. NTIA must be stronger with NSI in negotiating key terms for the post test-bed period as well as ensuring that NSI recognizes ICANN's authority. The transition of the domain name system from the U.S. Government to ICANN must facilitate fair competition for all registrars.

16. *Do you believe that it is important for the root server to remain under the control of the U.S. government?*

The root server should remain under the control of the U.S. Government in the short term. Once ICANN is fully operational and has transitioned to a more permanent structure, the root server should be transferred to ICANN's control.

I hope these responses provide you with a greater understanding of the issues we are facing. If you have any further questions, please do not hesitate to contact me.

Very truly yours,



Richard D. Forman  
President and CEO  
register.com, inc.

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**U.S. House of Representatives**  
**Committee on Commerce**  
 Room 2125, Rayburn House Office Building  
 Washington, DC 20515-6115

October 15, 1998

AMESE DENZER, AN, CHIEF OF STAFF

Mr. Ira Magaziner  
 Senior Advisor to the President for Policy Development  
 Executive Office of the President  
 The White House  
 Washington, DC 20500

Dear Mr. Magaziner:

I am writing to express my concerns about the Administration's role in the transfer of the Internet's Domain Name System (DNS) from the public sector to the private sector.

On June 10, 1998, the Subcommittee on Telecommunications, Trade and Consumer Protection held a hearing on the future of the Domain Name System. Associate Administrator of the National Telecommunication and Information Administration (NTIA) for International Affairs, J. Beckwith Burr, testified on the Administration's recently released policy statement on the future management of the DNS. This policy statement, known as the White Paper, outlines the Administration's proposal to turn over responsibility of the management of the DNS from the government to a newly created non-profit corporation. This new private corporation is intended to provide for competition in domain registration and global participation by all interested parties in the future management of the DNS.

I welcomed the White Paper's proposal for the new corporation to be "governed on the basis of a sound and transparent decision-making process, which protects against capture by a self-interested faction." The White Paper reiterated the need for openness when it stated that: "The new corporation's processes should be fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders."

At the hearing, I underscored the importance of private sector leadership and the need for stability and continuity in the operation of the Internet during the transfer of DNS management to the private sector. I believed that an open, consensus-based process to develop the new self-governing structure, embodied in the White Paper, was a promising approach. At the meetings over the summer of the International Forum for the White Paper (IFWP), a

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broad-based consensus was reached among the participants which echoed the principles of the White Paper.

To further the goals of the White Paper, it would seem incumbent upon the Administration to encourage all key Internet stakeholders to participate in an open, consensus-driven governance process, and, in particular, to encourage meaningful participation of one important stakeholder, the Internet Assigned Numbers Authority (IANA). As you know, IANA, a Department of Defense contractor, establishes technical protocols and allocates Internet Protocols (IP) addresses to regional IP numbering authorities, two functions that are critical to the operation of the Internet. I was disappointed to learn that IANA apparently did not meaningfully participate in the IFWP process.

Instead of participating in that process, IANA, under the leadership of Dr. Jon Postel, apparently developed its own DNS reform proposal behind closed doors with little consultation from the broader Internet community. The final IANA proposal, which was delivered to the Department of Commerce on October 2, only represented the position of IANA and no other parties.

Concurrent with IANA's release of its proposal for the new DNS corporation, known as the Internet Corporation for Assigned Names and Numbers (ICANN), IANA named nine individuals to serve as interim members of the board of directors of ICANN. I am concerned about the lack of openness in the consideration and selection process for ICANN's interim board members. In fact, Dr. Postel's written testimony recently before a House Committee acknowledged that the selection process for members of the interim board of directors of the new corporation to administer the DNS, was "undemocratic and closed." Further, I am concerned that the lack of a solid American majority on the interim board fails to reflect the leading role of American business investment and consumer-use in the growth of the Internet.

The Commerce Department has provided a comment period of just six business days (which began with the receipt of the proposals late on October 2, and ended on October 13, 1998), for the public to respond to the four proposals submitted to NTIA pursuant to the White Paper's request for proposals to establish a private sector entity. I am concerned that this limited time period is inadequate for all interested parties to provide meaningful comment on these proposals that are crucial to the future of the Internet and electronic commerce.

Finally, I have concerns regarding the legal authority upon which the Department has undertaken the process to transfer DNS management from the National Science Foundation (NSF) to a newly created non-profit corporation. As you know, the NSF took the lead in commercialization of the Internet through its operation of the NSFNET and its 1993 cooperative agreement with Network Solutions Incorporated (NSI) to register domain names and manage the root server system. It is my understanding that the NSF/NSI cooperative agreement was transferred to the Department of Commerce in September 1998.

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I am concerned about the manner in which the process of privatizing the governance of the DNS has apparently unraveled. I was hopeful that the Administration would bring leadership to this important effort. We are at a critical juncture in the efforts to establish a workable governance structure that will guide the future of the Internet and electronic commerce. The success or failure of this current undertaking will have a profound impact on the growth of electronic commerce as well as future Internet governance debates. It is vitally important that this first attempt at self-governance be undertaken in a deliberate, open and fair manner, so that it is not subject to capture by "a narrow group of stakeholders." A loss of credibility in the Internet community at large will seriously undermine the ability of the new corporation to administer the Domain Name System and the stability of the Internet itself.

Pursuant to Rules X and XI of the U.S. House of Representatives, I request that you provide the following information to the Committee by November 5, 1998.

1. Please provide the Committee with an explanation, including citations to relevant statutes, of the Administration's authority over management of the Internet. In particular, please explain: (1) the Department of Commerce's authority to assume the NSF cooperative agreement with NSI; and (2) the Department of Commerce's authority to transfer responsibility for the management of the DNS to the private sector.
2. Given IANA's historical role in the operation of the Internet and its role in establishing a new management structure, please describe your efforts to encourage IANA's meaningful participation in the IFWP process. Additionally, please describe your knowledge and/or involvement in IANA's decision to submit its own proposal. Please provide all records relating to IANA's participation in the IFWP or IANA's decision to submit a separate proposal.
3. Did you support the Department of Commerce's decision to limit the public comment period on the DNS proposals to six full business days? Please provide all records relating to the comment period, including but not limited to all records of communications (whether written, electronic or oral) between the Executive Office of the President and the Department of Commerce relating to the comment period.
4. Did you have any involvement in the consideration or selection of ICANN's proposed interim board members? If so, please describe your involvement and list and describe any communications you had with the following people or entities regarding the consideration or selection of the proposed interim board members prior to the announcement of the proposed interim board members: (1) IANA or its representatives; (2) the proposed interim board members; (3) representatives of foreign governments, international organizations, or non-governmental organizations; or (4)

Letter to Mr. Ira Magaziner

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other individuals and organizations outside the US government. Please provide all records relating to such communications (whether written, electronic or oral).

For purposes of responding to this request, the terms "records," "relating," "relate," and "regarding" should be interpreted in accordance with the Attachment to this letter.

Should you have any questions regarding this request, please contact me or have your staff contact Mark Paoletta, Chief Counsel for Oversight and Investigations, or Paul Scolese, Professional Staff Member, at (202) 225-2927.

The House Commerce Committee intends to monitor the consideration of the draft proposals and the transfer of DNS management to the private sector very closely for the remainder of the 105<sup>th</sup> Congress and throughout the 106<sup>th</sup> Congress. As the Administration undertakes this effort, I ask that the Committee be kept informed of and consulted on the process in a timely fashion.

Sincerely,



Tom Bliley  
Chairman

Attachment

## ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.
2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.



THE WHITE HOUSE  
WASHINGTON

October 27, 1998

Tom Bliley  
Chairman  
Committee on Commerce  
U.S. House of Representatives  
Room 2125, Rayburn House Office Building  
Washington, D.C. 205 15-6115

Dear Chairman Bliley:

This letter is a preliminary response to your inquiry of October 15 concerning the Administration's role in the transfer of the Internet's Domain Name System (DNS) from the public sector to the private sector. If after reading this response, you desire further information, I will forward it to you by your requested date of November 5.

Before addressing your specific questions, it would perhaps be useful to describe to you the process which we have undertaken since July 1, 1997, when the President directed the Commerce Department to oversee the transition of the DNS to the private sector.

In the Presidential directive on electronic commerce issued on July 1, 1997, the President stated:

"I direct the Secretary of Commerce to support efforts to make the governance of the domain name system private and competitive and to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis."

In his directive, the President created an interagency working group to oversee the implementation of the various parts of his electronic commerce strategy. As a coordinator of this group, I have supervised the interagency process which has overseen the Commerce Department's DNS efforts.

On July 2, 1997, the Department of Commerce issued a Request for Comments ( RFC ) on DNS administration. During the comment period, more than 430 comments were received, amounting to some 1,500 pages.

Informed by these comments and other broad consultations, on January 30, 1998, the Department of Commerce issued for comment "A Proposal to Improve the Technical Management of Internet Names and Addresses" also known as the Green paper. It made proposals to privatize the management of Internet names and addresses. The Department received more than 650 public comments from around the world on the proposal, amounting to over 2000 pages.

In response to these comments and reflecting the rapid pace of technological development of the Internet, the Department issued on June 5, 1998 its plan, "Management of Internet Names and Addresses" (also known as the White Paper). The White Paper invited the international community of private sector Internet stakeholders to work together to form a new corporation by October 1 to manage DNS functions currently performed by or on behalf of the U.S. Government. These functions include 1) management of the Internet IP numbering system; 2) coordination and management of the Internet root server system; 3) allocation and management of generic top level domains; and 4) coordination of Internet protocol assignments.

In keeping with the principles of the President's electronic commerce strategy, the White Paper states that the new corporation should be a private, non-profit, globally and functionally representative organization, operated on the basis of sound and transparent processes that protect against capture by self-interested factions. It further states that the new corporation's processes need to be fair, open and pro-competitive, and should have mechanisms for restructuring itself to reflect changes in the constituency of Internet stakeholders.

The White Paper also sets conditions for negotiations between the Commerce Department and Network Solutions, Inc. (NSI), a private company which manages certain aspects of the DNS for the Government, designed to end the NSI monopoly in the registration of second level domain names in generic top level domains. It also calls upon the World Intellectual Property Organization (WIPO) to conduct a study to be presented to the new organization on the proper way to handle trademark issues related to the DNS.

Finally, the White paper indicates that the U.S. Government would continue its oversight of the DNS for a transition period not to exceed two years and that the Government would consult with other interested governments during the process of forming the new corporation and during the period of oversight.

The Department of Commerce has completed its negotiations with NSI and an amendment to the cooperative agreement between the U.S. Government and NSI, which accomplish the goals laid out in the White Paper, and was announced on October 6.

WIPO has begun its study and has indicated that it will be prepared to report to the new corporation early in 1999.

The White Paper's principles and process won widespread support from the Internet community worldwide. Immediately after it was issued, at least two different efforts were initiated to respond to it. One process was initiated by the Internet Assigned Numbers Authority

(IANA), the group at the University of Southern California which now performs some of the DNS functions under contract with the Defense Advanced Research Projects Administration (DARPA). The other process, the International Forum for the White Paper (IFWP) was initiated by NSI, The Domain Name Rights Coalition (DNRC), the Commercial Internet Exchange (CIX) and a number of other companies and associations.

The IANA process consisted of solicitations of views on the Internet and negotiations with various groups on five successive drafts of proposed bylaws for the new corporation. The IFWP process consisted of a series of public meetings chaired by Professor Tamar Frankel from Boston University and coordinated by a steering group. These meetings were held throughout the summer in Reston, Geneva, Singapore and Buenos Aires. In addition, a meeting convened by the European Union in conjunction with this process was held in Brussels.

The Administration encouraged both processes and we would have encouraged other processes initiated by private stakeholders had they emerged. We did not see it as our role to define any specific process as being legitimate. Advocating private sector leadership to us meant allowing the private sector to lead, even if this meant competing processes for a period of time.

Those organizing the IANA process felt that the IFWP process was not sufficiently democratic because it gave undo weight to those who had the time and money to attend meetings around the world, a possibility not open to many Internet stakeholders. They argued that a process of successive drafts publicly posted on the Internet with opportunities for public comment was more democratic.

Those organizing the IFWP process argued that the meetings were more democratic because no one group controlled the drafting pen and the give and take of meetings and associated discussions on line provided for a more open process.

We did not see it as our role to shut off one process or the other. Instead, we encouraged those organizing each process to cooperate with each other as much as possible. We encouraged those associated with the IANA process to attend the IFWP meetings, and I believe that representatives from the IANA group and those associated with it did attend all the meetings. We also encouraged those organizing the IFWP process to respond to the IANA drafts and I believe that many did so.

I spoke at two of the IFWP meetings, reiterating the principles of the White Paper and urging that consensus be reached. I responded to phone calls and meeting requests I received from representatives of both groups and from a variety of other participants in the process. As expressed in the White Paper, I also had periodic conversations with representatives from other interested governments who requested to participate in the process. These included the European Union, France, Great Britain, Australia and Japan.

In late August, I was informed that the IFWP group was divided on whether to hold a wrap up meeting to summarize its work and produce a proposal. I gather that a vote taken on this possibility at one of their meetings produced a slight majority against the idea of a wrap up

meeting. I was also informed that some people associated with IFWP wanted to hold a meeting at Harvard University in mid September to culminate the process and hammer out a final agreement. Tamar Frankel requested that I come to the meeting and put the US Government on record as officially sanctioning that meeting as the process we would recognize.

Others, including some who had been sponsors of the IFWP process such as CIX, opposed the idea of such a meeting, preferring to negotiate with IANA to incorporate into its latest draft the consensus points of the IFWP meetings.

Those favoring a big public meeting felt that it would be more democratic. Those opposing the idea of a meeting felt that a large discussion forum of that sort was not the best way to draft a final set of bylaws and that the location of any such meeting would inherently bias the results since those who lived closest to the meeting site would have the greatest representation.

The Administration decided not to endorse one view or the other. Instead, we urged the groups to talk with each other and to try to reach consensus. We left it to them to decide whether this would occur in a big meeting or not.

From talking to the various parties involved, and reading the various lists on which groups were communicating with each other, we felt that consensus could be reached. There appeared to be agreement on 80% of the issues, a consensus which had been formed over the past months. The areas of disagreement were serious, but we believed could be negotiated.

While encouraging the groups to talk with each other, we understood that there could be one of two outcomes, either of which would provide the basis for a next step. There might emerge a consensus proposal because the existence of the deadline would force the groups to come together. If not, we would receive two or three proposals representing the consensus of different groups and we could then put together a process to reconcile differences after taking the pulse of the Internet community.

The latter has been the result. From the vast array of factions and proposals which existed last June, we now have three proposals which follow from the White Paper (and one proposal which rejects the White Paper principles and process and has little support in the public comments). These proposals agree on most of the fundamental issues, There are serious areas of disagreement, but we believe, having talked at length with the proposing groups, that these differences can be bridged.

The public comments we have received, numbering over 500 pages, provide the guidelines for these discussions. We have sent letters to the three groups that have made proposals expressing the consensus of the public comments and have encouraged them to engage in discussions to reach a satisfactory conclusion based on the public comments.

Most of the public comments support moving ahead with the ICANN group, but most also support many of the concerns voiced in the other proposals about the insufficient accountability, transparency, and protections against conflicts of interest in the ICANN proposal.

If these and some other modifications are made in the ICANN proposal, we believe that there will be sufficient consensus to move ahead:

As with many issues relating to the new digital economy, there are no established templates to follow on how to set up an organization to coordinate the DNS system. While this process has had many twists and turns, there has been significant progress. Even after the Commerce Department enters into a transition agreement with a new organization, there will be many difficult decisions and consensus building processes which will be necessary before that organization attains legitimacy and stability. The U.S. Government will have an important oversight role to play during this transition. The Administration will be pleased to work with you and your committee as we proceed through this difficult and uncertain process.

With this introduction, I will now turn to your specific questions.

1. The Commerce Department will respond to this question since it involves authorities of the Commerce Department.
2. As indicated above, after the White Paper was issued, IANA expressed an interest in submitting a proposal to meet the objectives of the White Paper process. In a few phone calls with Jon Postel and others from IANA in June, I encouraged them to do so, indicating that they should try to consult widely and achieve as broad based a consensus as possible. The IANA is a respected organization which has often succeeded at finding consensus within the Internet community over the years. Though there had been controversy over the IANA role in an Internet Society process to address domain name issues during the previous year, IANA was certainly capable of potentially pulling together a process which might find consensus and therefore there was no reason to discourage them.

When the IFWP process was proposed, I also encouraged its organizers. When the IANA group phoned me late in June and asked my opinion about the IFWP process, I encouraged them to participate.

As different groups approached me in September, I urged them to speak with each other to try to find consensus.

3. On October 2, in a phone conversation, I did encourage the Department of Commerce to limit the comment period. The stakeholders interested in the DNS had been following the issues all summer and were well aware of the October 1 deadline. There is a very widespread view among these stakeholders, reflected in the public comments, that after years of debate, this process should move forward quickly.

I believed on October 2 and still believe that virtually all those who wished to comment would be able to do so in the ten day period provided for public comments. We have not received a significant number of requests to extend the period for comment. Assuming that ICANN and the Commerce Department reach an agreement, there will be opportunity for public comment on it before it proceeds.

4. The ICANN group approached me late in August to describe the board structure and possible board members they were considering appointing. I urged them to try to find people of stature who would be viewed as independent, to consult widely before making choices and to make public as soon as possible the names they were considering. I had a few subsequent discussions with them as they considered names to propose.

In one discussion, they indicated that they were proposing four U.S. representatives, one representing academia, one from the policy community and two from the business community. They had settled on the representatives from academia and the policy community and asked my advice on the business representatives. I told them that it was not appropriate for me to make specific recommendations. When pressed, I gave them examples to indicate the stature and type of individual I thought might be appropriate, for example someone at a senior level from a company with significant interest in the Internet but not a significant interest in DNS issues as one choice, and someone from a company using the Internet who understands trademark issues as another choice. I suggested a few names as examples, none of whom were proposed.

In a few subsequent discussions in mid September, I expressed concern about the lack of a developing country representative and about the fact that Europe had three members and the Asia/Pacific region had only two. I suggested that a structure with four from the U.S., two from Europe, two from Asia/Pacific and one from a developing country, perhaps in Latin America, would be more reflective of Internet usage.

I had a number of discussions with officials from foreign governments on this issue which usually occurred as one item in a discussion of a number of Internet related issues. These included representatives from the European Union, the Japanese government and the Australian Government. I discussed with a number of European Union officials my view that their representation should be roughly equivalent to that of the Asia Pacific region and that there should be some developing country representation. They indicated that they had already discussed the matter with the IANA group and felt that the structure as proposed by IANA was more appropriate.

In discussions with the head of the National Office for the Information Economy in Australia, he indicated that he had discussions with the IANA group supporting the Australian nominee that the IANA group was proposing. Similarly, on a trip to Japan in mid September, I discussed with MITI and MPT officials, the IANA proposed Japanese member of the board. These officials expressed their support for that candidate.

In the European and Australian cases, the other government representatives brought up the issue and I discussed it with them, but indicated that they should talk to the IANA group directly. In the Japanese case, I responded to questions about whether I knew who from Japan, if anyone, was being considered for the board by IANA. I expressed what I had been told by the IANA group and heard their reactions.

I do not know, and don't believe I have ever met or talked with seven of the nine people that have been suggested for the interim board of ICANN. I have met Jun Murai once, on a recent

visit to Tokyo when he was part of a group of Internet experts invited by the U.S. embassy to have a breakfast meeting with me at the embassy. I did not discuss his potential board nomination with him.

I have known Esther Dyson for many years and frequently meet her when we are asked to speak at the same fora. I did not suggest her for this board. She approached me at a meeting in late August and indicated that she had been asked if she would be interested in serving on the board. She asked my opinion about whether the new organization would be significant. I indicated that the new organization would play an important role but made clear that no decision had been made as to whether the ICANN proposal would in fact go forward.

I would be pleased to meet with you and/or your staff to discuss these matters further. In particular, I would be happy to discuss whether there is any additional information or documentation you require.

Sincerely,



Ira C. Magaziner  
Senior Advisor to the President  
for Policy Development

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JAMES E. DECKERMAN, CHIEF OF STAFF

U.S. House of Representatives  
 Committee on Commerce  
 Room 2125, Rayburn House Office Building  
 Washington, DC 20515-6115

October 15, 1998

The Honorable William M. Daley  
 Secretary of Commerce  
 U.S. Department of Commerce  
 14<sup>th</sup> Street at Constitution Avenue, N.W.  
 Washington, D.C. 20230

Dear Mr. Secretary:

I am writing to express my concerns about the role of the Department of Commerce in the transfer of the Internet's Domain Name System (DNS) from the public sector to the private sector.

On June 10, 1998, the Subcommittee on Telecommunications, Trade and Consumer Protection held a hearing on the future of the Domain Name System. Associate Administrator of the National Telecommunication and Information Administration (NTIA) for International Affairs, J. Beckwith Burr, testified on the Administration's recently released policy statement on the future management of the DNS. This policy statement, known as the White Paper, outlines the Administration's proposal to turn over responsibility of the management of the DNS from the government to a newly created non-profit corporation. This new private corporation is intended to provide for competition in domain registration and global participation by all interested parties in the future management of the DNS.

I welcomed the White Paper's proposal for the new corporation to be "governed on the basis of a sound and transparent decision-making process, which protects against capture by a self-interested faction." The White Paper reiterated the need for openness when it stated that: "The new corporation's processes should be fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders."

At the hearing, I underscored the importance of private sector leadership and the need for stability and continuity in the operation of the Internet during the transfer of DNS management to the private sector. I believed that an open, consensus-based process to develop the new self-governing structure, embodied in the White Paper, was a promising approach. At the meetings over the summer of the International Forum for the White Paper (IFWP), a



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broad-based consensus was reached among the participants which echoed the principles of the White Paper.

To further the goals of the White Paper, it would seem incumbent upon the Administration to encourage all key Internet stakeholders to participate in an open, consensus-driven governance process, and, in particular, to encourage meaningful participation of one important stakeholder, the Internet Assigned Numbers Authority (IANA). As you know, IANA, a Department of Defense contractor, establishes technical protocols and allocates Internet Protocols (IP) addresses to regional IP numbering authorities, two functions that are critical to the operation of the Internet. I was disappointed to learn that IANA apparently did not meaningfully participate in the IFWP process.

Instead of participating in that process, IANA, under the leadership of Dr. Jon Postel, apparently developed its own DNS reform proposal behind closed doors with little consultation from the broader Internet community. The final IANA proposal, which was delivered to the Department of Commerce on October 2, only represented the position of IANA and no other parties.

Concurrent with IANA's release of its proposal for the new DNS corporation, known as the Internet Corporation for Assigned Names and Numbers (ICANN), IANA named nine individuals to serve as interim members of the board of directors of ICANN. I am concerned about the lack of openness in the consideration and selection process for ICANN's interim board members. In fact, Dr. Postel's written testimony recently before a House Committee acknowledged that the selection process for members of the interim board of directors of the new corporation to administer the DNS, was "undemocratic and closed." Further, I am concerned that the lack of a solid American majority on the interim board fails to reflect the leading role of American business investment and consumer-use in the growth of the Internet.

The Commerce Department has provided a comment period of just six business days (which began with the receipt of the proposals late on October 2, and ended on October 13, 1998), for the public to respond to the four proposals submitted to NTIA pursuant to the White Paper's request for proposals to establish a private sector entity. I am concerned that this limited time period is inadequate for all interested parties to provide meaningful comment on these proposals that are crucial to the future of the Internet and electronic commerce.

Finally, I have concerns regarding the legal authority upon which the Department has undertaken the process to transfer DNS management from the National Science Foundation (NSF) to a newly created non-profit corporation. As you know, the NSF took the lead in commercialization of the Internet through its operation of the NSFNET and its 1993 cooperative agreement with Network Solutions Incorporated (NSI) to register domain names and manage the root server system. It is my understanding that the NSF/NSI cooperative agreement was transferred to the Department of Commerce in September 1998.

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I am concerned about the manner in which the process of privatizing the governance of the DNS has apparently unraveled. I was hopeful that the Administration would bring leadership to this important effort. We are at a critical juncture in the efforts to establish a workable governance structure that will guide the future of the Internet and electronic commerce. The success or failure of this current undertaking will have a profound impact on the growth of electronic commerce as well as future Internet governance debates. It is vitally important that this first attempt at self-governance be undertaken in a deliberate, open and fair manner, so that it is not subject to capture by "a narrow group of stakeholders." A loss of credibility in the Internet community at large will seriously undermine the ability of the new corporation to administer the Domain Name System and the stability of the Internet itself.

Pursuant to Rules X and XI of the U.S. House of Representatives, I request that you provide the following information to the Committee by November 5, 1998.

1. Please provide the Committee with an explanation, including citations to relevant statutes, of the Administration's authority over management of the Internet. In particular, please explain: (1) the Department of Commerce's authority to assume the NSF cooperative agreement with NSI; and (2) the Department of Commerce's authority to transfer responsibility for the management of the DNS to the private sector.
2. Given IANA's historical role in the operation of the Internet and its role in establishing a new management structure, please describe the Department of Commerce's efforts to encourage IANA's meaningful participation in the IFWP process. Additionally, please describe the Department's knowledge and/or involvement in IANA's decision to submit its own proposal. Please provide all records relating to IANA's participation in the IFWP or IANA's decision to submit a separate proposal.
3. Why is the Department of Commerce's comment period so short? Why did the Department provide just six full business days for the public to analyze the proposals and provide comment? Please explain the Department's regulations and guidance governing public comment periods generally and in relation to the consideration of the four DNS reform proposals together with the relevant regulations and guidance.
4. Did the Department of Commerce have any involvement in the consideration or selection of ICANN's proposed interim board members? If so, please describe the Department's involvement and list and describe any communications the Department had with the following people or entities regarding the consideration or selection of the proposed interim board members prior to the announcement of the proposed interim board members: (1) IANA or its representatives; (2) the proposed interim board members; (3) representatives of foreign governments, international organizations, or non-governmental organizations; or (4) other individuals and organizations outside the

Letter to The Honorable William M. Daley

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US government. Please provide all records relating to such communications (whether written, electronic or oral).

For purposes of responding to this request, the term "records," "relating," "relate," and "regarding" should be interpreted in accordance with the Attachment to this letter.

Should you have any questions regarding this request, please contact me or have your staff contact Mark Paoletta, Chief Counsel for Oversight and Investigations, or Paul Scolese, Professional Staff Member, at (202) 225-2927.

The House Commerce Committee intends to monitor the consideration of the draft proposals and the transfer of DNS management to the private sector very closely for the remainder of the 105<sup>th</sup> Congress and throughout the 106<sup>th</sup> Congress. As the Administration undertakes this effort, I ask that the Committee be kept informed of and consulted on the process in a timely fashion.

Sincerely,

  
Tom Bliley  
Chairman

Attachment

## ATTACHMENT

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2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.



UNITED STATES DEPARTMENT OF COMMERCE  
Office of the General Counsel  
Washington, D.C. 20230

November 5, 1998

The Honorable Thomas J. Bliley, Jr.  
Chairman  
Committee on Commerce  
House of Representatives  
Washington, DC 205 15-6115

Dear Chairman Bliley:

Thank you for your October 15<sup>th</sup> letter to Secretary Daley expressing your continued interest in efforts to privatize management of the Internet domain name system (DNS) and requesting information about the Department's role in these efforts. Secretary Daley asked me to respond to your questions and concerns on the Department's behalf.

The Department of Commerce has been a strong proponent of the Administration's view that the private sector should continue to lead the expansion of the Internet. To that end, the Department has supported the efforts of the private sector to develop mechanisms to facilitate the successful operation of the DNS. At the same time, the Department has recognized the need to ensure stability and continuity in the operation of the Internet during the transfer of DNS management to the private sector. These beliefs formed the basis for the Administration's policy statement, "*Management of Internet Names and Addresses*" (the "White Paper"). The White Paper envisioned that the private sector would create a new, not-for profit corporation to undertake DNS management. In her testimony before the Subcommittee on Telecommunications, Trade and Consumer Protection in June and subsequent answers to the Subcommittee's follow-up questions, Becky Burr of the National Telecommunications and Information Administration (NTIA) reiterated the Department's commitment to private sector leadership in this area.

Consistent with the White Paper approach, the Department encouraged and supported all private sector efforts to create a new, not-for-profit corporation for DNS management, but did not endorse or direct any of them. The Department repeatedly and publicly encouraged all Internet stakeholders, including the Internet Assigned Numbers Authority (IANA), to participate in an open, consensus-driven process. It would have been inappropriate, however, for the U.S. Government to dictate to the private sector the method or process by which they should participate. Thus, aside from encouraging all parties to conduct their processes in an open and inclusive manner, the Department did not direct the type of process in which the private sector should engage to reach consensus.

For example, Commerce employees, including Ms. Burr, attended the meeting of the International Forum for the White Paper (IFWP) in Reston, Virginia in July. The President's domestic policy advisor, Ira Magaziner, spoke at the Reston IFWP meeting, as well as at the IFWP meeting held in Geneva. At these meetings, Ms. Burr and Mr. Magaziner encouraged

IFWP organizers to include the more traditional Internet community in its processes, and encouraged the Internet technical community to participate in the IFWP meetings. The Department understands that the late Dr. Jon Postel, Director of the Information Sciences Institute (ISI) of the University of Southern California and Director of IANA, personally participated in the IFWP meeting in Geneva, and that he was represented at all of the other IFWP meetings. Based on this understanding, the Department does not share your view that IANA did not meaningfully participate in the IFWP process.

It is the Department's view that the IFWP and the IANA process to develop a proposal for a new, non-profit corporation were complementary. The IFWP process brought people together physically in locations around the globe (Reston, Virginia, Geneva, Switzerland, Buenos Aires, Argentina and Singapore) to discuss issues pertaining to the creation of the new corporation. The IANA process reached out to the global community through the Internet to craft and discuss proposed governing documents for the new corporation.

The responses of the Department of Commerce to specific questions appear below. For ease of reference, we have included your questions in the text of the Department's responses.

*1. Please provide the Committee with an explanation, including citations to relevant statutes, of the Administrator's authority over management of the Internet. In particular, please explain: (1) the Department of Commerce's authority to assume the NSF cooperative agreement with NSI; and (2) the Department of Commerce's authority to transfer responsibility for the management of the DNS to the private sector.*

As noted in the White Paper, much of the U.S. Government's initial investment and oversight over the Internet was conducted through research and scientific agencies, including the Department of Defense's Advanced Research Projects Agency (DARPA) and the National Science Foundation (NSF). See White Paper, 63 Fed. Reg. 3 1741-42 (1998). In 1992, Congress gave NSF the statutory authority to permit commercial activity over what was to become known as the Internet. See Section 4(9) of the Scientific and Advanced Technology Act of 1992, Pub. L. No. 102-476, 106 Stat. 2297, 2300 (1992) (codified at 42 U.S.C. § 1862(g)). Major components of the domain name system are still performed by, or subject to, agreements with agencies of the U.S. Government, including the cooperative agreement with Network Solutions, Inc. (NSI) for domain name registration services.

The U.S. Government, however, recognizes that the Internet is rapidly becoming an international medium for commerce, education and communications and that Internet governance and technical functions should evolve to meet the new reality. In recognition of the changing nature of the Internet from a U.S. research-based tool to a dynamic medium for business and commerce, the President on July 1, 1997, directed the Secretary of Commerce to support efforts to make the governance of the domain system private and competitive. This directive recognizes the Department of Commerce's broad authority to foster, promote, and develop foreign and domestic commerce. See 15 U.S.C. § 1512.

Specifically, NSF transferred the authority and the responsibility for administering its cooperative agreement with NSI to the Department of Commerce under the authority of section 1870 of the National Science Foundation Act of 1950. See 42 U.S.C. 1870. Among other things, this statutory provision authorizes NSF to enter into arrangements with other government agencies to perform any activity that NSF is authorized to perform. Moreover, NTIA is specifically authorized to coordinate the telecommunications activities of the Executive Branch and assist in the formulation of policies and standards for those activities including, but not limited to, considerations of interoperability, privacy, security, spectrum use, and emergency readiness. 47 U.S.C. § 902(b)(2)(H). Attached please find the interagency agreement between NSF and the Department in which the Department assumes responsibility for the cooperative agreement.

As noted in the White Paper and as reiterated by Ms. Burr in answers to questions from the Telecommunications Subcommittee, the Department of Commerce contemplates entering an agreement (or agreements) with a not-for-profit corporation that would address the management of certain DNS technical functions. These functions include the assignment of numerical addresses to Internet users, the management of the system of registering names for Internet users, the operation of the Internet root server system, and the coordination of protocol assignment. The Department of Commerce, like other Federal agencies, has a number of congressionally authorized mechanisms for entering into agreements with third parties, including contracts, grants, joint projects, and cooperative agreements.

2. *Given IANA's historical role in the operation of the Internet and its role in establishing a new management structure, please describe the Department of Commerce's efforts to encourage IANA's meaningful participation in the IFWP process. Additionally, please describe the Department's knowledge and/or involvement in IANA's decision to submit its own proposal. Please provide all records relating to IANA's participation in the IFWP or IANA's decision to submit a separate proposal.*

Through the testimony of Anthony Rutkowski, the Department of Commerce learned of the formation of the IFWP and its plans to hold a meeting in Reston, Virginia on June 10, 1998, at the Subcommittee hearing on the future of the domain name system. In telephone conversations with Dr. Postel on June 11, 1998 and June 29, 1998 Ms. Burr encouraged IANA's active participation in any initiative that met the White Paper's criteria of openness and inclusiveness to the diverse interests of the Internet community. Dr. Postel indicated that he would be unable to participate in the Reston meeting, but that IANA would be represented there. He also stated that he would personally attend the next IFWP meeting scheduled in Geneva on July, 24-25. It is our understanding that IANA representatives did participate in all meetings of the IFWP.

On July 31, 1998, Joe Sims, IANA's legal counsel, sent an e-mail to Ms. Burr describing a telephone conversation he had with IFWP organizer John Wood. In the message, Mr. Sims indicated that the IFWP was organizing a final "wrap-up" meeting for early September to bring closure to the documents on which the group had been working. It was rumored in public

accounts that IANA would not be participating in the IFWP "wrap up" meeting. As a result, Ms. Burr sent an e-mail to Mr. Sims on August 20, 1998 expressing concern about IANA's participation in the meeting. Mr. Sims responded to Ms. Burr's e-mail on August 22, 1998, indicating that IANA was in discussions with IFWP organizer Larry Lessig. No further action was taken by Ms. Burr.

Department personnel were not involved in IANA's decision to submit a separate proposal for the creation of the new non-profit contemplated by the White Paper. Department personnel, however, did monitor IANA's open and iterative process for drafting and revising proposed by-laws for a new corporation throughout the summer via IANA's website at <http://www.iana.org>. Successive draft by-laws for the corporation were posted and a discussion mailing list was created to receive public comments on the drafts. IANA postings and mailing lists were open to all interested parties, including members of the IFWP, and generated significant on-line comment and discussion. We understand this discussion was used to modify later drafts.

Enclosed please find records responsive to this question.

3. *Why is the Department of Commerce's comment period so short? Why did the Department provide just six full business days for the public to analyze the proposals and provide comment? Please explain the Department's regulations and guidance governing public comment periods generally and in relation to the consideration of the four DNS proposals together with the relevant regulations and guidance.*

The Department of Commerce was under no legal obligation to make the various proposals for a new, non-profit corporation available for public comment. These proposals were not rulemakings subject to the requirements of the Administrative Procedures Act or otherwise subject to a requirement for public comment.

Nevertheless, to continue in the spirit of openness and transparency begun by the White Paper process, the Department posted for public review and comment all submissions concerning the private sector initiatives for the creation of a new, non-profit corporation. In deciding on a ten-day comment period, the Department balanced the desire for public comment with the need to move expeditiously toward establishing a relationship with a new non-profit corporation to manage DNS functions. The ten-day period seemed a reasonable balance of these two purposes. In those ten days, the Department received over 150 comments on the various proposals.

Under the Department's regulations, only rulemakings under section 553 of the Administrative Procedures Act, 5 U.S.C. § 553, are subject to a requirement for public comment. See E.O. 12866, section 6(a)(1). Executive Order 12866 established as Administration policy that the public should usually be provided a 60-day comment period on proposed regulations subject to 5 U.S.C. § 553.



4. *Did the Department of Commerce have any involvement in the consideration or selection of ICANN's proposed interim board members? If so, please describe the Department's involvement and list and describe any communications the Department had with the following people or entities regarding the consideration or selection of the proposed interim board members prior to the announcement of the proposed interim board members: (1) IANA or its representatives; (2) the proposed interim board members; (3) representatives of foreign governments, international organizations, or non-governmental organizations; (4) other individuals and organizations outside the U.S. government. Please provide all records relating to such communications (whether written, electronic or oral).*

Department of Commerce personnel did not have any involvement in the consideration or selection of proposed ICANN interim board members. Consistent with the White Paper, the Department of Commerce supported the private sector's efforts to form a new, non-profit corporation, but did not select or endorse any proposed ICANN board members. Moreover, the Department was well aware of its legal limits regarding actions that could be interpreted to suggest the formation of government-chartered or sponsored corporation. That is not to say that various private sector and governmental interests did not attempt to seek guidance from Department of Commerce personnel during this process. As described below, Departmental personnel had the following communications on this subject:

(1) *IANA or its Representatives.* To the best of her recollection, Ms. Burr spoke with Dr. Jon Postel and Ron Ohlander, Deputy Director of ISI, along with IANA's attorney Joe Sims, via telephone on one or two occasions during the first two weeks of August. During these conversations Dr. Postel mentioned that discussions about an interim board were underway. No specific names of interim board candidates were discussed between Ms. Burr and IANA or its representatives. Ms. Burr, however, specifically encouraged IANA to seek input on the issue of the interim board selection from some of its critics, citing Jay Fenello, President of Iperdome, as an example of an individual committed to the development of a new, DNS management organization but also a critic of the IANA process.

To the best of her recollection, during the week of September 21, 1998, Ms. Burr received a telephone call from Mr. Sims, who reported that the European Commission was "insisting" on a particular candidate for the interim board. Mr. Sims inquired as to whether the United States had a position with respect to this potential board member. Ms. Burr responded, after discussion with Mr. Magaziner, that the U.S. Government had no position as to possible candidates for an interim board and that the Administration believed that no government had the right to dictate to the private sector the selection of candidates to the board of directors.

(2) *The proposed interim board members.* Department of Commerce officials had no communications with proposed interim board members.

(3) *Representatives of foreign governments.* To the best of her recollection on two occasions between September 7, 1998 and September 18, 1998, Ms. Burr spoke with Christopher Wilkinson, Adviser, Directorate-General XIII, European Commission, regarding the ICANN

board. Mr. Wilkinson indicated that the Commission had in mind several candidates for the interim board of directors. On both occasions, Ms. Burr suggested that any European recommendations be sent directly to Mr. Sims, Dr. Postel and IFWP organizers.

On September 9, 1998 Ms. Burr and Karen Rose, Telecommunications Policy Specialist, Office of International Affairs, NTIA, met with Michelle D'Aurey and Janis Doran, representatives of the Canadian Government to discuss preparations for the October 7-9 Organization for Economic Cooperation and Development (OECD) meeting in Ottawa, Canada. During the course of the conversation, the Canadian representatives inquired about DNS, and whether a Canadian would serve on the board of directors of the new corporation. Ms. Burr and Ms. Rose suggested that any Canadian recommendations should sent directly to Mr. Sims, Dr. Postel and IFWP organizers. On September 28, 1998, Ms. Doran informed Ms. Burr and Ms. Rose that the Canadian government had recommended two individuals to IANA representatives.

Ms. Burr also had a conversation with Australian government representatives that took place, to the best of her recollection, on or about July 1, on the White Paper process in general. The Australian representatives indicated that they were interested in proposing an individual for the board of the to-be-formed corporation. Ms. Burr suggested that they contact Dr. Postel or IFWP organizers directly regarding this issue.

In a meeting with Ambassador Aaron on September 25, 1998, European Union Commissioner Martin Bangemann raised the issue of the composition of the interim board with the Ambassador. Ambassador Aaron, in turn, informed Andy Pincus, Department of Commerce General Counsel, and Ms. Burr of Commissioner Bangemann's interest. Neither Ms. Burr nor Mr. Pincus transmitted this interest to Dr. Postel or any other IANA representative.

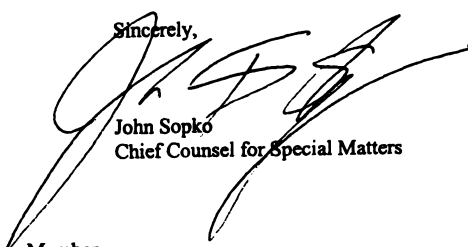
(4) *Other individuals and organizations outside the US government.* To the best of her recollection during the first week of August, Mr. Roger Cochetti, Program Director, Policy and Business Planning with IBM's Internet Division, contacted Ms. Burr and said that he was working on developing a set of names for the interim board. He indicated that Esther Dyson was being considered and asked Ms. Burr for suggestions of potential board members from the civil liberties and/or public interest community. Consistent with the Department's position refraining from recommendations, Ms. Burr did not provide Mr. Cochetti with any suggestions or indicate any preference for potential interim board members.

Enclosed please find records responsive to this question,

Please note that Department of Commerce personnel are regularly copied on various e-mail broadcast lists and, as a result, have received thousands of unsolicited e-mail messages from the Internet community, some of which may have reported on IANA's participation in the IFWP process or the proposed ICANN board. Department of Commerce personnel, however, did not act on these unsolicited broadcast messages. We are not providing copies of these unsolicited e-mails at this time, however, we will do so if the Committee feels that they would be relevant to its inquiry.

I hope that this information addresses your concerns. The Department of Commerce will gladly keep you and your staff informed of our progress to privatize management of the Internet DNS. We are, of course, available at your convenience to discuss the contents of this reply further. If you have any questions, please do not hesitate to contact me or Susan Truax at 202) 482-6440.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'J. Sopko', is written over the typed name and title.

John Sopko  
Chief Counsel for Special Matters

Enclosures

The Honorable John D. Dingell, Ranking Member





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**RM 193**

# Special Meeting of the Board Minutes

18 Oct 2006

A Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers)'s Board of Directors was held via teleconference on 18 October 2006 and was called to order at 1:00 P.M. PDT US.

Chairman Vinton G. Cerf presided over the entire meeting. The following other Board Directors participated in all or part of the meeting: Raimundo Beca, Susan Crawford, Demi Getschko, Hagen Hultsch, Joichi Ito, Veni Markovski, Alejandro Pisanty, Njeri Rionge, Rita Rodin, Peter Dengate Thrush, Paul Twomey, and David Wodelet. Board Members Hualin Qian and Vanda Scartezini were not present.

The following Board Liaisons participated in all or part of the meeting: Steve Crocker, Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee); Roberto Gaetano, At Large Advisory Committee (Advisory Committee) Liaison; Thomas Narten, IETF (Internet Engineering Task Force) Liaison; and Mohamed Sharil Tarmizi, Governmental Advisory Committee (Advisory Committee) Liaison.

John Jeffrey, General Counsel and Board Secretary; Kurt Pritz, Vice President, Business Operations; Paul Levins, Executive Officer and Vice President, Corporate Affairs; Theresa Swinehart, Vice President of Global and Strategic Partnerships; Melanie Keller, Chief Financial Officer; Denise Michel, Vice President, Policy Development; and, Dan Halloran, Deputy General Counsel also participated in the meeting.

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The following topics were covered during the Board Meeting:

Corporate Officer Signing Authorities

Staff presented in conjunction with the Finance Committee a



presentation of proposed enhancements to the Board-authorized executive officer signing authority. Questions were raised by various board members regarding this policy as compared to similarly situated organizations and their were responses to the questions from Board Members and Staff. Following this discussion, Hagen Hultzsch moved for a vote, and Veni Markovski seconded, a motion for a request of the following resolution:

Whereas, the organization has grown, and the resulting demands on the President & Chief Executive Officer (CEO) have increased and made it less practical for the President & CEO to handle day-to-day demands of business operations whilst performing the broader external functions facing ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, the annual budget and resulting expenditures have increased in amount and frequency over time.

Whereas, increasing the signing authorization levels would improve the efficiency of handling day-to-day business operations.

Whereas, the Chief Financial Officer in consultation with the Board Audit and Finance Committees, has prepared a proposed statement of "Financial Control Procedures: Corporate Officer Signing Authorities" dated 17 October 2006.

Whereas, the Audit and Finance Committees have reviewed the proposed statement of "Financial Control Procedures: Corporate Officer Signing Authorities" and determined that the provisions are reasonable in relation to other similar not-for-profit organizations based on size of the organization and total annual revenues, and provide appropriate financial control while regulating the related risk. The Audit and Finance Committees have determined the proposed procedures would be beneficial to the organization and recommend that the provisions set forth in the statement be adopted by the full Board of Directors.

Resolved (06.\_\_) that the statement of "Financial Control Procedures: Corporate Officer Signing Authorities" dated 17 October 2006 is hereby adopted.

The Board voted 11-0 in favor. In addition to the Board Members

that did not attend any part of the meeting, Njeri Rionge and Rita Rodin were not available for this vote.

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### Payment of Legal Expenses

The CFO presented a request for an authorization for payment of outstanding legal bills. The General Counsel confirmed that he had reviewed and approved the expenses. Following this discussion, Hagen Hultsch moved for a vote, and Joichi Ito seconded, a motion for a request of the following resolution:

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has had significant needs for legal services during the month of July 2006 and August 2006, including general legal advice and several pending lawsuits involving ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, Jones Day have provided extensive legal services to meet these needs.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has received invoices from Jones Day totaling US\$116,762.52 in connection with legal services provided to ICANN (Internet Corporation for Assigned Names and Numbers) during July and August 2006.

Whereas, the General Counsel and the Chief Financial Officer have reviewed the invoices and determined that they are proper and should be paid.

Resolved (06.\_\_), the President is authorized to make payments to Jones Day in the amount of US\$116,762.52 for legal services provided to ICANN (Internet Corporation for Assigned Names and Numbers) during July and August 2006.

The Board voted 12-0 in favor. In addition to the Board Members that did not attend any part of the meeting, Njeri Rionge was not available for this vote.

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### sTLD Agreement with .ASIA (DotAsia Organisation Limited)

Kurt Pritz presented the public comments relating to the .ASIA registry agreement that had been posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website, and outlined the history and process associated with the application. Various board members acknowledged that they had discussed aspects of the .ASIA agreement previously and noted that there were no additional comments. Peter Dengate Thrush moved and Raimundo Beca seconded a request for the following resolution to be voted on.

During the voting discussion, Susan Crawford made the following comments on the record:

“I would like the minutes to reflect that I do not want to get in the way of opening up dot Asia, but that the idea of a sponsored TLD (Top Level Domain) called dot Asia makes little sense, and the notion that ICANN (Internet Corporation for Assigned Names and Numbers) could police such a sponsorship makes less sense.

I wish we could drop the entire notion of sponsored TLDs, but this process for dot Asia has already taken far too long. I don't want to get in the way. I hope we can move forward swiftly with a process for new gTLDs that is far more standardized and lightweight and offers a standard contract along the lines I will suggest in connection with biz, org, and info.”

Additionally, Peter Dengate Thrush made the following comments on the record:

“I would like to also endorse what Susan has said and to say in relation to this application that it has seemed to me on occasion that the approach has been overly cautious, particularly in relation to geographic significance. And I congratulate the applicants on achieving this and for bearing with us through the process.”

Also, Demi Getschko raised concerns regarding whether it was a “sponsored top-level domain”. Vint Cerf responded indicating that he believed that the definition of “sponsored” could be debated but that it is self-defining.

Veni Markovski indicated on the record that hoped that ICANN (Internet Corporation for Assigned Names and Numbers) will be

able to introduce as many top-level domains as possible and as fast as possible, but that sponsored top-level domains take up too much time to establish, but that as a policy he is always in favor of new top-level domains.

Paul Twomey indicated the following on the record:

First of all, I would like to note that the applicant has done a lot of communications and a lot of interactions with the CC and other communities of the geographic region and also with the governments of the geographic region. That has been part of the cause for delay here, but I think it also has, with the feedback that they have received through that process, has been an important part of our moving forward and proceeding here, at least as far as I'm concerned. So I think that's an important point, and I thank the applicant for their perseverance and understanding in that process.

The second point, just to put it on the record, is while I note what some of my fellow directors have said about sponsored top-level domains, at least as it applies to dot Asia, I would make the observation that it is pointed out to myself on regular basis from some of the existing sponsored top-level domains how important and how valuable they find this sponsored type structure for top-level domain is for particular types of structured communities.

And I do think that there is some value in that, and I hope we don't lose sight that, in certain circumstances, there has seen to be value in such a structure.

Whereas, on 4 December 5, 2005, the board authorized the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .ASIA sponsored top-level domain (sTLD) with the applicant, DotAsia Organisation Limited,

Whereas, on 18 July, 2006, ICANN (Internet Corporation for Assigned Names and Numbers) announced that negotiations with the applicant for the .ASIA sponsored top-level domain had been successfully completed, and posted the proposed .ASIA sponsored TLD (Top Level Domain) registry agreement on the ICANN (Internet Corporation for Assigned Names and Numbers) website,

Whereas, the Board has determined that approval of the agreement, and delegation of a .ASIA sponsored top-level domain to DotAsia Organisation Limited would be beneficial for ICANN (Internet Corporation for Assigned Names and Numbers) and the Internet community,

Resolved (06.\_\_\_\_), the proposed agreement with DotAsia Organisation Limited concerning the .ASIA sTLD is approved, and the President is authorized to take such actions as appropriate to implement the agreement.

The Board voted 13-0 in favor of this resolution.

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#### Review of .BIZ, .INFO and .ORG

There was an extensive discussion among board members regarding the concerns relating to the changing domain name marketplace and specific concerns were raised regarding potential abuses of ICANN (Internet Corporation for Assigned Names and Numbers) rules as it relates to consumer interests. Accordingly the board discussed commencing a study to provide additional insight into the domain name market. Following this discussion, the board also discussed the .BIZ, .INFO and .ORG agreements and in particular the new comments that had been received regarding these agreements. Included in the discussion was a reference to how a study such as the one contemplated would benefit the process of negotiating similar agreements in the future.

Following this discussion Alejandro Pisanty moved and Veni Markovski seconded the following resolutions for approval:

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values include:

- Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
- Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

- Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
- Whereas, the domain registration market is very complex and producing reliable analysis and findings will require high-levels of economic expertise.
- Resolved (06.\_\_\_\_), the President is directed to commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market, such as:
  - whether the domain registration market is one market or whether each TLD (Top Level Domain) functions as a separate market,
  - whether registrations in different TLDs are substitutable,
  - what are the effects on consumer and pricing behavior of the switching costs involved in moving from one TLD (Top Level Domain) to another,
  - what is the effect of the market structure and pricing on new TLD (Top Level Domain) entrants, and
  - whether there are other markets with similar issues, and if so how are these issues addressed and by who?

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Whereas, proposed new registry agreements between ICANN (Internet Corporation for Assigned Names and Numbers) the operators of the .BIZ, .INFO, and .ORG registries have been posted for public comment and presented to the Board.

Whereas, the proposed new agreements were the subject of a substantial number of comments, especially concerning competition-related issues such as differential pricing.

Whereas, the Board has carefully considered the proposed new agreement, and the public comments and the registry responses, and finds that approval of the proposed new agreements would be beneficial for ICANN (Internet Corporation for Assigned Names and Numbers) and the Internet community, provided that ICANN

(Internet Corporation for Assigned Names and Numbers) and the registry operators are able to agree to appropriate revisions to the proposed agreements to address competition-related issues such as differential pricing.

Whereas, the GNSO (Generic Names Supporting Organization) is currently conducting a policy-development process that includes study of some of these issues, but ICANN (Internet Corporation for Assigned Names and Numbers) has pressing operational questions relating to its bilateral contracts with registry operators that need to be resolved, separate from any generally applicable new policies on this subject that might be recommended through the GNSO (Generic Names Supporting Organization) process.

Resolved (06.\_\_), after having considered the public comments and the responses from the registries, the President and the General Counsel are hereby requested to renegotiate the proposed agreements relating to: competition-related concerns (in particular price increase restrictions); traffic data and review mechanisms resulting from the introduction of new studies or additional information.

The Board voted 11-0 in favor. In addition to the Board Members that did not attend any part of the meeting, Njeri Rionge and Rita Rodin were not available for this vote.

The meeting was adjourned at 3.02 PM PST.

**RM 194**



**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS  
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**AFILIAS DOMAINS NO. 3 LIMITED,**  
*Claimant*

v.

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,**  
*Respondent*

**ICDR Case No. 01-18-0004-2702**

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**REPORT OF DENNIS W. CARLTON**

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30 May 2019

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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. Qualifications**

1. I am the David McDaniel Keller Professor of Economics at the Booth School of Business of The University of Chicago. I received my A.B. in Applied Mathematics and Economics from Harvard University and my M.S. in Operations Research and Ph.D. in Economics from the Massachusetts Institute of Technology. I have served on the faculties of the Law School and the Department of Economics at The University of Chicago and the Department of Economics at the Massachusetts Institute of Technology.

2. I specialize in the economics of industrial organization. I am co-author of the book *Modern Industrial Organization*, a leading text in the field of industrial organization, and I also have published over 100 articles in academic journals and books. In addition, I serve as Co-Editor of the *Journal of Law and Economics*, a leading journal that publishes research applying economic analysis to industrial organization and legal matters; serve on the Editorial Board of *Competition Policy International*, a journal devoted to competition policy; and serve on the Advisory Board of the *Journal of Competition Law and Economics*. I have also served as an Associate Editor of the *International Journal of Industrial Organization and Regional Science and Urban Studies*, and on the Editorial Board of *Intellectual Property Fraud Reporter*. I was designated the 2014 Distinguished Fellow of the Industrial Organization Society. I lecture frequently in the United States and in foreign countries on topics of competition policy and have given several keynote addresses at competition policy events, including at the International Competition Network and the Organisation for Economic Co-operation and Development.

3. In addition to my academic experience, I served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, U.S. Department of Justice from October 2006 through January 2008. I also served as a Commissioner of the Antitrust Modernization Commission, created by Congress to evaluate U.S. antitrust laws. I have served as a consultant to the Department of Justice and Federal Trade Commission on the Horizontal Merger

Guidelines, as a general consultant to the Department of Justice and Federal Trade Commission on antitrust matters, as a member of the American Bar Association advisory committee that advises the next President on antitrust policy, and as an advisor appointed by the American Economic Association to the Bureau of the Census on the collection and interpretation of economic data.

4. I also am a Senior Managing Director of Compass Lexecon, a consulting firm that specializes in the application of economics to legal and regulatory issues and for which I served as President (of Lexecon) for several years. I have provided expert testimony before various U.S. state and federal courts, the U.S. Congress, a variety of state and federal regulatory agencies and foreign tribunals. My curriculum vitae, including a list of my testimony during the last four years, is attached as Appendix A. The materials I rely upon are listed in Appendix B.

5. I have been asked by the Internet Corporation for Assigned Names and Numbers (“ICANN”) to evaluate the claims made by Professor Jonathan Zittrain and Dr. George Sadowsky regarding the competitive significance of Verisign operating .WEB. Professor Zittrain and Dr. Sadowsky both claim that Verisign should not be allowed to operate .WEB because Verisign has market power<sup>1</sup> through its operation of .COM and because .WEB is the new generic top-level domain (“gTLD”) best positioned to meaningfully compete with .COM. I interpret these claims as concluding that competition from an Afilias-operated .WEB would impose a meaningful competitive constraint on .COM relative to a world in which Verisign operates .WEB. The economic implication of this conclusion is that an Afilias-operated .WEB would cause Verisign to reduce the prices it charges for .COM below the levels that would prevail if Verisign operated .WEB. Dr. Sadowsky also claims that Afilias will promote .WEB more aggressively than would Verisign. I interpret this claim by Dr. Sadowsky as concluding that

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<sup>1</sup> “A firm [...] has market power if it is profitably able to charge a price above that which would prevail under competition...” Carlton, Dennis W. and Jeffrey M. Perloff, *Modern Industrial Organization*, 4th ed., p. 642.

Afilias would expand .WEB's domain registrations more effectively than would Verisign. I address these claims below.

## **B. Summary of My Conclusions**

6. Professor Zittrain and Dr. Sadowsky both claim that an Afilias-operated .WEB is uniquely positioned to place competitive pressure on .COM. They justify this claim by emphasizing that .WEB is a short, memorable name with a connection to the Internet and by pointing to the bid price paid for .WEB at auction. To assess this claim from an economics standpoint, one needs to determine whether competitive pressure from an Afilias-operated .WEB would cause Verisign to reduce its .COM prices or otherwise improve the quality of the .COM offering. Professor Zittrain and Dr. Sadowsky provide no reliable empirical support for why an Afilias-operated .WEB would have such an effect on .COM, and I conclude that their reasoning is flawed for the following reasons:

- Professor Zittrain and Dr. Sadowsky ignore the fact that Verisign's .COM prices are regulated by price caps imposed by the federal government and that Verisign consistently charges the maximum-allowed, regulated price for .COM domain name registrations. This suggests that the regulated .COM price is below the price Verisign would charge absent those price caps. Professor Zittrain and Dr. Sadowsky also ignore the fact that the maximum-allowed price for .COM domain name registrations is low compared to the prices charged by other TLD operators in other TLDs. Both of these points indicate that Verisign is not likely to deviate from its long-standing strategy of charging the maximum-allowed price for .COM in response to an Afilias-operated .WEB, even if one accepts the proposition that .WEB will be a popular TLD.
- Professor Zittrain and Dr. Sadowsky ignore the fact that several other new gTLDs with similarly short, memorable names connected to the Internet have already launched and have had only a minimal competitive impact on .COM. Likewise, while the winning

auction bid for .WEB is high, parties have paid significant amounts to operate other TLDs that have not had a meaningful, competitive impact on .COM. Moreover, the winning .WEB bid price is small relative to the collective amount spent to operate other new gTLDs, which, collectively, have not had a significant, competitive impact on .COM.<sup>2</sup> While .WEB will offer consumer choice among domain-name registrants, Professor Zittrain and Dr. Sadowsky fail to demonstrate that an Afilias-operated .WEB would add meaningfully to the competition that .COM already faces from all other TLDs, even in the event that regulation one day does not bind .COM pricing.

7. Dr. Sadowsky's claim that .WEB would be promoted less intensively if operated by Verisign than if operated by Afilias is speculative and unsupported for the following reason:

- Dr. Sadowsky does not consider or address relative differences between Verisign and Afilias that could affect .WEB's promotion in the marketplace, including factors that could suggest Verisign would promote .WEB more than Afilias, such as relative operational cost differences between the companies. For example, if Verisign's relative costs in offering .WEB domain names are lower than Afilias's because Verisign is more efficient, that could translate into Verisign offering lower prices for .WEB domain names than Afilias. Without an analysis of these other factors, one cannot reliably conclude that a Verisign-operated .WEB would be promoted less or priced higher than an Afilias-operated .WEB. Moreover, there is some evidence suggesting the possibility that Verisign would be *more* effective at expanding .WEB's domain registrations than Afilias would be.

8. Finally, it is important to note that the Antitrust Division of the Department of Justice opened and then, approximately one year later, closed an investigation into Verisign's

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<sup>2</sup> "Although ICANN's New gTLD Program has substantially expanded the number of top level domains, Verisign's market dominance persists as a result of the unique attributes of its .com and .net registries." Dr. Sadowsky's report, ¶ 17.

potential operation of .WEB without taking action. The Antitrust Division has expertise evaluating competition concerns such as those raised by Professor Zittrain and Dr. Sadowsky and almost certainly would have had access to more information than that available to Professor Zittrain, Dr. Sadowsky or me. Assuming that such an evaluation occurred, the Antitrust Division's apparent decision that competition concerns related to Verisign's operation of .WEB were not sufficient to justify blocking the transaction is significant evidence that the concerns raised by Professor Zittrain and Dr. Sadowsky are not supported.

9. I explain my conclusions, along with their underlying bases, in the sections that follow. Section II provides an overview of key historical and economic facts regarding the New gTLD Program that are relevant to my analysis. Section III provides a brief summary of the conclusions in Professor Zittrain's report ("Zittrain Report") and Dr. Sadowsky's report ("Sadowsky Report") that I address. Section IV explains why the effects of regulation are central to assessing Professor Zittrain and Dr. Sadowsky's claims and why their failure to incorporate these effects into their evaluation leads them to an incorrect conclusion. Section V considers whether the evidence supports the contention of both Professor Zittrain and Dr. Sadowsky regarding the special importance of .WEB as a competitive force and addresses the effects of competition on .COM from the New gTLD Program. Section VI addresses Dr. Sadowsky's claim that Verisign would promote .WEB less intensively than would Afilias. Section VII explains why the Department of Justice's decision to not challenge Verisign's possible operation of .WEB suggests that Verisign's operation of .WEB does not raise significant competitive issues. I conclude in Section VIII.

10. My research and analysis regarding this matter are continuing, and my opinions may be supplemented or updated to reflect any additional information provided to me. I also intend to review any additional information, witness statements or expert reports that may be submitted by Afilias or other entities involved in this matter, such as Verisign and Nu Dot Co LLC. If necessary, I will revise and update my analysis.

## II. OVERVIEW OF THE NEW gTLD PROGRAM

### A. History

11. ICANN is a California nonprofit public-benefit corporation whose mission is to “ensure the stable and secure operation of the Internet’s unique identifier systems.”<sup>3</sup> One of ICANN’s core values is, “[w]here feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market.”<sup>4</sup> “The introduction of new top-level domains into the DNS has thus been a fundamental part of ICANN’s mission from its inception, and was specified in ICANN’s Memorandum of Understanding and Joint Project Agreement with the U.S. Department of Commerce.”<sup>5</sup>

12. ICANN has worked towards adding new TLDs since at least 2000 with the first set (e.g., .INFO and .BIZ) being introduced in 2001 and 2002.<sup>6</sup> The current New gTLD Program is the latest round of gTLD expansion.<sup>7</sup> It began with a policy development process by ICANN’s Generic Names Supporting Organization (“GNSO”) from 2005 to 2007,<sup>8</sup> from which the GNSO recommended that ICANN expand the number of gTLDs.<sup>9</sup> In October 2008, “ICANN posted the Draft Applicant Guidebook, including an outline of the evaluation procedures (incorporating both reviews of the applied-for gTLD string and of the applicant), as well as the intended application

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<sup>3</sup> ICANN Bylaws (18 June 2018), Article 1, Section 1.1.

<https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>4</sup> ICANN Bylaws (18 June 2018), Article 1, Section 1.2(b)(iii).

<https://www.icann.org/resources/pages/governance/bylaws-en>. “DNS” refers to the Domain Name System, which is a protocol that maps “easy-to-understand domain names like ‘howstuffworks.com’ into an Internet Protocol (IP) address, such as 70.42.251.42 that computers use to identify each other on the network.” Brain, Marshall, Nathan Chandler and Stephanie Crawford. “How Domain Name Servers Work.” *HowStuffWorks*, 31 January 2019, <https://computer.howstuffworks.com/dns.htm/printable>.

<sup>5</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, p. 4.

<sup>6</sup> See ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, p. 4 and <https://archive.icann.org/en/tlds/>.

<sup>7</sup> [https://icannwiki.org/New\\_gTLD\\_Program](https://icannwiki.org/New_gTLD_Program).

<sup>8</sup> [https://icannwiki.org/New\\_gTLD\\_Program](https://icannwiki.org/New_gTLD_Program).

<sup>9</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, p. 5.



questions and scoring criteria. These were continually revised, updated, and posted for comment through successive drafts of the [Applicant] Guidebook.”<sup>10</sup>

13. In 2009, at ICANN’s request, I analyzed ICANN’s anticipated introduction of new gTLDs from an economic perspective and opined on the benefits and costs associated with ICANN’s proposal. I concluded that “[a]n increase in the number of gTLDs increases the number of alternatives available to consumers, and thus offers the potential for increased competition, reduced prices, and increased output.”<sup>11</sup>

14. ICANN’s Board of Directors approved the Applicant Guidebook and authorized the launch of the New gTLD Program in June 2011.<sup>12</sup> The application window opened in January 2012, and the first new gTLDs were authorized in October 2013.<sup>13</sup>

## **B. Goals of the New gTLD Program**

15. Consistent with ICANN’s mission and core values, one of the goals of the New gTLD Program was to “[introduce] competition and consumer choice in the DNS” while “ensuring internet security and stability.”<sup>14</sup>

16. The GNSO also recommended that:

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. [...] All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.<sup>15</sup>

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<sup>10</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, p. 10.

<sup>11</sup> Preliminary Report of Dennis Carlton Regarding Impact of New gTLDs on Consumer Welfare, p. 5.

<sup>12</sup> <https://newgtlds.icann.org/en/about/program>

<sup>13</sup> <https://newgtlds.icann.org/en/about/program>

<sup>14</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, pp. 7 and 4.

<sup>15</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, p. 11.

These principles were also recognized by the ICANN Board as important goals of the New gTLD Program.<sup>16</sup>

### **C. Application and Auction Process**

17. ICANN identified several financial considerations it deemed important in evaluating and deciding on a fee structure for the New gTLD Program. These included ensuring that the New gTLD Program be fully self-funding and that applicants have the financial wherewithal to operate a new gTLD.<sup>17</sup> Both considerations caused ICANN to set an application fee of \$185,000.<sup>18</sup>

18. The final process for submitting new gTLD applications and approving gTLD operators is similar to what I described in my 2009 report. “ICANN [evaluates] both the technical and financial capabilities of the applicant, the effect of the proposed gTLD on consumer confusion, and the effects of the proposed gTLD on Internet stability.”<sup>19</sup> “If more than one application for similar (or identical) gTLDs passes ICANN’s evaluation phase, these applications enter the ‘string contention’ process, in which ICANN determines which application will ultimately be approved. ICANN will first encourage the interested parties to negotiate a solution amongst themselves. If the applicants are unable to negotiate a resolution, they enter [an ICANN contention resolution] phase.”<sup>20</sup> If more than one application still remains after this phase, ICANN employs a public auction as a tie-break mechanism.

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<sup>16</sup> See ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, pp. 14-15, stating the importance of “fairness, transparency and non-discrimination” in addition to “stimulat[ing] competition”.

<sup>17</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, pp. 12, 19-20 and 27.

<sup>18</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, p. 23.

<sup>19</sup> Preliminary Report of Dennis Carlton Regarding Impact of New gTLDs on Consumer Welfare, p. 6.

<sup>20</sup> Preliminary Report of Dennis Carlton Regarding Impact of New gTLDs on Consumer Welfare, p. 6. See also ICANN Board Rationales for the Approval of the Launch of the New gTLD Program pp. 99-101.

19. The exact public auction procedure is an “ascending clock auction” with an “activity rule,” where a bidder needs to have been ‘in’ at early prices in the auction in order to continue to stay ‘in’ at later prices.”<sup>21</sup> This is a type of second-price auction in which the winning bidder pays the final bid of the second-highest bidder.<sup>22</sup>

#### **D. Results of the New gTLD Program**

20. The New gTLD Program received a total of 1,930 applications.<sup>23</sup> Most of these applications involved unique strings and were successful, resulting in the delegation (to date) of more than 1,200 new gTLDs.<sup>24</sup> These newly-created gTLDs joined pre-existing TLDs, such as .COM and .ORG, and pre-existing country-code TLDs (“ccTLDs”), such as .FR, .JP and .US, which are administered by country-code managers recognized by ICANN, in the DNS.<sup>25</sup> According to DomainTools.com, with the pre-existing TLDs, new gTLDs and ccTLDs, there are over 1,500 operable TLDs with at least one registered domain name.<sup>26</sup>

21. Applicants have collectively spent several hundred million dollars to become the operators of these new gTLDs. From 2013 to 2017, applicants spent a total of \$294.6 million in new gTLD application fees, paid another \$240.6 million for winning public auctions (including the .WEB auction),<sup>27</sup> and expended many millions more in privately resolved contention sets.<sup>28</sup>

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<sup>21</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, pp. 104-105. See also <https://www.icann.org/public-comments/new-gtld-auction-rules-2013-12-17-en>.

<sup>22</sup> Auction Rules for New gTLDs, Version 2013-12-12, pp. 6-7.

<sup>23</sup> See <https://gtldresult.icann.org/applicationstatus/viewstatus> or <https://newgtlds.icann.org/en/program-status/statistics>.

<sup>24</sup> <https://newgtlds.icann.org/en/program-status/statistics>.

<sup>25</sup> <https://www.icann.org/resources/pages/cctlds-21-2012-02-25-en>

<sup>26</sup> <https://research.domaintools.com/statistics/tld-counts/>, last accessed 4/29/2019.

<sup>27</sup> See ICANN financial statements for the years ending June 2013 – June 2017. Over those five years, ICANN recognized new gTLD application fees of \$294.6, excluding deferred revenues received by ICANN but not yet recognized in ICANN's financial statements. I understand that the recognized fees reflect refunds for withdrawn applications and reduced application fees for certain gTLD applicants based on financial need.

<sup>28</sup> As mentioned above, ICANN encourages applicants to privately resolve string contentions. “Usually, this entails a private auction in which the winning bid is shared evenly between the losing applicants.” <http://domainincite.com/23818-how-new-gtld-auctions-could-kill-gaming-for-good>. See also <https://gnso.icann.org/sites/default/files/file/field-file-attach/supplemental-report-01nov18-en.pdf>: “Based

While I understand that ICANN does not have precise information about the sums spent in private resolutions, existing information suggests that the number is substantial. For example, one publicly-traded registry operator has disclosed that it has received over \$50 million from losing private auctions.<sup>29</sup>

#### **E. Challenges to the Verisign's Efforts to Operate .WEB**

22. In July 2016, Nu Dot Co LLC won the .WEB auction using funding from Verisign.<sup>30</sup> I understand that various parties have objected to Verisign's involvement in the .WEB auction and potential operation of .WEB.

### **III. PRIMARY CONCLUSIONS REACHED BY PROFESSOR ZITTRAIN AND DR. SADOWSKY**

23. Professor Zittrain and Dr. Sadowsky both claim that Verisign should not be allowed to operate .WEB because Verisign has market power through its operation of .COM and that .WEB is the new gTLD best positioned to meaningfully compete with .COM.<sup>31</sup>

24. According to Professor Zittrain, "the purpose of the New gTLD Program was to create competition for Verisign."<sup>32</sup> He also claims that ".WEB is the strongest potential

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on input from applicants in the 2012 round of the New gTLD Program, applicants resolving their contention privately through various means, including private auctions, was common."

<sup>29</sup> In 2014 alone, MMX received \$37.5 million dollars from gTLD auctions. See <http://domainincite.com/23818-how-new-gtld-auctions-could-kill-gaming-for-good> and MMX's annual reports, e.g., <https://mmx.co/wp-content/uploads/2016/04/2015-Audited-Financial-Statements.pdf>.

<sup>30</sup> "[Verisign] entered into an agreement with Nu Dot Co LLC wherein [Verisign] provided funds for Nu Dot Co's bid for the .web TLD. We are pleased that the Nu Dot Co bid was successful." Verisign, *VeriSign Statement Regarding .Web Auction Results*, <https://www.businesswire.com/news/home/20160801005586/en/Verisign-Statement-.Web-Auction-Results>.

<sup>31</sup> "[.WEB] had and continues to have the potential to meaningfully compete with .COM as a standard-bearer for web-based entities." Zittrain Report, ¶ 46. "In my opinion, the only new domain that is likely to compete strongly with .com is .web, due to properties inherent in its name." Sadowsky Report, ¶ 39. "I would expect to see very considerable early demand for .web registrations that offer value to specific registrants, demand that would greatly exceed that for registrations in any other new gTLD." Sadowsky Report, ¶ 40.

<sup>32</sup> Zittrain Report, ¶ 52.

competitor of all the new gTLDs,”<sup>33</sup> and that allowing Verisign to operate .WEB would “[violate] ICANN’s Competition Mandate.”<sup>34</sup>

25. Dr. Sadowsky makes similar claims. First, he claims that “Verisign is the dominant entity in the registry services industry,” that Verisign’s market power is evinced by the U.S. government’s imposition of price caps on .COM, and that “Verisign’s market dominance persists” despite the entrance of other new gTLDs. Second, he claims that .WEB is the new gTLD best positioned to meaningfully compete with .COM and so “[a]llowing Verisign to control [.WEB] would prevent any other industry participant from seriously challenging Verisign’s dominant position...” Third, he claims that “[t]o fulfill its competition mandate, ICANN must attack and weaken Verisign’s industry dominance.”<sup>35</sup> Dr. Sadowsky also makes an additional claim that “Verisign would have only a limited incentive to promote .web, because its success would come, at least in part, at the expense of .com and .net.”<sup>36</sup>

26. The claims made by Professor Zittrain and Dr. Sadowsky that .WEB is uniquely positioned to challenge Verisign’s dominance are not supported by empirical evidence. They argue that .WEB is a special TLD because its name is short, generic, evocative of the Internet, and memorable.<sup>37</sup> Dr. Sadowsky further argues that the competitive significance of .WEB is demonstrated by statements made by .WEB applicants and other industry participants, as well as the significant, winning bid price at the .WEB auction.<sup>38</sup>

27. I interpret Professor Zittrain and Dr. Sadowsky as concluding that competition from an Afilias-operated .WEB would impose a meaningful competitive constraint on .COM relative to a world in which Verisign operates .WEB. The economic implication of this conclusion

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<sup>33</sup> Zittrain Report, ¶ 46.

<sup>34</sup> Zittrain Report, ¶ 55.

<sup>35</sup> Sadowsky Report, ¶ 17.

<sup>36</sup> Sadowsky Report, ¶ 48.

<sup>37</sup> See, *inter alia*, Zittrain Report, ¶¶ 46-49 and Sadowsky Report, ¶ 41.

<sup>38</sup> “Three kinds of evidence support my belief that .web would be a competitive threat to .com if it were owned by an entity other than Verisign...” Sadowsky Report, ¶ 42.

is that an Afiliac-operated .WEB would impose a meaningful competitive constraint on the price that Verisign could charge for .COM. In other words, Professor Zittrain and Dr. Sadowsky's conclusion implies that an Afiliac-operated .WEB would cause Verisign to reduce its .COM price below the levels that would prevail if Verisign operated .WEB. Analogously, I interpret Dr. Sadowsky's claim regarding Verisign's promotion of .WEB as concluding that Afiliac would expand .WEB's domain registrations more effectively than would Verisign. I address these claims below. I do not, however, attempt to evaluate the claims that ICANN is required to take certain actions to block a Verisign-operated .WEB based on its foundational documents (such as ICANN's Bylaws) or as part of the New gTLD Program because that involves a legal interpretation.

#### **IV. THE CLAIM THAT AN AFILIAC-OPERATED .WEB WOULD PLACE COMPETITIVE PRESSURE ON .COM IGNORES THE IMPACT OF PRICE REGULATION**

28. Professor Zittrain and Dr. Sadowsky both claim that an Afiliac-operated .WEB is uniquely positioned to place competitive pressure on .COM. To assess the relevance of this claim from an economics standpoint, one needs to determine whether competitive pressure from an Afiliac-operated .WEB would cause Verisign to reduce its .COM prices or otherwise improve the quality of the .COM offering. Professor Zittrain and Dr. Sadowsky provide no empirical support for why an Afiliac-operated .WEB would have such an effect on .COM. By contrast, I present evidence that an Afiliac-operated .WEB is not likely to have such an effect on .COM given the government regulations that constrain .COM pricing and relatively-higher pricing in other gTLDs. In other words, there exists evidence suggesting that an Afiliac-operated .WEB is not likely to cause Verisign to reduce its already relatively-low .COM price below the regulated level.

29. Verisign's .COM prices are regulated by price caps imposed by the federal government,<sup>39</sup> and the empirical evidence I present below demonstrates that Verisign has consistently charged the maximum-allowed, regulated price for .COM domain name registrations. This suggests that the regulated .COM price is below the price that Verisign would set absent regulation. Dr. Sadowsky agrees that, absent price caps, "it is highly likely that, because of its industry dominance, Verisign would be able to charge prices that are substantially higher than those that are permitted under the price caps."<sup>40</sup> Therefore, according to this reasoning and the fact that price regulations are set to remain in place for several years,<sup>41</sup> the claim that .WEB would impose price constraints on .COM requires the conclusion that an Afilias-operated .WEB would force Verisign to reduce its .COM prices below the maximum regulated level. Even if .WEB is special in some way, as Professor Zittrain and Dr. Sadowsky postulate, neither of them provides reliable support for this conclusion. To the contrary, the evidence I present indicates that competition from .WEB is unlikely to cause Verisign to deviate from its long-standing strategy of charging the maximum-allowed regulated price, a price that I show below is lower than the prices typically charged by other TLD operators in other TLDs.

30. The evidence I have examined indicates that Verisign has consistently set .COM prices equal to the maximum level allowed under existing price caps. For example, since 2012, the maximum price Verisign has been allowed to charge registrars for .COM domain name

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<sup>39</sup> I understand that the U.S. Department of Commerce has an oversight role in regulating the maximum price that Verisign can charge registrars for .COM domain names. This is managed through the Verisign Cooperative Agreement, which was last updated in 2018.

[https://www.ntia.doc.gov/files/ntia/publications/amendment\\_35.pdf](https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf).

<sup>40</sup> Sadowsky Report, ¶ 17.

<sup>41</sup> Amendment 35 to the Verisign Cooperative Agreement with the Department of Commerce sets a maximum price that Verisign can charge registrars of \$7.85 through 2020. After 2020, the maximum allowable rate increases by 7% per year until 2024 when the current term of the Cooperative Agreement ends. After 2024, the agreement will automatically renew for another six-year term unless the Department chooses not to renew. [https://www.ntia.doc.gov/files/ntia/publications/amendment\\_35.pdf](https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf).

registrations is \$7.85, a cap that will remain in place through 2020.<sup>42</sup> In reviewing current .COM prices as well as snapshots of .COM prices on the seven observable dates from 2015 through 2017,<sup>43</sup> I find that, in every case, Verisign charged a .COM price of exactly \$7.85 to registrars for both new and existing registrations. The fact that Verisign has consistently charged the maximum-allowable price for .COM domain name registrations indicates that regulation is a binding constraint and that Verisign would set a higher price for .COM absent the regulation.

31. Also of relevance is the fact that the maximum-allowable .COM price is lower than the price typically charged to registrars for domain name registrations in other TLDs. The registrar Domain Cost Club publishes information on registry pricing to registrars for 413 TLDs.<sup>44</sup> Table 1 shows that the median price charged by these TLDs to registrars is \$20 and that one quarter of TLDs charge prices of \$33 or more. .COM is priced in the lower quartile.<sup>45</sup> Only 7% of other TLDs offer lower prices to registrars than those offered for .COM.<sup>46</sup> Further, 89% of other TLDs charge prices over 30% higher than the .COM price.<sup>47</sup> Hence, the continued

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<sup>42</sup> 2012 .COM Registry Agreement, available at <https://www.icann.org/resources/pages/agreement-2012-12-05-en>. 2018 Cooperative Agreement, available at [https://www.ntia.doc.gov/files/ntia/publications/amendment\\_35.pdf](https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf). After 2020, the maximum allowable rate increases by 7% per year for four years, or 31% total.

<sup>43</sup> I observe data on the current prices that TLDs charge to registrars for new and existing domain registrations from <https://www.domaincostclub.com/pricing.dhtml>, last accessed 4/29/2019. Using the Wayback Machine Internet archive for <https://www.domaincostclub.com/pricing.dhtml>, I am also able to observe TLD prices on 3/15/2015, 10/16/2015, 3/25/2016, 5/5/2016, 6/17/2016, 10/18/2016 and 7/1/2017.

<sup>44</sup> The wholesale price that registry operators charge registrars to register a domain is typically lower than the retail price that registrars charge registrants. The previously discussed \$7.85 that Verisign charges for a .COM registration is the wholesale price. I observe wholesale prices for other TLDs from Domain Cost Club, which is an ICANN-accredited registrar that operates as a buying club. According to Domain Cost Club's website, registrants pay a membership fee and are then able to register domains at the wholesale price registrars pay to registries. See <https://www.icann.org/registrar-reports/accredited-list.html>, <https://www.domaincostclub.com/index.dhtml> and <https://www.domaincostclub.com/pricing.dhtml>, last accessed 4/29/2019. I understand that occasionally some registries may have marketing incentive programs for registrars that could lower the effective registration price below the wholesale price.

<sup>45</sup> Table 1 weights all TLDs equally. If TLDs are instead weighted by the volume of domain registrations, then the numbers change, though the conclusions are similar. .COM is still priced in the lower quartile. When weighted by volume and excluding .COM, the 25<sup>th</sup> percentile of prices is \$8.33, the 50<sup>th</sup> percentile is \$9.93, and the 75<sup>th</sup> percentile is \$11.48.

<sup>46</sup> Many TLDs offer a first-year discount for new registrations. In total, 41% of the TLDs considered by Domain Cost Club have first-year prices that are below .COM's price.

<sup>47</sup> <https://www.domaincostclub.com/pricing.dhtml>, last accessed 4/29/2019.



regulation of .COM pricing, with its limited allowed future increases, implies that the price registrars will pay for .COM in 2024 will still be below the price that registrars currently pay for most other registries.<sup>48</sup>

**Table 1**  
**Distribution of Prices for TLDs**

Percentile	Price
25 <sup>th</sup>	\$13.33
50 <sup>th</sup>	\$20.00
75 <sup>th</sup>	\$33.00

Notes: DomainCostClub.com member pricing for renewal registrations. .COM is priced at \$7.85.

32. In sum, when evaluating the claims of Professor Zittrain and Dr. Sadowsky that an Afilias-operated .WEB would provide a competitive check on Verisign’s alleged market power in .COM, a key economic question is whether Verisign would reduce .COM prices in response to an Afilias-operated .WEB. In this regard, the evidence I have reviewed demonstrates two points. One, price regulation on .COM appears to constrain .COM pricing in that Verisign consistently prices .COM domain name registrations at the maximum-allowable level, which is likely below what Verisign would choose absent regulation. Two, the regulated .COM price charged to registrars is low compared to prices charged to registrars in other TLDs, even factoring in the anticipated increases in the maximum allowed pricing for .COM. Both of these points indicate that Verisign is not likely to reduce its already low, regulated .COM prices in response to an Afilias-operated .WEB. And neither Professor Zittrain nor Dr. Sadowsky offer any contrary evidence suggesting that an Afilias-operated .WEB would in fact force .COM’s pricing below the regulated rates, even if one accepts their assumption that .WEB is special.

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<sup>48</sup> The new gTLDs .ONLINE, .SITE and .WEBSITE, which appear to have similar desirable features as .WEB (see Section V-A), have prices above those of .COM. Their prices are \$25.00, \$20.00 and \$15.00 respectively. <https://www.domaincostclub.com/pricing.dhtml>, last accessed 4/29/2019.

Hence, because both Professor Zittrain and Dr. Sadowsky ignore the importance of regulation and relative TLD pricing, they arrive at an erroneous conclusion.

**V. PROFESSOR ZITTRAIN AND DR. SADOWSKY FAIL TO DEMONSTRATE THAT .WEB WOULD IMPOSE COMPETITIVE CONSTRAINTS ON .COM BEYOND THOSE ALREADY IMPOSED BY OTHER TLDS**

33. When evaluating existing and potential competition effects, economists generally evaluate effects on price. In the prior section, I explained that, even if an Afilias-operated .WEB were a popular TLD, it is not likely to cause Verisign to reduce its already-low, regulated .COM price. If one adopts the view that regulation will continue to limit .COM pricing, this should end the analysis of whether .WEB will be a unique competitive check on .COM, as I conclude it likely will not.

34. In this section, I explain that, even if one ignores the binding regulation on .COM pricing, the evidence relied upon by Afilias's experts does not provide a reliable basis from which to conclude that a .WEB operated by Afilias would impose unique competitive constraints on .COM. In developing my conclusion, I identify other factors indicating that an Afilias-operated .WEB likely will not have such a unique competitive effect. I first explain, in Section A, that the reasons Professor Zittrain and Dr. Sadowsky rely on to justify their claim that .WEB will provide a unique competitive constraint on .COM (short, appealing name) are not convincing in light of the evidence that they fail to cite about other, similar TLD names. I then show, in Section B, that the reliance by Dr. Sadowsky on the auction fee for .WEB does not establish that .WEB would be a unique competitive constraint on .COM. In Section C, I report on the large increase in the number and importance of other TLDs that already provide some competitive constraint on .COM. If .WEB is not unique compared to these other TLDs, it is unclear why .WEB should be expected to provide a special competitive constraint on .COM beyond what these many

hundreds of other TLDs collectively would provide.<sup>49</sup> Finally, in Section D, I explain that a fundamental shortcoming of Professor Zittrain and Dr. Sadowsky’s analyses is that they fail to evaluate whether .WEB is a good substitute for .COM, and so they provide no basis from which to assess whether .COM and .WEB would significantly compete for domain name registrations.

**A. Professor Zittrain and Dr. Sadowsky Fail to Establish That .WEB Would Exert a Unique Competitive Constraint on .COM Based on Its Name**

35. Professor Zittrain states that “.WEB is the strongest potential competitor of all new gTLDs” and that .WEB has “the potential to meaningfully compete with .COM as a standard-bearer for web-based entities.”<sup>50</sup> Dr. Sadowsky similarly claims that .WEB is uniquely positioned to challenge Verisign’s dominance.<sup>51</sup> He reasons that .WEB is special because its name is short, generic, evocative of the Internet, and memorable. He quotes industry participants and analysts to bolster his claim.<sup>52</sup>

36. Professor Zittrain and Dr. Sadowsky, however, ignore the fact that industry participants and analysts have made similar claims about other new gTLDs such as .ONLINE, .SITE and .WEBSITE. These gTLDs are also short, generic, evocative of the internet, and memorable, but they have not had a meaningful competitive impact on .COM’s pricing or share of domain registrations. Statements made by applicants for these TLDs characterize them as strong competitors to .COM. As to .ONLINE, for example:

Registrants and Internet Users will benefit from the .ONLINE TLD as a generic, available, relevant and memorable alternative to existing gTLD’s [...] The .ONLINE string is immediately apprehended by most minds as eminently related to the Internet, and the word is now a part of the common vernacular. Registrants will no doubt benefit from the

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<sup>49</sup> According to DomainTools.com, there are over 1,500 operable TLDs—including legacy TLDs, new gTLDs and ccTLDs—with at least one registered domain. There is a total of 340 million registered domains, of which TLDs other than .COM account for 198 million. See <https://research.domaintools.com/statistics/tld-counts/>, last accessed 4/29/2019.

<sup>50</sup> Zittrain Report, ¶ 46.

<sup>51</sup> “In my opinion, the only new domain that is likely to compete strongly with .com is .web, due to properties inherent in its name.” Sadowsky Report, ¶ 39. “I would expect to see very considerable early demand for .web registrations that offer value to specific registrants, demand that would greatly exceed that for registrations in any other new gTLD.” Sadowsky Report, ¶ 40.

<sup>52</sup> Sadowsky Report, ¶ 41.

introduction of the .ONLINE TLD into the Internet namespace, simply due to the increase in available keyword strings paired with a memorable, relevant TLD string.<sup>53</sup>

While certainly distinct from all existing TLDs, .online is essentially a better alternative to existing generics such as .com or .net. The proposed gTLD will create a new space open to any organization and participant conducting its activities on the internet. Although there are existing generic TLDs (e.g. .com, .net, .info), businesses and individuals describe being on or using the internet as “being online” or “going online.” The .com registry in particular has become overcrowded and most useful names have already been registered. The .online Registry will provide all potential registrants with a wide selection of relevant and shorter-string domain names.<sup>54</sup>

The .Online registry will be a new direct and formidable competitor to the current group of global generic TLDs. This will be especially true in the key growing international markets.<sup>55</sup>

With respect to .SITE:

As the New gTLD expansion takes place, SiTE's mission and purpose will be to provide an intuitive new namespace for individuals, hobbyists, and business owners alike. The word "site" is intrinsically connected to the Internet, and is recognized to mean “a space on the Internet.” The introduction of the SiTE top-level domain will allow Internet users to extend their reach under an easily identifiable Internet extension.<sup>56</sup>

.SITE is a perfect fit among today's top TLDs and is a viable alternative to current generic TLDs. .SITE has meaning to the entire online population, and Interlink believes that it will be a natural selection for new domain holders as they venture out to secure an online identity. Additionally, SiTE will be a popular choice among many consumers looking to secure names that more closely match what they stand for.<sup>57</sup>

The .Site registry will be a new direct and formidable competitor to the current group of global generic TLDs.<sup>58</sup>

And as to .WEBSITE:

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<sup>53</sup> New gTLD Application submitted to ICANN by Namecheap Inc.  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/45>

<sup>54</sup> New gTLD Application submitted to ICANN by Dot Online LLC  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1801>

<sup>55</sup> New gTLD Application submitted to ICANN by DotOnline Inc.  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1485>

<sup>56</sup> New gTLD Application submitted to ICANN by Neustar  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1778>

<sup>57</sup> New gTLD Application submitted to ICANN by Neustar  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1778>

<sup>58</sup> New gTLD Application submitted to ICANN by Radix  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1507>

The .Website registry will be a new direct and formidable competitor to the current group of global generic TLDs.<sup>59</sup>

The mission of the .Website TLD is to serve as a home on the Internet for users across the world. .Website aims to be a generic TLD with no preconception of meaning whatsoever, no theme, no categorizations, no restrictions of use. .Website does not restrict its scope to businesses (.Biz), commercial websites (.Com), or organizations (.Org). Unlike country TLDs (ccTLDs), it is not associated with any country or region, .Website is a truly global TLD.<sup>60</sup>

.Website will provide registrants the option to register more desirable and shorter names as opposed to names they would have otherwise registered in existing gTLDs due to the high saturation of the existing namespaces.<sup>61</sup>

37. While .ONLINE, .SITE and .WEBSITE are among the new gTLDs with the most registered domain names, they collectively account for just 2.5 million registrations. In contrast, .COM has 141.5 million domain name registrations,<sup>62</sup> and its share of registrations has continued to grow despite the presence of these and other gTLDs.<sup>63</sup> Moreover, the registration prices for these three gTLDs are higher than what .COM charges registrars.<sup>64</sup> Therefore, the evidence shows that these gTLDs have not had a major competitive impact on .COM.

38. Moreover, some other new gTLDs have unique advantages that .WEB and .COM do not have. For example:

[R]esearch reveals an appetite amongst consumers for [.online] beyond being a mere alternative to .com or .net. Currently, approximately 900,000 domain names contain the word “online” immediately preceding various TLDs (e.g. www.shoesonline.com), and the .online gTLD will shorten the string length for these existing domains (e.g. www.shoes.online). Transitioning to a shorter second level domain, with a “.online” gTLD

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<sup>59</sup> New gTLD Application submitted to ICANN by Radix  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1505>

<sup>60</sup> New gTLD Application submitted to ICANN by Radix  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1505>

<sup>61</sup> New gTLD Application submitted to ICANN by Radix  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1505>

<sup>62</sup> <https://research.domaintools.com/statistics/tld-counts/>, last accessed 4/29/2019

<sup>63</sup> In December 2016, .COM accounted for 38.5% of all registered domains and 68.0% of all domains excluding ccTLDs. By December 2018, .COM's share had increased to 39.9% of all registered domains and 71.5% of all domains excluding ccTLDs. See Verisign Domain Name Industry Briefs, 2016 Q4 and 2018 Q4.

<sup>64</sup> .ONLINE, .SITE and .WEBSITE charge \$25.00, \$20.00 and \$15.00 respectively to registrars for renewal registrations while .COM charges \$7.85. <https://www.domaincostclub.com/pricing.dhtml>, last accessed 4/29/2019.

is a natural and intuitive transition for these existing registrants, as well as the massive market of potential registrants seeking an ‘online’ portal for whatever they wish to share with the world.<sup>65</sup>

39. Afilias’s own new gTLD application for .ONLINE (which Afilias did not ultimately obtain) stated that:

The TLD .online stands for the global trend of being online, reachable, always on and always connected. Online stands as synonym for the Internet as the predominant technology today, which influences societies, businesses and individuals.<sup>66</sup>

The string will clearly differentiate itself from many existing and new gTLDs [...] because the string is in the vocabulary of many people and eas[ily] recognizable.<sup>67</sup>

According to statistics, “online” is the most frequently used word in domain names. This applies also to domain names on the secondary market. Registrants associate the Internet with “Online” and like to register domain names which contain this string. A new TLD .online could shorten domain names and supplies an intuitive namespace, eliminating the string “online” at the second-level.<sup>68</sup>

40. It is true that industry participants and analysts expect .WEB to have potential, but they also expected several other new gTLDs to have this same potential.<sup>69</sup> Yet, Professor Zittrain and Dr. Sadowsky ignore that these other TLDs have apparently not had the impact that was predicted. And Professor Zittrain and Dr. Sadowsky provide no evidence to explain why these other TLDs with potential have failed to “[show] the degree of popularity needed to compete with .com or .net in a meaningful way,” and yet .WEB will.<sup>70</sup>

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<sup>65</sup> New gTLD Application submitted to ICANN by Dot Online LLC  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1801>

<sup>66</sup> New gTLD Application submitted to ICANN by Afilias  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1604>

<sup>67</sup> New gTLD Application submitted to ICANN by Afilias  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1604>

<sup>68</sup> New gTLD Application submitted to ICANN by Afilias  
<https://gtldresult.icann.org/applicationstatus/applicationdetails/1604>

<sup>69</sup> Dr. Zittrain also claims that .WEB is unique because “[i]n 2012, .WEB again attracted the most applications ...” (Zittrain Report, ¶ 49). This is inconsistent with my review of the data. I find that there were seven applications for .WEB, which is tied for the 12<sup>th</sup> most. The TLDs that attracted the most applications were .APP (with 13 applications), .HOME (with 11 applications), .INC (with 11 applications) and .ART (with 10 applications). [https://icannwiki.org/All\\_New\\_gTLD\\_Applications](https://icannwiki.org/All_New_gTLD_Applications)

<sup>70</sup> Sadowsky Report, ¶ 17.

41. Additionally, Dr. Sadowsky, in supporting his claim that .WEB is unique, quotes an article which states that there are “a few points that may indicate .web is poised to gain traction relative to other recently introduced TLDs.”<sup>71</sup> But Dr. Sadowsky ignores that the same article also suggests that .WEB is unlikely to impose a meaningful competitive constraint on .COM.

“There’s such a huge array of new domains available to buyers now making it very difficult for them to really understand the selection on offer. Likewise, I’ve yet to see any registrar (ourselves included) deliver a domain search tool that really nails domain discovery,” [Stuart Melling, co-founder of UK domain name firm 34SP.com] says. “It boils down to marketing might at this point. The registries that will win are most likely going to be those that have the heftiest budgets to market and promote their domains. I personally see .com being the de facto domain for any new website for some time to come. Right now, the new TLDs seem to represent a fallback, a secondary area to secure a relevant domain if the .com space isn’t viable. I’d imagine it would take years to unseat this kind of approach; but then this is the web, and making predictions is really a fools game.”<sup>72</sup>

“Everyone still wants a .com. We’ve done user testing on people searching for domains, where users speak their thoughts during the test, and almost all of them say ‘Where’s the .com?’ With that said, I can’t foresee .web becoming the new .com, but I think it will be one of the more popular new TLDs that could overtake .net in a few years,” [Mark Medina, Director of Product, Domain Names with Dreamhost] says. “The .net TLD has been losing its popularity, and I think TLDs like a .web or a .xyz could become more popular than .net in a few years time. .Com will remain number 1 but number 2 is up for the taking.”<sup>73</sup>

## **B. Dr. Sadowsky Misinterprets the Results of the .WEB Auction**

42. Dr. Sadowsky relies on the auction price of .WEB to support his claim that .WEB is competitively unique.<sup>74</sup> Dr. Sadowsky further claims that the .WEB auction price reveals “[t]he magnitude of the winning bid for .web provides strong evidence that Verisign regarded it as a

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<sup>71</sup> Sadowsky Report, ¶ 44, quoting TheHostingFinders, “Inside the High Stakes Auction for .Web” (July 25, 2016), available at <http://www.thehostingfinders.com/inside-the-high-stakes-auction-for-web/>.

<sup>72</sup> TheHostingFinders, “Inside the High Stakes Auction for .Web” (July 25, 2016), available at <http://www.thehostingfinders.com/inside-the-high-stakes-auction-for-web/>.

<sup>73</sup> TheHostingFinders, “Inside the High Stakes Auction for .Web” (July 25, 2016), available at <http://www.thehostingfinders.com/inside-the-high-stakes-auction-for-web/>.

<sup>74</sup> Sadowsky Report, ¶ 42.

significant competitive threat if were controlled by another registry operator.”<sup>75</sup> Both uses of the auction price are incorrect.

43. The \$135 million paid for .WEB is the highest price paid in a public new gTLD auction, but there have been other transactions in which TLDs sold for large amounts. For example, Neustar purchased the .CO registry for \$109 million in 2014, which at the time had only 1.6 million registered domain names.<sup>76</sup> Likewise, Afilias purchased .IO’s registry service provider for \$70 million in 2017, which at the time was reported to have only 270,000 registered domain names.<sup>77</sup> If one is to use dollar value as an indicator of competitive importance, then the higher combined value of .CO and .IO would imply that they are collectively more competitively important than .WEB despite accounting for less than 1% of all registered domain names.

44. The .WEB bid price is also lower than the cumulative purchase price of other new gTLDs. As described in Section II, ICANN reported that new gTLD applicants spent a total of \$294.6 million in new gTLD application fees and paid another \$240.6 million for winning public auctions (including the .WEB auction).<sup>78</sup> Many more millions were spent in privately-resolved contention sets with one publicly traded registry operator alone receiving over \$50 million from

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<sup>75</sup> Sadowsky Report, ¶ 46.

<sup>76</sup> <https://www.bizjournals.com/washington/blog/techflash/2014/03/neustar-to-buy-co-domain-for-109.html>.

<sup>77</sup> It has been reported that Afilias purchased Internet Computer Bureau Ltd (“ICB”) for \$70 million in April 2017. Although ICB was just the registry service provider (i.e., the backend provider) for .IO and two small ccTLDs, not the full-fledged registry operator, market observers speculate that “ICB held a long-term contract to operate the .io registry” and that “Afilias effectively purchased these ccTLDs.” Accordingly, I treat the \$70 million as an indicator of the value of .IO and the two small ccTLDs. These two ccTLDs are extremely small relative to the size of .IO, and so I ignore their value in the discussion in the text. <https://tweb.domains/2018/11/19/io-sold-to-afiliast/>. See also <http://domainincite.com/23650-afiliast-bought-io-for-70-million>, <http://www.icb.co.uk/> and <https://research.domaintools.com/statistics/tld-counts/>, last accessed 4/29/2019.

<sup>78</sup> See ICANN financial statements for the years ending June 2013 – June 2017. Over those five years, ICANN recognized new gTLD application fees of \$294.6, excluding deferred revenues received by ICANN but not yet recognized in ICANN’s financial statements. I understand that the recognized fees reflect refunds for withdrawn applications and reduced application fees for certain gTLD applicants based on financial need.



losing private auctions.<sup>79</sup> The cumulative purchase price of other new gTLDs is thus much larger than the individual price paid for .WEB. Hence, if auction money and fees paid are indicators of competitive constraint as Dr. Sadowsky seems to suggest, then .WEB is a much less important competitive constraint than all of the other gTLDs combined.

45. Dr. Sadowsky further claims that the magnitude of the .WEB auction price provides evidence that Verisign wanted to prevent .WEB from falling into the hands of a competitor. This argument is incorrect. The magnitude of the .WEB auction price reflects the amount that Afilias (the second-highest bidder) was willing to pay to operate .WEB,<sup>80</sup> presumably because it expected to sell registrations. The fact that Verisign was willing to pay \$135 million to assist Nu Dot Co in prevailing in the .WEB auction indicates that Verisign valued operating the .WEB TLD more highly than did other applicants, but Verisign's valuation, just like Afilias's, may have been based on its desire to sell registrations, not necessarily to prevent competition.<sup>81</sup>

### **C. Recent Entry of Other New gTLDs Suggests That .WEB's Incremental Competitive Effect May Be Small**

46. The number of TLDs competing to provide domain names has increased rapidly since the first new gTLDs were authorized in October 2013. More than 1,200 new gTLDs have been authorized to date<sup>82</sup> and, collectively, these TLDs have almost 24 million registered

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<sup>79</sup> In 2014 alone, MMX received \$37.5 million dollars from gTLD auctions. See <http://domainincite.com/23818-how-new-gtld-auctions-could-kill-gaming-for-good> and MMX's annual reports, e.g., <https://mmx.co/wp-content/uploads/2016/04/2015-Audited-Financial-Statements.pdf>.

<sup>80</sup> The .WEB auction employed a second-price-auction format in which the winning bidder paid the second-highest bid. In a second-price auction, bidders have an incentive to bid up to their valuations' (barring any constraint) and then to quit. Hence, the auction price reflects Afilias's valuation. See, for example, Osborne, J. Martin. *An Introduction to Game Theory*, 2004.

<sup>81</sup> I note that the Amended IRP suggests that Afilias may also have been willing to pay more than \$135 million to operate .WEB, but that Afilias had to stop bidding because of a financing constraint. "Under the terms of its bank financing agreements, Afilias was able to bid up to USD 135 million for .WEB..." Amended IRP, ¶ 35.

<sup>82</sup> <https://newgtlds.icann.org/en/program-status/statistics>.

domains.<sup>83</sup> As already discussed, many of these gTLDs have names that would seem to have universal appeal and a connection to the Internet, such as .ONLINE, .SITE and .WEBSITE. There has also been continued growth in ccTLDs such as .FR, .JP and .US, which are administered by country-code managers recognized by ICANN.<sup>84</sup> This includes a rise in so-called “open ccTLDs” that can be registered by any registrant regardless of which country the registrant resides in, such as .CO, .IO, .TK and .TV.<sup>85</sup> All together, there are over 300 ccTLDs<sup>86</sup> and, collectively, they have over 154 million registered domains.<sup>87</sup> Moreover, several legacy TLDs, such as .ORG and .INFO, have millions of registered domains.

47. Market observers have recognized this recent proliferation in registry options and its effect on competition. For example, the U.S. National Telecommunications and Information Administration stated that, since the launch of the New gTLD Program, “ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace.”<sup>88</sup> Yet Professor Zittrain and Dr. Sadowsky fail to consider the large and growing number of alternatives for .COM and whether .WEB adds incrementally to this competition. In particular, neither Professor Zittrain nor Dr. Sadowsky address how an Afilias-operated .WEB would meaningfully add to the constraints collectively imposed on .COM by these many alternative TLDs, as neither’s analyses demonstrate that .WEB is competitively important in comparison to all these other TLDs.

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<sup>83</sup> Verisign Domain Name Industry Brief, 2018 Q4.

<sup>84</sup> <https://www.icann.org/resources/pages/cctlds-21-2012-02-25-en>

<sup>85</sup> [https://icannwiki.org/Country\\_code\\_top-level\\_domain#Open\\_ccTLDs](https://icannwiki.org/Country_code_top-level_domain#Open_ccTLDs).

<sup>86</sup> Internet Assigned Numbers Authority Database, <https://www.iana.org/domains/root/db>, last accessed 4/29/2019.

<sup>87</sup> Verisign Domain Name Industry Brief, 2018 Q4.

<sup>88</sup> “NTIA Statement on Amendment 35 to the Cooperative Agreement with Verisign,” <https://www.ntia.doc.gov/press-release/2018/ntia-statement-amendment-35-cooperative-agreement-verisign>.

**D. Professor Zittrain and Dr. Sadowsky Fail to Establish That Registrants Consider .WEB a Good Substitute for .COM and Therefore Fail to Demonstrate That Competition from .WEB Would Impose a Meaningful Constraint on .COM**

48. An Afilias-operated .WEB would be able to impose a meaningful constraint on the price that Verisign charges for .COM only if there were many registrants who consider .WEB a good substitute for .COM.<sup>89</sup> If instead most registrants would be willing to pay a significantly higher price to register a .COM domain name than a .WEB domain name, then .WEB would not be a good substitute for .COM and would not impose a meaningful competitive constraint on .COM. Professor Zittrain and Dr. Sadowsky fail to consider the substitutability to registrants between .COM and .WEB. I present evidence below that existing registrants likely would not consider .WEB a good substitute for .COM and new registrants might not either.

49. Consider first existing registrants. Existing registrants likely face costs when switching registries because the TLD is a component of the domain name which, by definition, cannot be ported across registries. For example, if the registrant that operates the website CARS.COM wants to switch to .WEB, then it must register CARS.WEB (if available) or adopt another .WEB domain name. An existing registrant that switches TLDs might incur “switching costs,” such as having to spend money to inform and remind consumers that its domain name has changed, and the registrant may lose consumers who are unaware of the change. If these switching costs are large, then .WEB could not be a good substitute for .COM from the perspective of existing .COM registrants as existing registrants will prefer to renew with .COM rather than switch to .WEB, even if the .COM price is higher. On the other hand, if switching

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<sup>89</sup> In assessing the potential competitive constraints that .WEB could impose on .COM, I focus on the decision of registrants, even though I understand registrants do not purchase directly from the .COM registry and will not purchase directly from the .WEB registry. This is appropriate because the prices charged by these registries to registrars likely affect the prices charged by registrars to registrants for domain name registrations in these registries. In particular, the wholesale pricing of a registry, such as .COM, to registrars will affect the costs of registrars selling .COM domain names and that in turn will affect the prices that registrars charge for .COM domain names.

costs are low, then it is possible that existing registrants could consider .WEB a good substitute for .COM, which could affect .COM's market power over existing registrants.

50. Both Professor Zittrain and Dr. Sadowsky fail to consider whether high switching costs for existing .COM registrants may mute the importance of competition from .WEB, even though Dr. Sadowsky explicitly recognizes that switching costs are generally high: "Registrants therefore overwhelmingly prefer to renew their domain names, even possibly at a significantly higher price than registering their names in a new domain. Accordingly, for renewals, all registries enjoy some degree of market power."<sup>90</sup>

51. The DOJ recognized these same switching costs for existing registrants and in 2008 concluded that "new gTLDs, while providing a desired choice for some registrants, are unlikely to restrain the exercise of market power by the .com registry operator."<sup>91</sup> If, as these materials suggest, there are many existing registrants for whom switching costs are high, then .WEB would not provide a significant competitive constraint on .COM as to existing registrants.

52. Now consider new registrants. New registrants do not incur switching costs, so it is possible that some new registrants would consider .WEB to be a good substitute for .COM. If there are enough such new registrants, then it is possible that .WEB could exert unique competitive influence on .COM as to new registrants. However, it is also possible that many new registrants view .COM as superior to all other TLDs, including .WEB, and so .COM's market power over new registrants will not be eroded by .WEB.

53. Neither Professor Zittrain nor Dr. Sadowsky provides any empirical evidence that new registrants view .WEB as a good substitute for .COM. They ignore that registrants might still find it beneficial to register their domains on .COM because of the desirability of having a .COM domain name even if .WEB is available. Moreover, they fail to provide any empirical

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<sup>90</sup> Sadowsky Report, ¶ 30.

<sup>91</sup> See the December 2008 letter from Deborah A. Garza at the DOJ to Meredith A. Baker at the NTIA.

evidence that new registrants would view .WEB as a superior substitute to .COM compared to other gTLDs such as .ONLINE, .SITE or .WEBSITE.

54. To illustrate how both Professor Zittrain and Dr. Sadowsky ignore the competitive interaction between different TLDs, I note that neither recognizes that TLDs may be complements as opposed to substitutes. Registrants may benefit from using several TLDs at the same time, and therefore, .WEB may be a complement for .COM rather than a substitute. In 2008, the DOJ explicitly recognized this possibility of complementarity: “[W]e found that VeriSign possesses significant market power as the operator of the .com registry because many registrants do not perceive .com and other gTLDs (such as .biz and .info) and country code TLDs (“ccTLDs,” such as .uk and .de) to be substitutes. Instead, registrants frequently purchase domains in TLDs other than .com as complements to .com domains, not as substitutes for them.” Thus, if these considerations apply to .WEB, then .WEB could attract many new registrants without being a close substitute for .COM. In such a case, there would be no effect from .WEB on .COM’s market power over existing or new registrants.

## **VI. DR. SADOWSKY’S CLAIM REGARDING THE PROMOTION OF .WEB IS UNSUPPORTED**

55. Dr. Sadowsky claims that “Verisign would have only a limited incentive to promote” .WEB because Verisign would risk cannibalizing its own registrations in .COM.<sup>92</sup> This is equivalent to claiming that Verisign would charge a higher (quality-adjusted) price for .WEB than would Afilias. I agree that this is theoretically possible if one assumes that .WEB poses a significant competitive constraint on .COM. But even if that assumption were true, the validity of Dr. Sadowsky’s prediction would ultimately depend on economic factors that Dr. Sadowsky does not consider, such as the companies’ relative costs. For example, if Verisign’s relative costs in offering .WEB domain names are lower than Afilias’s because it is more efficient (as a

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<sup>92</sup> Sadowsky Report, ¶ 48.

consequence of its leading position and experience operating .COM), that could translate into lower prices for .WEB domain names. Such efficiencies, which might not be achieved with an Afilias-operated .WEB, could more than offset any potential anticompetitive harms and lead Verisign to set lower prices for .WEB than would Afilias.

56. Neither I nor Dr. Sadowsky are able to compare or evaluate the costs of Verisign and Afilias because that information is not available to us. However, if Verisign has lower costs than Afilias in the operation of .WEB, then it is quite possible that Verisign would set a lower price for .WEB than would Afilias, despite any potential risk of cannibalization.

57. Moreover, Dr. Sadowsky ignores evidence which indicates that Verisign might be *more* effective at expanding .WEB's domain registrations than Afilias would be. For example, Verisign claims to be uniquely-well positioned to promote .WEB:

As the most experienced and reliable registry operator, Verisign is well-positioned to widely distribute .web. Our expertise, infrastructure, and partner relationships will enable us to quickly grow .web and establish it as an additional option for registrants worldwide in the growing TLD marketplace. Our track record of over 19 years of uninterrupted availability means that businesses and individuals using .web as their online identity can be confident of being reliably found online. And these users, along with our global distribution partners, will benefit from the many new domain name choices that .web will offer.<sup>93</sup>

Moreover, an article cited by Dr. Sadowsky agrees that Verisign is uniquely positioned to drive .WEB growth:

If [Verisign] did indeed acquire .WEB, the company now owns a new growth engine and they are uniquely positioned to drive it. Some suggest they would bury it to protect .COM. That is not in the best interest of shareholders. .COM is still king, will be for some time and .WEB can immediately contribute healthy operating profits out of the gate. If well executed, .WEB can add significant shareholder value.<sup>94</sup>

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<sup>93</sup> Verisign, *VeriSign Statement Regarding .Web Auction Results*, <https://www.businesswire.com/news/home/20160801005586/en/Verisign-Statement-.Web-Auction-Results>.

<sup>94</sup> Authentic Web, “.WEB Acquired for \$135 Million. Too much? How does it compare?”, available at <https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/>. The Sadowsky Report, ¶ 44 quotes the same article.

## VII. THE DEPARTMENT OF JUSTICE'S DECISION TO NOT CHALLENGE VERISIGN'S POSSIBLE OPERATION OF .WEB SUGGESTS THAT VERISIGN'S OPERATION OF .WEB DOES NOT RAISE SIGNIFICANT COMPETITIVE ISSUES

58. “The mission of the Antitrust Division [of the U.S. Department of Justice] is to promote economic competition through enforcing and providing guidance on antitrust laws and principles.”<sup>95</sup> A primary function of the Antitrust Division is the “enforcement of the Federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization, including investigation of possible violations of antitrust laws, conduct of grand jury proceedings, issuance and enforcement of civil investigative demands, and prosecution of all litigation that arises out of such civil and criminal investigations.”<sup>96</sup> The Antitrust Division has the authority to investigate and challenge mergers, acquisitions and other types of transactions and conduct that significantly harm competition.

59. As mentioned earlier, I served as the Deputy Assistant Attorney General for Economic Analysis for the Antitrust Division. The Antitrust Division, which has a large staff of Ph.D. economists in addition to attorneys, is one of the world's leading venues for applying economics to real world questions of competition. The economic issues most often analyzed by the Antitrust Division include the competitive effect of mergers, acquisitions and various alleged restraints of trade.

60. In January 2017, the Antitrust Division launched an investigation of Verisign's proposed acquisition of Nu Dot Co's contractual rights to operate the .WEB TLD.<sup>97</sup> Although I obviously do not know the details of this non-public investigation, based on my experience, I

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<sup>95</sup> <https://www.justice.gov/atr/mission>.

<sup>96</sup> Antitrust Division Manual, Fifth Edition, Ch. I, Section B, available at <https://www.justice.gov/atr/file/761126/download>.

<sup>97</sup> Verisign's 2017 10-K reports that: “On January 18, 2017, the Company received a Civil Investigative Demand from the Antitrust Division of the United States Department of Justice (“DOJ”) requesting certain material related to the Company becoming the registry operator for the .web gTLD. On January 9, 2018, the DOJ notified the Company that this investigation was closed.” <https://investor.verisign.com/node/19931/html>. See also <https://domainnamewire.com/2017/02/09/u-s-antitrust-division-investigating-verisign-running-web/>.

expect that the focus of the investigation was whether Verisign's operation of .WEB was likely to significantly harm competition through increased prices or reduced quality given Verisign's operation of .COM. If I am correct, then the Antitrust Division lawyers and economists would have had to evaluate the very concerns that Professor Zittrain and Dr. Sadowsky raise. Indeed, I expect that Afilias, and others, would have had the opportunity to raise their competitive concerns about a Verisign-operated .WEB with the Antitrust Division. Moreover, the Antitrust Division would have had to consider whether any possible efficiencies on the part of Verisign might offset any possible competitive harms and lead to a procompetitive outcome.

61. If the Antitrust Division's investigation had concluded that, on balance, Verisign's operation of .WEB significantly threatened harm to competition, my understanding is that the Antitrust Division could have taken steps or filed litigation to block Verisign from operating .WEB. Instead, in January 2018, the Antitrust Division closed its investigation of .WEB without taking any action to block Verisign from operating .WEB.<sup>98</sup> If the Antitrust Division did undertake the type of investigation that I have just described, then its decision to allow the transaction to proceed indicates to me that the Antitrust Division concluded—likely based on much more information than is available to me, Professor Zittrain or Dr. Sadowsky—that Verisign's operation of .WEB is not likely to harm competition.

### **VIII. CONCLUSION**

62. Professor Zittrain and Dr. Sadowsky have produced reports that contain a great deal of interesting historical information. However, both appear to reach economic conclusions unsupported by actual evidence. Specifically, Professor Zittrain and Dr. Sadowsky's conclusion that competition from an Afilias-operated .WEB would increase the competitive pressure on .COM is relevant only to the extent that Verisign would set lower .COM prices relative to a world in which Verisign operates both TLDs. In reaching this conclusion, however, Professor Zittrain

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<sup>98</sup> Ibid.



and Dr. Sadowsky ignore the pricing regulations that constrain .COM's prices as well as relative pricing for other TLDs.

63. Both Professor Zittrain and Dr. Sadowsky also claim that .WEB would exert special competitive constraints on .COM. In making this claim, they ignore the contrary evidence that indicates that there may be nothing special about the competitive significance of .WEB in light of the other new gTLDs with similar "special" features that have not turned out to be competitively significant in constraining .COM's pricing or reducing .COM's share of domain registrations. Finally, Dr. Sadowsky's claim that Verisign would promote .WEB less aggressively than would Afilias might be true, but might not, even given his unsupported assumption that .WEB will exert special competitive constraints on .COM. Efficiencies can offset the creation of market power and Dr. Sadowsky pays no attention to that.

64. Finally, I note that the Antitrust Division of the Department of Justice investigated Verisign's potential operation of .WEB and chose not to block it. Although I do not know the details of that investigation, I assume that the Antitrust Division was aware of the competitive concerns raised by Afilias's experts and would have evaluated them. It appears that the Antitrust Division determined that these concerns were not sufficient to warrant blocking Verisign's purchase of .WEB.

*Dennis W. Carlton*

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Dennis W. Carlton

May 30, 2019

**RM 195**

**Phase II Assessment of the Competitive Effects  
Associated with  
the New gTLD Program**

**Greg Rafert and Catherine Tucker<sup>1</sup>**

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## EXECUTIVE SUMMARY

This report was commissioned by ICANN to assess the extent to which the release of new gTLDs (the “New gTLD Program”) has resulted in changes in competition in the domain name marketplace as part of ICANN’s Affirmation of Commitments with the U.S. Department of Commerce. An initial report was published on September 28, 2015 (the “Phase I Assessment”), which established a baseline description of metrics that can be used to assess the competitive conditions in the marketplace for domain names. This subsequent report (the “Phase II Assessment”) updates our measures of those metrics to assess the extent to which the New gTLD Program has affected competition in this marketplace over the past year.<sup>2</sup> While only one year has passed, we do observe some changes in the marketplace. It is important to note, however, that the New gTLD Program is still relatively new, and that top-level domains continue to be introduced. Therefore, there could be additional changes to the competitive environment in the future.

The metrics discussed in this report reflect economic theory related to measuring and evaluating competition and also reflect consultation with the Competition, Consumer Trust & Consumer Choice Review Team (the “CCT Review Team”). As a result, this report includes additional metrics that were not included in the Phase I Report.

In assessing how key metrics have changed over the past year, we find that:

- Average and median retail prices for registrations of legacy and new gTLDs, as well as retail mark-ups over wholesale prices, have declined since Phase I.<sup>3</sup>
- The overall price level of legacy TLD wholesale price caps continues to be lower than wholesale prices for new gTLDs.<sup>4,5</sup> In addition, we find effectively no change in wholesale price caps for legacy TLDs, nor wholesale price levels for new gTLDs, when comparing our Phase I and Phase II results. The presence of price caps on legacy TLDs may help to explain the absence of changes in legacy TLD wholesale prices.<sup>6</sup>
- There are noticeable changes in the set of entities included in the largest 15 registries and registrars ranked by total domain registrations as a result of entry by new gTLD registries and growth in registrations made by different registrars who register new gTLD domains. In addition, we observe declines in the share of gTLD registrations held by the top four, top eight, and top 15 registries and registrars between Phase I and Phase II.

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<sup>2</sup> The Phase I Assessment was released for public comment on September 28, 2015 and is publicly available at <https://www.icann.org/news/announcement-2-2015-09-28-en>.

<sup>3</sup> Due to limitations on our ability to collect data on legacy TLD wholesale prices, we substitute for them with legacy TLD price caps (not the actual wholesale prices charged by registry operators of legacy TLDs).

<sup>4</sup> Since legacy TLD wholesale price caps are below the wholesale prices of new gTLDs, legacy TLD wholesale prices must also be below wholesale prices of new gTLDs.

<sup>5</sup> Legacy TLDs exclude ccTLDs.

<sup>6</sup> While a number of legacy TLDs have price caps that adjust relative to the previous year’s price (and therefore do not necessarily bind the TLD to a specific price level), the presence of the cap may still limit the incentive for the TLD to change its price.

- There were changes in the new gTLD registration shares of registrars, with the largest registrar in the Phase I Assessment dropping out of the top 15 registrars (ranked by total domain registrations) and being replaced by a registrar whose share of new gTLD registrations increased by nearly 22 percent. We also observe that registrars located in China have become more prevalent among registrars with the largest shares of new gTLD registrations.
- We find the largest percentage growth in the number of registry operators in the Asian Pacific and European regions.
- New gTLDs continue to target registrants with a variety of interests, and the entry of new gTLDs within a given interest area is often associated with a decline in registration shares of other new gTLDs within the same interest area.
- The expansion of new gTLDs has continued since our Phase I Assessment; new gTLD registrations have increased from 3,483,064 registrations as of November 2014 to 16,570,035 registrations as of March 2016. New gTLD registrations accounted for approximately 2 percent of all gTLD registrations as of November 2014 and now account for 9 percent of all gTLD registrations. Overall domain registration levels have also increased since Phase I, since legacy TLD registrations have not declined and new gTLD registrations are growing.
- There continues to be no aggregate (worldwide) effect of new gTLD entry or registrations on legacy TLD registrations. This suggests that total TLD registrations have grown since the beginning of the New gTLD program, since legacy TLD registrations have not fallen and new gTLD registrations are growing. However, in analyzing the effect of the entry of regionally-specific TLDs (e.g., nyc), we typically observe a decline in new gTLD and legacy registrations after the entry of the regional TLD in the region relevant to that TLD. This suggests that regional TLDs may be viewed as substitutes for other new gTLDs and legacy TLDs.

While we are unable to draw conclusions about whether the New gTLD Program has caused a change in competition in the domain name marketplace, some of these changes in the past year are consistent with what one would expect to see in a marketplace with increased competition. For example, the decline in the share of new gTLD registrations attributable to the four and eight registries with the most registrations, and the observed volatility in the registration shares held by registry operators, could point to increased competition. The volatility in new gTLD registration shares made by registrars may also be indicative of increased competition; while there are multiple explanations for this volatility, one could observe movement in registration shares because of the entry of new registrars in the marketplace.

One might also expect that increased competition among new gTLD registry operators would result in lower new gTLD wholesale prices, which we do not observe. However, the decline in retail prices and markups since Phase I is consistent with increased competition among registrars. In making these observations, it is important to note that our price-based analyses are limited by available data. In particular, we would have liked to evaluate detailed transaction-level data to compare, for example, how prices of the same or similar second-level domain names differ across legacy TLDs and new gTLDs. However, we received no data from secondary market institutions in Phase I or Phase II.

Finally, in both our Phase I and Phase II Assessments, we found no aggregate (worldwide) effect of new gTLD entry or registrations on legacy TLD registrations. This is consistent with new gTLDs generally not being treated as substitutes for legacy TLDs. The observed impact of the entry of regionally-specific TLDs (e.g., nyc) on other TLD registration activity in the regional TLD's geographic area, suggests that regional TLDs may be viewed as substitutes for other new gTLDs and legacy TLDs. However, we do not have the necessary transaction-level data to fully analyze the substitutability of new gTLDs for legacy TLDs.

## **SECTION I – INTRODUCTION**

We were retained by ICANN to assess the extent to which the New gTLD Program has resulted in increased competition in the domain name marketplace, and we have divided our work into two phases: an initial report published on September 28, 2015 (the “Phase I Assessment”), which established a baseline description of metrics that can be used to assess, in the future, the competitive conditions in the marketplace for domain names, and this subsequent report (the “Phase II Assessment”), which assesses the extent to which the New gTLD Program has affected competition in this marketplace over the past year.<sup>7</sup>

Since the Phase I Assessment, the domain registration space has continued to expand. As of March 2016, there were 955 new gTLDs available for registration and 16,570,035 domain registrations in new gTLDs. This represents a growth of 405 available new gTLDs available for registrations and 13,086,971 domain registrations in new gTLDs since November 2014.<sup>8</sup>

Our Phase II Assessment reveals how the competition metrics established in the Phase I Assessment have changed (or remained the same) as the New gTLD Program has continued in the past year. When interpreting these results one should note that the New gTLD Program continues to introduce new gTLDs. Therefore, the marketplace for domain names may continue to change as the program proceeds.

In this assessment, our principal findings are that:

- Average and median retail prices for registrations of legacy and new gTLDs, as well as retail mark-ups over wholesale prices, have declined since Phase I.<sup>9</sup>
- The overall price level of legacy TLD wholesale price caps continues to be lower than wholesale prices for new gTLDs.<sup>10,11</sup> In addition, we find effectively no change in wholesale price caps for legacy TLDs, nor wholesale price levels for new gTLDs, when comparing our Phase I and Phase II results. The presence of price caps on

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<sup>7</sup> The Phase I Assessment was released for public comment on September 28, 2015 and is publicly available at <https://www.icann.org/news/announcement-2-2015-09-28-en>.

<sup>8</sup> Our Phase I Assessment relied on registration data available as of November 2014.

<sup>9</sup> Due to limitations on our ability to collect data on legacy TLD wholesale prices, we substitute for them with legacy TLD price caps (not the actual wholesale prices charged by registry operators of legacy TLDs).

<sup>10</sup> Since legacy TLD wholesale price caps are below the wholesale prices of new gTLDs, legacy TLD wholesale prices must also be below wholesale prices of new gTLDs.

<sup>11</sup> Legacy TLDs exclude ccTLDs.

legacy TLDs may help to explain the absence of changes in legacy TLD wholesale prices.<sup>12</sup>

- There are noticeable changes in the set of entities included in the largest 15 registries and registrars ranked by total domain registrations as a result of entry by new gTLD registries and growth in registrations made by different registrars who register new gTLD domains. In addition, we observe declines in the share of gTLD registrations held by the top four, top eight, and top 15 registries and registrars between Phase I and Phase II.
- There were changes in the new gTLD registration shares of registrars, with the largest registrar in the Phase I Assessment dropping out of the top 15 registrars (ranked by total domain registrations) and being replaced by a registrar whose share of new gTLD registrations increased by nearly 22 percent. We also observe that registrars located in China have become more prevalent among registrars with the largest shares of new gTLD registrations.
- We find the largest percentage growth in the number of registry operators in the Asian Pacific and European regions.
- New gTLDs continue to target registrants with a variety of interests, and the entry of new gTLDs within a given interest area is often associated with a decline in registration shares of other new gTLDs within the same interest area.
- The expansion of new gTLDs has continued since our Phase I Assessment; new gTLD registrations have increased from 3,483,064 registrations as of November 2014 to 16,570,035 registrations as of March 2016. New gTLD registrations accounted for approximately 2 percent of all gTLD registrations as of November 2014 and now account for 9 percent of all gTLD registrations. Overall domain registration levels have also increased since Phase I, since legacy TLD registrations have not declined and new gTLD registrations are growing.
- There continues to be no aggregate (worldwide) effect of new gTLD entry or registrations on legacy TLD registrations. This suggests that total TLD registrations have grown since the beginning of the New gTLD program, since legacy TLD registrations have not fallen and new gTLD registrations are growing. However, in analyzing the effect of the entry of regionally-specific TLDs (e.g., nyc), we typically observe a decline in new gTLD and legacy registrations after the entry of the regional TLD in the region relevant to that TLD, which suggests that regional TLDs may be viewed as substitutes for other new gTLDs and legacy TLDs.

## **SECTION II – THE MARKETPLACE FOR DOMAIN NAMES**

In this section, we provide a brief overview of what types of changes we would expect to see in a marketplace that has experienced changes in competitive pressures. We then detail our methodological approach to assessing competitive effects in Section III and discuss our results in Section IV.

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<sup>12</sup> While a number of legacy TLDs have price caps that adjust relative to the previous year's price (and therefore do not necessarily bind the TLD to a specific price level), the presence of the cap may still limit the incentive for the TLD to change its price.

### ***An Economic Framework***

As discussed in Section II of the Phase I Assessment in more detail, firms in a marketplace can compete on factors such as price, product and service attributes, marketing and promotion efforts, and ancillary services. Since firms can compete on price and non-price factors, it follows that these factors are often used to evaluate changes in competition. Although there is not by any means necessarily a causal link, a decrease in the prices charged to consumers, an increase in the quality of products offered, and/or an increase in the quality of other services provided by firms may reflect increased competition. Furthermore, an increase in the number of firms offering services or an increase in the production of a given good may be correlated with increased competition in some instances.

As such, our assessment of the effect of the New gTLD Program on competition in the marketplace for domain names focuses on the extent to which price and non-price factors have changed as new gTLDs, registries, and registrars have entered into (or in some cases, exited from) the marketplace. If, for example, competition has increased among registries or registrars, we may expect to see entry by new registry operators or registrars, or changes in which parties have significant domain registration activity. Additionally, if competition has increased among registry operators in the past year, we may see signs that wholesale prices have decreased or begun to converge; similarly, if competition among registrars has increased, we may observe signs that retail prices have decreased or begun to converge. We also investigate whether registration activity or changes in retail and wholesale prices in the past year differ between new gTLDs and legacy TLDs. Such changes among legacy TLDs may indicate that consumer demand for legacy TLDs is related to new gTLDs: for example, a decline in registrations of legacy TLDs while new gTLD registrations increased would be consistent with the possibility that consumers view new gTLDs as substitutes for legacy TLDs. However, we note that given that only one year has passed since our initial assessment and that the New gTLD Program continues to develop, one can expect that these measures of competition may continue to change in the future.

If firms choose to engage in price competition, consumers will typically benefit from the resulting lower prices. Other benefits, which are more difficult to observe than price, may also manifest as a result of competition; for example, competing firms may choose to develop new or different product offerings, therefore increasing the variety of choices consumers face, and potentially allowing for more personalized products and increases in consumer welfare. In the marketplace for domain names, the availability of a diverse selection of specialized gTLDs may be an example of welfare-enhancing product differentiation.



## SECTION III – DATA COLLECTION AND METHODOLOGY

In this section, we describe our sample selection methodology and data collection process,<sup>13</sup> and conclude with a brief overview of the data we compiled for the Phase I and Phase II Assessments.

### *TLD Sample Construction*

Given the large number of new gTLDs available at the time of the Phase I Assessment, we developed a methodology designed to sample new gTLDs that had generated the greatest registration activity (both historically and recently); we also included new gTLDs that overlapped with those new gTLDs in terms of target customer groups. The resulting sample for the Phase I Assessment included 109 new gTLDs, accounting for 81.4 percent of new gTLD registrations; we also included 14 legacy TLDs, the selection of which is described below.

In the Phase II Assessment, we added additional new gTLDs based on recent registration volume and/or overlap with the target consumer groups of new gTLDs included in our Phase I sample. We also expanded the representation of IDN TLDs (that is, new gTLDs whose string included non-ASCII characters such as “.綆动”). In total, we added 30 new gTLDs to our sample for the Phase II Assessment, resulting in a total of 139 new gTLDs, which accounted for 83.3 percent of new gTLD registrations. We also included 14 legacy TLDs.

Our sampling approach provides several benefits. First, the approach is objective and reproducible. Second, the use of registration volumes in guiding our sampling means that we are allowing consumers’ decisions in the marketplace to determine the relevant sample.<sup>14</sup> And finally, by including those new gTLDs that may overlap in their target consumer groups, we include sets of new gTLDs in which one may observe more direct competition for particular customers.

Below, we describe our selection process in more detail for new gTLDs and legacy TLDs.

### *Sample Selection of New gTLDs and Legacy TLDs*

For the Phase I Assessment, our selection process for new gTLDs consisted of three steps. First, in order to ensure that our sample contained only active, new gTLDs that were

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<sup>13</sup> Details that do not compromise the confidentiality of the registrars and registries have been provided. For example, registry wholesale prices for gTLDs are confidential, and as such, we do not identify wholesale prices for specific gTLDs. Furthermore, we do not report summaries of registry wholesale prices for gTLDs that could be used to infer the wholesale prices for specific gTLDs.

<sup>14</sup> Such an approach is often used in the specification of common economic indices. For example, the S&P 500 index consists of the largest 500 companies listed in the NYSE. If an individual wants to gauge the performance of the broader economy, looking at the S&P 500 will be much more informative than choosing a few random and possibly small companies.

available for purchase in Phase I, we eliminated any gTLD for which there were no monthly transaction reports available as of March 2015.<sup>15</sup>

Second, we selected from this group as follows.

- First, we included a set of new gTLDs based on total current registrations to account for historically popular new gTLDs.
- Second, we included a set of new gTLDs based on the number of registrations in the three months prior to sample selection to account for “popular” new gTLDs at the time of selection.
- Finally, given the resulting list above, we also included any new gTLDs that were similar to these new gTLDs in name and likely purpose. These similar new gTLD groups consist of new gTLDs with similar spellings or topic areas and are likely to have some overlap in their respective target groups of consumers (e.g., if .work had been included, other new gTLDs such as .careers, .career, and .jobs would be considered.)

The process described above generated a set of 109 new gTLDs that represents 81.4 percent of overall gTLD registration activity.

Third, the 109 selected new gTLDs were examined to confirm that the resulting sample included new gTLDs reflecting diversity with respect to geographic scope and “community” designations. Specifically, we verified that our list of 109 new gTLDs included:

- At least five IDN new gTLDs.
- At least five “community” new gTLDs, where “community” new gTLDs are determined based on the original new gTLD applications. “Community” new gTLDs are operated for the benefit of a clearly defined community. All applicants must substantiate their claim that they represent a well-defined community, and must submit written endorsements to this effect.<sup>16</sup> However, these applications are only evaluated if the new gTLD string is contested.

In Phase II, we expanded the sample of new gTLDs with the inclusion of 30 additional new gTLDs. Twenty-five additional new gTLDs were selected based on their registration activity and/or overlap with the target consumer groups of new gTLDs included in our Phase I sample. In particular, 17 were selected due to having the largest number of registrations as of October 2015, while eight were selected due to their overlap with the target consumer groups of our Phase I sample. We also expanded our sample of IDN new gTLDs by selecting the five IDN new gTLDs that were not included in our Phase I sample and had the most active registrations as of October 2015.

In addition, we also included all legacy TLDs that were available before the first new gTLD was released in October 2013, and that are currently available for purchase without certain

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<sup>15</sup> Monthly transaction reports are submitted to ICANN by operating registries of legacy TLDs and new gTLDs, and detail the number of registrations and renewals for a TLD, for each registrar.

<sup>16</sup> These groups must also be of considerable size, and the members must also be aware that they belong to said group. “Shared characteristics” can be broadly defined, and includes professions, languages, and geographic locations. For more information, see ICANN Applicant Guidebook Section 1.2.3.

registration restrictions. (We excluded legacy TLDs that were intended specifically for government entities, institutions, and organizations with restrictive registration requirements.) Based on the latter criterion, from the 22 legacy TLDs available, we limited our legacy TLD sample to those that did not have restrictive criteria that limited who could register domains: .com, .net, .org, .biz, .info, .name, .pro, .asia, .travel, .jobs, .mobi, .cat, .tel, and .xxx.<sup>17</sup>

Ultimately, our data requests and collection process included 109 new gTLDs and 14 legacy TLDs in Phase I, and 139 new gTLDs and 14 legacy TLDs in Phase II.

### ***Registry and Registrar Selection***

Since each TLD can only be operated by one registry operator, our sample of TLDs determined our list of registries from which to request data. Because a registry operator can operate multiple TLDs, our final list of registry operators that we contacted in Phase I consisted of 59 unique registry operators.<sup>18</sup> In Phase II, we contacted 65 unique registry operators.

While each TLD has a single registry operator, registrations in legacy TLDs and new gTLDs can be offered by more than one registrar. In Phase I, we selected a sample of 54 registrars associated with our selected TLDs to collect data from the registrars who account for the most domain registrations, and to also ensure that each TLD in our sample was offered by at least ten of the selected registrars.<sup>19</sup> In Phase II, we added registrars to our sample for any of the 30 new gTLDs that were added to our sample and were not represented by at least ten registrars in our Phase I registrar sample. In selecting these new registrars, we selected those with the most registrations of that TLD as of October 2015.<sup>20</sup> This resulted in a sample of 59 registrars.

### ***Data Collection Methodology***

Price and non-price data for the sample of registries and registrars were obtained through direct outreach to registries, review of registrars' publicly-available websites, and from ICANN. In Phase II, we also purchased registrar pricing data from Domain Name Prices, which provided us with registrar pricing data for registrars in and outside of our registrar sample.<sup>21</sup>

### ***Registration Volumes***

Publicly-available transaction reports for each TLD, which provide information on historical registration volumes, were collected from ICANN's website in Phase I at

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<sup>17</sup> This criterion excluded .gov, .edu, .int, .mil, .aero, .coop, .post, and museum from our sample.

<sup>18</sup> The reduction in the number of operating registries (from the total number of TLDs) was primarily due to one registry that is the operating registry for many of the TLDs in our Phase I and Phase II samples.

<sup>19</sup> Some TLDs were offered by a total of fewer than ten registrars. In this case, all registrars offering the TLD were included in the registrar sample.

<sup>20</sup> For those TLDs that were provided by a total of fewer than ten registrars, all registrars offering the TLD were included in the registrar sample.

<sup>21</sup> Domain Name Prices collects registrar registration, renewal, and transfer prices from publicly available sources, as well as premium domain sales. See [www.dnpric.es/services](http://www.dnpric.es/services).

<https://www.icann.org/resources/pages/reports-2014-03-04-en>. Reports as of March 2016 were provided by ICANN in Phase II (and are also publicly available). These reports detail how many registrations of a given TLD each registrar was responsible for in each month.

We also received registration data from DomainTools that was extracted from WhoIs registration records. WhoIs data are generated at the time that a domain name is registered, and consist of the registered domain name, information about the registration (i.e., registration date), and information about the registrant (i.e., registrant name and location).<sup>22</sup> We received data from DomainTools summarizing the number of new registrations made by registrants in a given geographic location in each new gTLD and legacy TLD for each month from January 2014 through January 2016. These data were obtained for registrants in certain geographic areas related to regional TLDs to analyze the impact of the entrance of such TLDs on registration activity in legacy and new gTLDs. The geo-TLDs which are included in our analysis include: .berlin, capetown, .cologne, .hamburg, .london, .nyc, .quebec, .scot, .tokyo, and .vegas.

### *Sunrise and Wholesale Prices*

Data regarding sunrise and regular wholesale prices were requested and collected directly from the operating registries. While some legacy TLD registries provided data, most data on historic legacy TLD wholesale prices are restricted to price caps (and not the actual wholesale prices charged by registry operators of legacy TLDs), which were collected from official price change correspondence between operating registries and ICANN.<sup>23</sup> Legacy TLD price change data are available at <https://www.icann.org/resources/pages/correspondence>.

### *Retail Prices*

Requests for current and historical pricing data were sent to all registrars in our Phase I and Phase II samples. In Phase I, only six registrars, all from the Asia Pacific region, provided some form of historical data. These responsive registrars accounted for only 14 percent of registration volume of the new gTLDs being sampled and did not provide any regional geographic variation. The response in Phase II was similar, with only five registrars, all from the Asia Pacific region, electing to participate.

Given the lack of responses from registrars, we collected posted retail prices from the websites of registrars in our sample.<sup>24</sup> However, many registrars in our Phase I and Phase II samples (which were based on registration volumes of new gTLDs) did not offer publicly-

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<sup>22</sup> "WHOIS Primer," ICANN, available at <https://Whois.icann.org/en/primer>.

<sup>23</sup> Some legacy gTLD wholesale price data are also available in public press releases, however those data are not available for all legacy gTLDs and there is no guarantee that those data are complete.

<sup>24</sup> In collecting retail prices from registrar websites, we first looked for available price-sheets, which describe what the price for a one-year registration is for different TLDs. If price sheets were unavailable, we manually searched for the exact domain "somethinggeneric.tld" (in Phase I) or "testsomethinggeneric.tld" (in Phase II) for each TLD in our sample that the registrar offered and recorded the retail price for a one-year registration. We only report and analyze list prices.

available pricing information.<sup>25</sup> As a result, we collected retail price information from 39 of the original 54 registrars in our sample in Phase I.<sup>26</sup> In Phase II, if available, we collected retail price data from Domain Name Prices for registrars and TLDs in our sample; when not available from Domain Name Prices, we manually collected retail price data from the websites of registrars. As a result, we collected retail price information from a total of 39 registrars in Phase II: 14 were available in the Domain Name Prices data and 25 were collected manually. Because our retail price data are limited to registrars with publicly available pricing, our analyses of retail prices may not be representative of the retail market for domain names if consulting registrars or other registrars without publicly available price information exhibit meaningfully different pricing patterns than those with public price information.

We recognize that our price data are limited; given detailed transaction-level data, one could compare, for example, how prices of the same or similar second-level domain names differ across legacy TLDs and new gTLDs. We also received no data from secondary market institutions in Phase I or Phase II; such data would have allowed for better investigation of how consumers value different domain names at legacy TLDs and new gTLDs. However, the paucity of this type of detailed data available to us makes such an exercise currently impossible.

#### *Add-on Prices and Availability*

Examples of add-on services offered by registrars include hosting, email, server, SSL, privacy, website builder, eCommerce, DNS, and forwarding services. Requests for add-on services and relevant prices were sent to registrars in both Phase I and Phase II, but none provided data. Therefore, in Phase I, we manually collected current add-on prices and availability from a sample of 35 registrar webpages.<sup>27</sup> Our Phase I results showed a large variety of add-on categories offered by registrars, with each registrar often offering multiple products with varying prices within each category. Due to the wide range of add-on products and prices, an update to our Phase I analysis was unlikely to illuminate any competitive effects of the New gTLD Program. In Phase II, we therefore limited our analysis to a smaller set of registrars with the intention of analyzing whether the marketplace for add-on services has changed in a meaningful way or not. For the Phase II study, we manually collected current add-on prices and availability from ten registrar webpages.<sup>28</sup>

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<sup>25</sup> Many registrars that did not offer publicly-available pricing data were consulting registrars and did not have websites where consumers could shop for individual domain names.

<sup>26</sup> Retail price information for one gTLD was unavailable.

<sup>27</sup> Prices were collected either from price lists or via manual searches. In the case of manual searches, “testsomethinggeneric.tld” was used across a set of TLDs to ensure add-on prices did not vary across TLDs within a registrar. No differences were observed in add-on prices across TLDs within the same registrar.

<sup>28</sup> Registrars were selected based on the number of registrations made during the period of December 2014 through October 2015. We selected the 10 registrars with the highest number of registrations during that period.

***Summary of Data Collected***

Tables 1A and 1B below outline general statistics regarding the number of TLDs from which we were able to obtain price and registration volume data in Phase I and Phase II, respectively.

**Table 1A**  
**Summary of Collected Phase I Data**

		<b>Legacy TLDs</b>	<b>New gTLDs</b>	<b>All TLDs</b>
<b>Total in Sample</b>		<b>14</b>	<b>109</b>	<b>123</b>
<b>Sunrise Prices</b>	Number of TLDs with Available Data	5	82	87
	Percent of Total Registrations	0.0%	11.6%	0.3%
<b>April 2015 Wholesale Prices</b>	Number of TLDs with Available Data	10	78	89
	Percent of Total Registrations	99.6%	68.7%	98.9%
<b>April 2015 Retail Prices</b>	Number of TLDs with Available Data	14	108	122
	Average Number of Offering Registrars Across TLDs	20	22	21
	Collected Registrars' Percent of TLD Registrations	55.7%	62.8%	55.9%
<b>Registration Volume Data</b>	TLDs With Historical Registration Data	14	109	123

**Notes:**

[1] Percent of Total Registrations for Sunrise Prices reports the sunrise volume data for TLDs with pricing information in our sample as a fraction of all April registration volume for our full sample of TLDs.

[2] Percent of Total Registrations for April 2015 Wholesale Prices reports the wholesale volume data for TLDs with pricing information in our sample as a fraction of all April registration volume for our full sample of TLDs.

[3] Average Number of Offering Registrars Across TLDs reports, on average, legacy TLDs were offered by 20 registrars.

[4] Collected Registrars' Percent of TLD Registrations reports the retail volume data for TLDs with pricing information in our sample as a fraction of all April registration volume for our full sample of TLDs.

[5] Sunrise prices were not available for all TLDs due to a lack of a response from the registries.

[6] Wholesale prices were not available for all TLDs due to a lack of a response from the registries.

[7] Retail prices were not available either for lack of offering registrars or lack of available list price information.

**Sources:**

[1] Wholesale prices were provided by operating registries and official ICANN documentation.

[2] Retail prices were collected from registrar websites.

[3] Volume data were provided through Monthly Transaction Reports.

**Table 1B**  
**Summary of Collected Phase II Data**

		Legacy TLDs	New gTLDs	All TLDs
<b>Total in Sample</b>		<b>14</b>	<b>139</b>	<b>153</b>
<b>Sunrise Prices</b>	Number of TLDs with Available Data	6	104	110
	Percent of Total Registrations	4.3%	82.5%	10.2%
<b>March 2016 Wholesale Prices</b>	Number of TLDs with Available Data	12	105	117
	Percent of Total Registrations	99.8%	45.5%	95.7%
<b>March 2016 Retail Prices</b>	Number of TLDs with Available Data	14	136	150
	Average Number of Offering Registrars Across TLDs	24	20	20
	Percent of Total Registrations	100.0%	99.0%	99.9%
	Collected Registrars' Percent of TLD Registrations	54.2%	44.1%	53.4%
<b>Registration Volume Data</b>	TLDs With Historical Registration Data	14	139	153

**Notes:**

[1] Percent of Total Registrations for Sunrise prices reports the share of March 2016 registrations of TLDs in our sample accounted for by TLDs for which Sunrise pricing data is available.

[2] Percent of Total Registrations for March 2016 Wholesale prices reports the share of March 2016 registrations of TLDs in our sample accounted for by TLDs for which current wholesale pricing data is available.

[3] Percent of Total Registrations for March 2016 retail prices reports the share of March 2016 registrations of TLDs in our sample accounted for by TLDs for which any retail pricing data is available.

[4] Collected Registrars' Percent of TLD Registrations reports the retail volume accounted for by registrars from whom pricing information was available for each TLD in our sample as a fraction of all March 2016 registration volume for our full sample of TLDs.

[5] Sunrise period and current wholesale prices were not available for all TLDs due to a lack of a response from the registries.

[6] Retail prices were not available for all TLDs either for lack of offering registrars or lack of available list price information.

[7] Average number of offering registrars across TLDs reports the average number of registrars from which retail pricing information was collected for each type of TLD.

**Sources:**

[1] Current and Sunrise period wholesale prices were provided by operating registries and official ICANN documentation.

[2] Retail prices were collected from registrar websites or provided by DNPrice.es.

[3] Volume data were provided through monthly transaction reports.



As shown in Table 1A, we collected retail price information in Phase I for 123 TLDs (this includes legacy TLDs and new gTLDs), with TLDs being offered by 21 registrars on average. Wholesale price information was provided for 78 new gTLDs and 89 TLDs overall, which account for 69 percent and 99 percent, respectively, of registrations in our original sample.<sup>29</sup> Additionally, add-on list prices were collected from a total of 35 registrars. Finally, historical registration volume data were available for all legacy and new gTLDs.

As shown in Table 1B, we collected retail price information in Phase II for 150 TLDs, with TLDs being offered by 20 registrars on average. Wholesale price information was provided for 105 new gTLDs and 117 TLDs overall, which account for 46 percent and 96 percent of registrations in our TLD sample, respectively.<sup>30</sup> Add-on list prices were collected from a total of ten registrars.

## **SECTION IV – RESULTS**

### ***Summary of Results***

This section summarizes how measures of price, registration volume, and other competition metrics have changed since our baseline measurements in Phase I. Specifically:

- We investigated how the new gTLD expansion increased the number of available TLDs over time. The expansion has continued since our Phase I Assessment; new gTLD registrations now account for 9 percent of all gTLD registrations.<sup>31</sup>
- We investigated how domain name registrations are distributed across registries and registrars. In Phase I we found that registration shares across registries and registrars, respectively, were more dispersed for new gTLDs as compared to legacy TLDs. That result persists in the Phase II results. We also observe noticeable movement in the set of the entities included in the largest 15 registries and registrars ranked by total domain registrations, as a result of the entry of new gTLD registries and growth in registrations made by different registrars who register new gTLD domains.
- We observe a noticeable decline in the share of gTLD registrations held by the top 4, top 8, and top 15 registries and registrars between Phase I and Phase II, with the top registry's share declining by 6.2 percent and the top registrar's share declining by 2.8 percent.<sup>32</sup>
- We note that there were considerable changes in the new gTLD registration shares of registrars, with the largest registrar in the Phase I Assessment dropping out of the top 15 registrars (as ranked by registration volume) and being replaced by a registrar whose share of new gTLD registrations increased by nearly 22 percent.

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<sup>29</sup> As noted above, we rely on price cap information as a substitute for legacy gTLD wholesale prices.

<sup>30</sup> As noted above, we rely on price cap information as a substitute for legacy gTLD wholesale prices.

<sup>31</sup> This is calculated as the total registrations reported in March 2016 monthly transaction reports for new gTLDs divided by the total number of registrations reported in March 2016 for new and legacy TLDs.

<sup>32</sup> Top registry and registrar are defined as the registry and registrar with the most registrations in any new gTLD as of November 2014.

Registrars located in China have become more prevalent among registrars with the largest shares of new gTLD registrations.

- We found that, in general, the share of new gTLD registrations attributable to the four or eight registries and registrars with the most registrations, respectively, is smaller than the share of legacy TLD registrations attributable to those registries and registrars, respectively. The share of new gTLD registrations attributable to the four or eight largest registries and registrars of new gTLDs, respectively, has declined in the year since our Phase I Assessment.<sup>33</sup>
- In Phase I, we found a significant amount of price dispersion. In Phase II, we continue to see considerable price dispersion. Although there has not been much change in wholesale price caps over the past year, retail prices and mark-ups for both new gTLDs and legacy TLDs have declined since Phase I.
- We investigated how our price-index values for legacy TLDs and new gTLDs have changed since the Phase I Assessment. In Phase I, we found that the overall price level for legacy TLDs was lower than that for new gTLDs. That result persists in Phase II. We find limited changes in the wholesale price indices and un-weighted retail price index, but see noticeable declines in the retail price index for both legacy TLDs and new gTLDs when the index is weighted by registration volume.<sup>34</sup>
- We investigated the extent to which new gTLDs have affected legacy TLD registrations. In Phase I, we did not identify any effect of new gTLD entry or registrations on legacy TLD registrations. That general result persists in Phase II, as legacy TLD registration activity does not appear to experience a systematic change in response to the New gTLD Program. As a result, total TLD registration has increased since the beginning of the New gTLD Program.
- We investigated the extent to which the entry of regionally-specific TLDs (e.g., .nyc) affected legacy and other new gTLDs. We typically observe a decline in new gTLD and legacy registrations after the entry of the regional TLD in the region relevant to that TLD, which suggests that regional TLDs may be viewed as substitutes for other new gTLDs and legacy TLDs.
- We find the largest percentage growth in the number of registry operators in the Asian Pacific and European regions.
- We find that new gTLDs continue to target registrants with a variety of interests, and the entry of new gTLDs within a given interest area is often associated with a decline in registration shares of other new gTLDs within the same interest area.
- We continue to observe considerable variation in the non-price characteristics of ancillary services offered by registrars.

In what follows, we first present a simple examination of how the number of TLDs has changed over time. We then examine whether there are any indications that the New gTLD Program has affected competition in the TLD marketplace based on changes in our Phase I Assessment baseline measurements.

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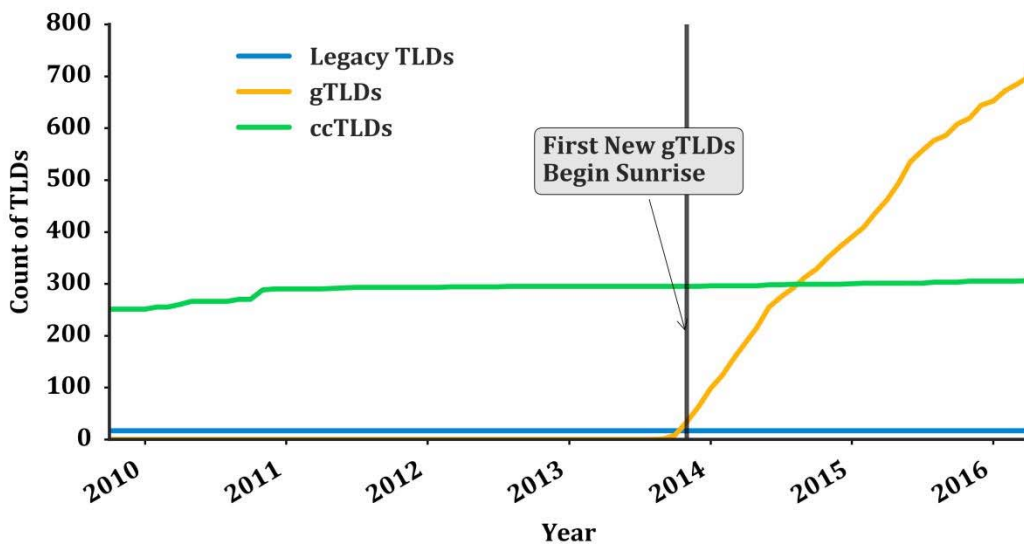
<sup>33</sup> Concentration is measured by the combined registration share held by the four and eight registries with the largest shares of new gTLD registrations.

<sup>34</sup> As discussed above, we rely on price cap data as a substitute for legacy TLD wholesale prices.

### Number of Available TLDs Over Time

We first examine how the expansion of the New gTLD Program has affected the number of TLDs available to consumers; these data are plotted below in Figure 1.

**Figure 1**  
**Cumulative Number of Available Legacy TLDs and gTLDs (2009 - 2016)**



#### Notes:

- [1] The entrance for each gTLD is defined as the end of its Sunrise period.
- [2] Only new gTLDs with non-zero registration volumes as of March 2016 are included as being publicly available.

#### Sources:

- [1] Sunrise period dates are collected from ICANN's website; <https://newgtlds.icann.org/en/program-status/sunrise-claims-periods>
- [2] ccTLD entrance dates were provided by ICANN.

Prior to the entry of the first new gTLDs, 14 legacy TLD domain names without certain restrictive registration requirements were available. The first new gTLDs were introduced in late 2013, and by the end of 2014, the number of available new gTLDs had increased to 428; in addition to the 14 available legacy TLDs, this resulted in a total of 442 gTLDs being available to consumers. As of March 2016, there are 955 available new gTLDs and 969 gTLDs including legacy TLDs.

### Baseline Analyses

Given the available data, we focus on examining the distribution of prices and registration volumes across and within TLDs. In our Phase II Assessment, we are able to examine how these baseline measurements have changed over the course of one year.

#### Registration Distributions

We first examine the current distribution of domain name registrations. Tables 2A-2F below show the share of domain name registrations within legacy TLDs and new gTLDs for

the top 15 registries as ranked by their share of registrations during the Phase I Assessment and the Phase II Assessment.

Table 2A shows the top 15 registries based on their share of all registrations as of *November 2014* (i.e., as they were ranked in the Phase I Assessment). As can be seen below, Verisign, which operates .com, .net, and .name, remains the largest registry and has slightly increased its share of legacy TLD registrations from 86.9 percent to 87.2 percent. However, most movement in registration shares occurred among all registrations rather than legacy registrations. This suggests that registration activity in the new gTLDs, rather than in legacy TLDs, is affecting overall registry shares of registrations. Table 2B shows the top 15 registries ranked by their share of all registrations as of March 2016. Comparing this list of registries to those in Table 2A, new registries that are associated with new gTLDs have entered the top 15 ranking, such as Jiangsu Bangning Science & Technology, First Registry, Rightside, and 6A Queensway, and Dotsite. (These registries had no registrations in the Phase I Assessment and do not operate legacy TLDs.)

**Table 2A**  
**Registry Operator Shares of All Registrations (Legacy and New gTLDs)**  
*Top 15 Registry Operators by Share of All Registrations as of November 2014*

	Number of TLDs Operated			Share of Registrations					
	by Registry Operator			All TLDs			Legacy TLDs		
	Phase			Phase			Phase		
	I	II	Change	I	II	Change	I	II	Change
<b>Verisign</b>	3	16	13	85.5%	79.4%	-6.2%	86.9%	87.2%	0.3%
<b>Public Interest Registry</b>	1	6	5	6.7%	6.2%	-0.5%	6.8%	6.8%	0.0%
<b>Afilias</b>	4	18	14	4.0%	3.9%	-0.2%	4.1%	3.9%	-0.2%
<b>Neustar</b>	1	2	1	1.6%	1.3%	-0.3%	1.7%	1.4%	-0.2%
<b>XYZ.COM</b>	2	3	1	0.5%	1.5%	1.0%	0.0%	0.0%	0.0%
<b>Donuts</b>	52	186	134	0.4%	0.9%	0.5%	0.0%	0.0%	0.0%
<b>Dot Asia Organisation</b>	1	1	0	0.2%	0.1%	-0.1%	0.2%	0.1%	-0.1%
<b>dot Berlin</b>	1	1	0	0.1%	0.0%	-0.1%	0.0%	0.0%	0.0%
<b>.Club Domains</b>	1	1	0	0.1%	0.4%	0.3%	0.0%	0.0%	0.0%
<b>Uniregistry</b>	10	24	14	0.1%	0.5%	0.4%	0.0%	0.0%	0.0%
<b>Telnic</b>	1	1	0	0.1%	0.1%	0.0%	0.1%	0.1%	0.0%
<b>Registry Services Corporation</b>	1	1	0	0.1%	0.2%	0.1%	0.1%	0.2%	0.1%
<b>ICM Registry</b>	1	4	3	0.1%	0.1%	0.0%	0.1%	0.1%	0.0%
<b>Real Estate Domains</b>	1	1	0	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%
<b>Zodiac</b>	1	4	3	0.1%	0.6%	0.5%	0.0%	0.0%	0.0%
<b>All Other Registry Operators</b>				0.4%	4.8%	4.3%	0.1%	0.1%	0.0%

**Notes:**

[1] Registration volumes are collected from monthly transaction reports provided to ICANN by registry operators. Phase I registration shares are as of November 2014. Phase II registration shares are as of March 2016.

[2] Each TLD's registration volume was assigned to a registry operator as specified in the registry agreement with ICANN.

[3] Each TLD was then linked to a parent company registry operator, the total domains for each of its associated TLDs was summed, and registration shares were calculated based on these sums for all registry operators.

[4] Registry operators shown are the top 15 as ranked by share of all registrations as of November 2014.

**Source:**

[1] Registration data is obtained from monthly transaction reports provided to ICANN by registry operators as of November 2014 for Phase I shares and March 2016 for Phase II shares.

**Table 2B**  
**Registry Operator Shares of All Registrations (Legacy and New gTLDs)**  
*Top 15 Registry Operators by Share of All Registrations as of March 2016*

	Number of TLDs Operated			Share of Registrations					
	by Registry Operator			All TLDs			Legacy TLDs		
	Phase			Phase			Phase		
	I	II	Change	I	II	Change	I	II	Change
<b>Verisign</b>	3	16	13	85.5%	79.4%	-6.2%	86.9%	87.2%	0.3%
<b>Public Interest Registry</b>	1	6	5	6.7%	6.2%	-0.5%	6.8%	6.8%	0.0%
<b>Afilias</b>	4	18	14	4.0%	3.9%	-0.2%	4.1%	3.9%	-0.2%
<b>XYZ.COM</b>	2	3	1	0.5%	1.5%	1.0%	0.0%	0.0%	0.0%
<b>Neustar</b>	1	2	1	1.6%	1.3%	-0.3%	1.7%	1.4%	-0.2%
<b>Jiangsu Bangning Science &amp; Technology</b>	1	1	0	0.0%	1.0%	1.0%	0.0%	0.0%	0.0%
<b>Donuts</b>	52	186	134	0.4%	0.9%	0.5%	0.0%	0.0%	0.0%
<b>Zodiac</b>	1	4	3	0.1%	0.6%	0.5%	0.0%	0.0%	0.0%
<b>Uniregistry</b>	10	24	14	0.1%	0.5%	0.4%	0.0%	0.0%	0.0%
<b>First Registry</b>	0	1	1	0.0%	0.5%	0.5%	0.0%	0.0%	0.0%
<b>.Club Domains</b>	1	1	0	0.1%	0.4%	0.3%	0.0%	0.0%	0.0%
<b>Rightside</b>	9	39	30	0.1%	0.3%	0.2%	0.0%	0.0%	0.0%
<b>6A Queensway</b>	0	4	4	0.0%	0.3%	0.3%	0.0%	0.0%	0.0%
<b>Registry Services Corporation</b>	1	1	0	0.1%	0.2%	0.1%	0.1%	0.2%	0.1%
<b>Dotsite</b>	0	1	1	0.0%	0.2%	0.2%	0.0%	0.0%	0.0%
<b>All Other Registry Operators</b>				0.9%	3.0%	2.1%	0.5%	0.4%	0.0%

**Notes:**

- [1] Registration volumes are collected from monthly transaction reports provided to ICANN by registry operators. Phase I registration shares are as of November 2014. Phase II registration shares are as of March 2016.
- [2] Each TLD's registration volume was assigned to a registry operator as specified in the registry agreement with ICANN.
- [3] Each TLD was then linked to a parent company registry operator, the total domains for each of its associated TLDs was summed, and registration shares were calculated based on these sums for all registry operators.
- [4] Registry operators shown are the top 15 as ranked by share of all registrations as of March 2016.

**Source:**

- [1] Registration data is obtained from monthly transaction reports provided to ICANN by registry operators as of November 2014 for Phase I shares and March 2016 for Phase II shares.

Tables 2C and 2D, below, rank the top 15 registries by new gTLD registrations as of November 2014 and March 2016, respectively. Table 2C shows that there has been a considerable decline in the registration shares of several new gTLD registries that were among the top 15 registries of new gTLDs in Phase I. Table 2D shows the top 15 registries by new gTLD registrations as of March 2016 and draws attention to the entry and growth of new registries among the top 15.

**Table 2C**  
**Registry Operator Shares of New gTLD Registrations**  
*Top 15 Registry Operators by Share of New gTLD Registrations as of November 2014*

Registry Operators	Number of New gTLDs Operated by Registry Operator			Share of New gTLD Registrations		
	Phase		Change	Phase		
	I	II		I	II	Change
<b>XYZ.COM</b>	2	3	1	28.4%	16.5%	-11.8%
<b>Donuts</b>	52	186	134	26.4%	10.0%	-16.4%
<b>dot Berlin</b>	1	1	0	6.1%	0.4%	-5.7%
<b>.Club Domains</b>	1	1	0	5.7%	4.6%	-1.2%
<b>Uniregistry</b>	10	24	14	5.6%	5.9%	0.3%
<b>Real Estate Domains</b>	1	1	0	3.4%	0.5%	-2.9%
<b>Zodiac</b>	1	4	3	3.3%	6.5%	3.2%
<b>Rightside</b>	9	39	30	3.2%	2.9%	-0.3%
<b>NYC Department of Information Technology and Telecom</b>	1	1	0	2.5%	0.5%	-2.0%
<b>GMO Registry</b>	1	4	3	2.4%	0.3%	-2.1%
<b>OVH</b>	1	1	0	2.2%	0.3%	-1.9%
<b>Dot London Domains</b>	1	1	0	2.1%	0.4%	-1.7%
<b>NetCologne</b>	2	2	0	1.4%	0.2%	-1.1%
<b>Bayern Connect</b>	1	1	0	1.0%	0.2%	-0.8%
<b>Afilias</b>	2	16	14	0.8%	3.5%	2.7%
<b>All Other Registry Operators</b>				5.7%	47.4%	41.7%

**Notes:**

[1] Registration volumes are collected from monthly transaction reports provided to ICANN by registry operators. Phase I registration shares are as of November 2014. Phase II registration shares are as of March 2016.

[2] Each TLD's registration volume was assigned to a registry operator as specified in the registry agreement with ICANN.

[3] Each TLD was then linked to a parent company registry operator, the total domains for each of its associated TLDs was summed, and registration shares were calculated based on these sums for all registry operators.

[4] Registry operators shown are the top 15 as ranked by share of new gTLD registrations only as of November 2014.

**Source:**

[1] Registration data is obtained from monthly transaction reports provided to ICANN by registry operators as of November 2014 for Phase I shares and March 2016 for Phase II shares.

**Table 2D**  
**Registry Operator Shares of New gTLD Registrations**  
*Top 15 Registry Operators by Share of New gTLD Registrations as of March 2016*

Registry Operators	Number of New gTLDs Operated by Registry Operator			Share of New gTLD Registrations		
	Phase			Phase		
	I	II	Change	I	II	Change
<b>XYZ.COM</b>	2	3	1	28.4%	16.5%	-11.8%
<b>Jiangsu Bangning Science &amp; Technology</b>	1	1	0	0.5%	11.0%	10.5%
<b>Donuts</b>	52	186	134	26.4%	10.0%	-16.4%
<b>Zodiac</b>	1	4	3	3.3%	6.5%	3.2%
<b>Uniregistry</b>	10	24	14	5.6%	5.9%	0.3%
<b>First Registry</b>	0	1	1	0.0%	5.3%	5.3%
<b>.Club Domains</b>	1	1	0	5.7%	4.6%	-1.2%
<b>Afilias</b>	2	16	14	0.8%	3.5%	2.7%
<b>Rightside</b>	9	39	30	3.2%	2.9%	-0.3%
<b>6A Queensway</b>	0	4	4	0.0%	2.9%	2.9%
<b>Dotsite</b>	0	1	1	0.0%	2.1%	2.1%
<b>Dot Science</b>	0	1	1	0.0%	2.1%	2.1%
<b>Dot Bid</b>	0	1	1	0.0%	2.0%	2.0%
<b>Elegant Leader</b>	0	1	1	0.0%	1.9%	1.9%
<b>Beijing Qianiang Wangjing Technology Development Co.</b>	0	1	1	0.0%	1.8%	1.8%
<b>All Other Registry Operators</b>				26.1%	20.9%	-5.1%

**Notes:**

[1] Registration volumes are collected from monthly transaction reports provided to ICANN by registry operators. Phase I registration shares are as of November 2014. Phase II registration shares are as of March 2016.

[2] Each TLD's registration volume was assigned to a registry operator as specified in the registry agreement with ICANN.

[3] Each TLD was then linked to a parent company registry operator, the total domains for each of its associated TLDs was summed, and registration shares were calculated based on these sums for all registry operators.

[4] Registry operators shown are the top 15 as ranked by share of new gTLD registrations only as of March 2016.

**Source:**

[1] Registration data is obtained from monthly transaction reports provided to ICANN by registry operators as of November 2014 for Phase I shares and March 2016 for Phase II shares.



**Table 2E**  
**Registration Shares Across Registry Operators**  
*Phase I and II Comparison*  
*Ranked by Share of All Registrations as of November 2014*

	<b>Share of All Registrations (Legacy and New gTLD)</b>		
	<b>Phase</b>		
	<b>I</b>	<b>II</b>	<b>Change</b>
<b>Top Registry Operator</b>	85.5%	79.4%	-6.2%
<b>Top 4 Registry Operators</b>	97.9%	90.7%	-7.1%
<b>Top 8 Registry Operators</b>	99.1%	93.3%	-5.8%
<b>Top 15 Registry Operators</b>	99.6%	95.2%	-4.3%

**Notes:**

[1] Registration volumes are collected from monthly transaction reports provided to ICANN by registry operators.

[2] Each TLD's registration volume was assigned to a registry operator as specified in the registry agreement with ICANN.

[3] Each TLD was then linked to a parent company registry operator, the total domains for each of its associated TLDs was summed, and registration shares were calculated based on these sums for all registry operators.

[4] Registry operators are ranked by share of all registrations across all TLDs as of November 2014.

**Source:**

[1] Registration data is obtained from monthly transaction reports provided to ICANN by registry operators as of November 2014 for Phase I shares and March 2016 for Phase II shares.

**Table 2F**  
**Registration Shares Across Registry Operators**  
*Phase I and II Comparison*  
*Ranked by Share of New gTLD Registrations as of November 2014*

	Share of All New gTLD Registrations		
	Phase I	Phase II	Change
<b>Top Registry Operator</b>	28.4%	16.5%	-11.8%
<b>Top 4 Registry Operators</b>	66.6%	31.5%	-35.1%
<b>Top 8 Registry Operators</b>	82.1%	47.2%	-34.8%
<b>Top 15 Registry Operators</b>	94.3%	52.6%	-41.7%

**Notes:**

[1] Registration volumes are collected from monthly transaction reports provided to ICANN by registry operators.

[2] Each TLD's registration volume was assigned to a registry operator as specified in the registry agreement with ICANN.

[3] Each TLD was then linked to a parent company registry operator, the total domains for each of its associated TLDs was summed, and registration shares were calculated based on these sums for all registry operators.

[4] Registry operators are ranked by share of registrations across new gTLDs only as of November 2014.

**Source:**

[1] Registration data is obtained from monthly transaction reports provided to ICANN by registry operators as of November 2014 for Phase I shares and March 2016 for Phase II shares.

Table 2E above shows that the top four registries, as ranked by the share of *all registrations* as of November 2014, were responsible for 97.9 percent of all registrations in Phase I, and that this share has fallen slightly to 90.7 percent in Phase II. By contrast, Table 2F shows that the top four registries, as ranked by the share of *new gTLD registrations* as of November 2014, were responsible for 66.6 percent of all new gTLD registrations in Phase I, and that share has been cut roughly in half in Phase II. In general, the registration shares for new gTLDs are less concentrated compared to legacy TLDs and have continued to become less concentrated in the year since our Phase I Assessment.

Tables 3A through 3F below show a similar, though less pronounced, story for the largest 15 registrars by share of registrations. Table 3A shows that the top 15 registrars as of November 2014 are each generally responsible for a smaller share of all registrations in Phase II than they were in Phase I. Table 3B shows the top 15 registrars as of March 2016 based on all registrations. The registrars listed in Table 3B are largely the same as the registrars listed in Table 3A, showing that there has been less compositional change among

the top 15 registrars than among the top 15 registries based on all registrations.<sup>35</sup> (See Tables 2A and 2B above.) Tables 3C and 3D, however, demonstrate that there has been a considerable change in the composition of the top 15 registrars ranked by new gTLD registrations since Phase I. Table 3C shows the top 15 registrars of new gTLDs in Phase I, and Table 3D shows the top 15 registrars of new gTLDs in Phase II. The difference in registrars listed in the two tables draws attention to the instability of new gTLD registration activity across registrars. These results are highlighted in Tables 3E and 3F. Table 3E shows small changes in the share of all registrations made by the largest 15 registrars as of November 2014;<sup>36</sup> Table 3F shows considerably large changes in the share of new gTLD registrations made by the largest 15 registrars of new gTLDs as of November 2014.

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<sup>35</sup> Because legacy TLDs account for a large portion of all registrations, results that rank registrars by legacy TLD registrations are very similar to those shown in Tables 3A and 3B.

<sup>36</sup> Similar results not shown here are found for the largest 15 registrars based on legacy TLD registrations as of November 2014.

**Table 3A**  
**Registrar Shares of All Registrations (Legacy and New gTLD)**  
*Top 15 Registrars Ranked by Share of All Registrations as of November 2014*

Registrar	Share of All Registrations			Share of Legacy TLD Registrations			Share of New gTLD Registrations		
	Phase			Phase			Phase		
	I	II	Change	I	II	Change	I	II	Change
<b>GoDaddy</b>	32.0%	29.3%	-2.8%	32.3%	31.5%	-0.8%	14.8%	6.9%	-7.9%
<b>eNom</b>	7.4%	6.6%	-0.9%	7.5%	7.0%	-0.5%	5.4%	2.4%	-3.0%
<b>Tucows</b>	5.4%	4.5%	-0.8%	5.4%	4.9%	-0.5%	2.1%	1.2%	-0.9%
<b>Network Solutions</b>	5.0%	3.6%	-1.4%	4.8%	3.9%	-1.0%	15.3%	0.6%	-14.7%
<b>1&amp;1</b>	3.8%	3.2%	-0.6%	3.8%	3.4%	-0.4%	4.3%	1.6%	-2.6%
<b>PDR Ltd.</b>	3.0%	2.9%	-0.1%	3.0%	3.0%	0.0%	0.8%	1.7%	0.9%
<b>Wild West</b>	2.4%	2.0%	-0.4%	2.4%	2.1%	-0.3%	0.3%	0.2%	-0.2%
<b>GMO Internet</b>	2.3%	2.4%	0.0%	2.3%	2.1%	-0.2%	5.3%	5.5%	0.1%
<b>Register.com</b>	1.8%	1.3%	-0.5%	1.8%	1.4%	-0.4%	0.3%	0.1%	-0.2%
<b>Hichina Zhicheng Technology LTD</b>	1.6%	3.0%	1.4%	1.6%	3.2%	1.6%	0.0%	0.1%	0.1%
<b>Fastdomain</b>	1.5%	1.3%	-0.2%	1.6%	1.4%	-0.1%	0.0%	0.0%	0.0%
<b>Melbourne IT</b>	1.5%	1.0%	-0.5%	1.5%	1.1%	-0.4%	0.0%	0.1%	0.1%
<b>Domain.com</b>	1.4%	1.2%	-0.2%	1.4%	1.3%	-0.1%	0.0%	0.0%	0.0%
<b>XinNet Technology</b>	1.3%	1.0%	-0.4%	1.2%	1.0%	-0.3%	6.6%	0.8%	-5.8%
<b>OVH</b>	1.2%	1.1%	-0.1%	1.2%	1.1%	-0.1%	2.4%	0.8%	-1.7%
<b>All Other Registrars</b>	28.4%	35.8%	7.4%	28.2%	31.6%	3.4%	42.3%	78.2%	35.9%

**Notes:**

- [1] Registration volumes are collected from monthly transaction reports provided to ICANN by operating registries.
- [2] Within a TLD, registration volumes were assigned to distinct registrars. Registrars are identified by their IANA ID.
- [3] Registration volumes within a registrar were then summed, and registration shares were calculated based on these sums for all registrars.
- [4] Registrars shown are the top 15 as ranked by share of all registrations as of November 2014.

**Source:**

- [1] Registration data is derived from monthly transaction reports provided to ICANN by operating registries as of November 2014 for Phase I shares and March 2016 for Phase II shares.

**Table 3B**  
**Registrar Shares of All Registrations (Legacy and New gTLD)**  
*Top 15 Registrars Ranked by Share of All Registrations as of March 2016*

Registrar	Share of All Registrations			Share of Legacy TLD Registrations			Share of New gTLD Registrations		
	Phase			Phase			Phase		
	I	II	Change	I	II	Change	I	II	Change
<b>GoDaddy</b>	32.0%	29.3%	-2.8%	32.3%	31.5%	-0.8%	14.8%	6.9%	-7.9%
<b>eNom</b>	7.4%	6.6%	-0.9%	7.5%	7.0%	-0.5%	5.4%	2.4%	-3.0%
<b>Tucows</b>	5.4%	4.5%	-0.8%	5.4%	4.9%	-0.5%	2.1%	1.2%	-0.9%
<b>Network Solutions</b>	5.0%	3.6%	-1.4%	4.8%	3.9%	-1.0%	15.3%	0.6%	-14.7%
<b>1&amp;1</b>	3.8%	3.2%	-0.6%	3.8%	3.4%	-0.4%	4.3%	1.6%	-2.6%
<b>Hichina Zhicheng Technology LTD</b>	1.6%	3.0%	1.4%	1.6%	3.2%	1.6%	0.0%	0.1%	0.1%
<b>PDR Ltd.</b>	3.0%	2.9%	-0.1%	3.0%	3.0%	0.0%	0.8%	1.7%	0.9%
<b>Xiamen eName Technology</b>	0.5%	2.6%	2.2%	0.5%	2.3%	1.8%	0.0%	6.3%	6.3%
<b>Chengdu West Dimension Digital</b>	0.4%	2.6%	2.3%	0.3%	0.4%	0.1%	2.9%	24.8%	21.9%
<b>GMO Internet</b>	2.3%	2.4%	0.0%	2.3%	2.1%	-0.2%	5.3%	5.5%	0.1%
<b>Wild West</b>	2.4%	2.0%	-0.4%	2.4%	2.1%	-0.3%	0.3%	0.2%	-0.2%
<b>Register.com</b>	1.8%	1.3%	-0.5%	1.8%	1.4%	-0.4%	0.3%	0.1%	-0.2%
<b>Fastdomain</b>	1.5%	1.3%	-0.2%	1.6%	1.4%	-0.1%	0.0%	0.0%	0.0%
<b>Domain.com</b>	1.4%	1.2%	-0.2%	1.4%	1.3%	-0.1%	0.0%	0.0%	0.0%
<b>OVH</b>	1.2%	1.1%	-0.1%	1.2%	1.1%	-0.1%	2.4%	0.8%	-1.7%
<b>All Other Registrars</b>	30.5%	32.5%	2.1%	30.2%	31.0%	0.8%	46.0%	48.1%	2.0%

**Notes:**

- [1] Registration volumes are collected from monthly transaction reports provided to ICANN by operating registries.
- [2] Within a TLD, registration volumes were assigned to distinct registrars. Registrars are identified by their IANA ID.
- [3] Registration volumes within a registrar were then summed, and registration shares were calculated based on these sums for all registrars.
- [4] Registrars shown are the top 15 as ranked by share of all registrations as of March 2016.

**Source:**

- [1] Registration data is derived from monthly transaction reports provided to ICANN by operating registries as of November 2014 for Phase I shares and March 2016 for Phase II shares.

**Table 3C**  
**Registrar Shares of New gTLD Registrations**  
*Top 15 Registrars Ranked by Share of New gTLD Registrations as of November 2014*

<b>Registrar</b>	<b>Share of New gTLD Registrations</b>		
	<b>Phase I</b>	<b>Phase II</b>	<b>Change</b>
<b>Network Solutions</b>	15.3%	0.6%	-14.7%
<b>GoDaddy</b>	14.8%	6.9%	-7.9%
<b>XinNet Technology</b>	6.6%	0.8%	-5.8%
<b>eNom</b>	5.4%	2.4%	-3.0%
<b>GMO Internet</b>	5.3%	5.5%	0.1%
<b>Psi USA</b>	4.6%	0.5%	-4.2%
<b>1&amp;1</b>	4.3%	1.6%	-2.6%
<b>Uniregistrar</b>	3.5%	2.6%	-0.9%
<b>NameShare</b>	3.4%	0.5%	-3.0%
<b>United Domains</b>	3.3%	0.9%	-2.4%
<b>Chengdu West Dimension Digital</b>	2.9%	24.8%	21.9%
<b>OVH</b>	2.4%	0.8%	-1.7%
<b>Tucows</b>	2.1%	1.2%	-0.9%
<b>Mesh Digital</b>	2.1%	0.8%	-1.4%
<b>Crononag</b>	1.7%	0.6%	-1.1%
<b>All Other Registrars</b>	22.2%	49.8%	27.6%

**Notes:**

[1] Registration volumes are collected from monthly transaction reports provided to ICANN by operating registries.

[2] Within a TLD, registration volumes were assigned to distinct registrars. Registrars are identified by their IANA ID.

[3] Registration volumes within a registrar were then summed, and registration shares were calculated based on these sums for all registrars.

[4] Registrars shown are the top 15 as ranked by share of new gTLD registrations as of November 2014.

**Source:**

[1] Registration data is derived from monthly transaction reports provided to ICANN by operating registries as of November 2014 for Phase I shares and March 2016 for Phase II shares.

**Table 3D**  
**Registrar Shares of New gTLD Registrations**  
*Top 15 Registrars Ranked by Share of New gTLD Registrations as of March 2016*

<b>Registrar</b>	<b>Share of New gTLD Registrations</b>		
	<b>Phase I</b>	<b>Phase II</b>	<b>Change</b>
<b>Chengdu West Dimension Digital</b>	2.9%	24.8%	21.9%
<b>Paradise Registrars</b>	0.2%	9.3%	9.0%
<b>GoDaddy</b>	14.8%	6.9%	-7.9%
<b>Xiamen eName Technology</b>	0.0%	6.3%	6.3%
<b>GMO Internet</b>	5.3%	5.5%	0.1%
<b>Alibaba</b>	0.0%	5.4%	5.4%
<b>Namecheap</b>	0.2%	4.6%	4.4%
<b>West263 International</b>	0.0%	2.8%	2.8%
<b>Uniregistrar</b>	3.5%	2.6%	-0.9%
<b>eNom</b>	5.4%	2.4%	-3.0%
<b>PDR Ltd.</b>	0.8%	1.7%	0.9%
<b>Telecity Internal Registrar</b>	0.0%	1.7%	1.7%
<b>1&amp;1</b>	4.3%	1.6%	-2.6%
<b>Nawang</b>	0.1%	1.3%	1.2%
<b>Tucows</b>	2.1%	1.2%	-0.9%
<b>All Other Registrars</b>	60.3%	22.1%	-38.2%

**Notes:**

[1] Registration volumes are collected from monthly transaction reports provided to ICANN by operating registries.

[2] Within a TLD, registration volumes were assigned to distinct registrars. Registrars are identified by their IANA ID.

[3] Registration volumes within a registrar were then summed, and registration shares were calculated based on these sums for all registrars.

[4] Registrars shown are the top 15 as ranked by share of new gTLD registrations as of March 2016.

**Source:**

[1] Registration data is derived from monthly transaction reports provided to ICANN by operating registries as of November 2014 for Phase I shares and March 2016 for Phase II shares.

**Table 3E**  
**Registration Shares Across Registrars**  
*Phase I and II Comparison*  
*Ranked by Share of All Registrations (Legacy and New gTLD) as of November 2014*

	<b>Share of All Registrations (Legacy and New gTLD)</b>		
	<b>Phase I</b>	<b>Phase II</b>	<b>Change</b>
<b>Top Registrar</b>	32.0%	29.3%	-2.8%
<b>Top 4 Registrars</b>	49.8%	43.9%	-5.9%
<b>Top 8 Registrars</b>	61.3%	54.4%	-6.9%
<b>Top 15 Registrars</b>	71.6%	64.2%	-7.4%

**Notes:**

- [1] Registration volumes are collected from monthly transaction reports provided to ICANN by operating registries.
- [2] Within a TLD, registration volumes were assigned to distinct registrars. Registrars are identified by their IANA ID.
- [3] Registration volumes within a registrar were then summed, and registration shares were calculated based on these sums for all registrars.
- [4] Registrars are ranked by share of all registrations across all TLDs as of November 2014.

**Source:**

- [1] Registration data is derived from monthly transaction reports provided to ICANN by operating registries as of November 2014 for Phase I shares and March 2016 for Phase II shares.



**Table 3F**  
**Registration Shares Across Registrars**  
*Phase I and II Comparison*  
*Ranked by Share of New gTLD Registrations as of November 2014*

	<b>Share of All New gTLD Registrations</b>		
	<b>Phase I</b>	<b>Phase II</b>	<b>Change</b>
<b>Top Registrar</b>	15.3%	0.6%	-14.7%
<b>Top 4 Registrars</b>	42.1%	10.7%	-31.4%
<b>Top 8 Registrars</b>	59.8%	20.8%	-39.0%
<b>Top 15 Registrars</b>	77.8%	50.2%	-27.6%

**Notes:**

[1] Registration volumes are collected from monthly transaction reports provided to ICANN by operating registries.

[2] Within a TLD, registration volumes were assigned to distinct registrars. Registrars are identified by their IANA ID.

[3] Registration volumes within a registrar were then summed, and registration shares were calculated based on these sums for all registrars.

[4] Registrars are ranked by share of all registrations across new gTLDs only as of November 2014.

**Source:**

[1] Registration data is derived from monthly transaction reports provided to ICANN by operating registries as of November 2014 for Phase I shares and March 2016 for Phase II shares.

Finally, the New gTLD Program allows culturally- or regionally-specific TLDs to be created. Table 4 below shows the number of registry operators which are based in each of ICANN's five regions,<sup>37</sup> and demonstrates an increase in the number of registry operators since Phase I, which is associated with the continuing entry of new gTLDs. In total, there are 125 new, active registry operators since Phase I, with the majority of growth occurring in Europe, Asia Pacific, and North America.

**Table 4**  
**Registry Operators Across Regions**

Region	Number of Registry Operator Parent Companies		
	Phase I	Phase II	Change
<b>Africa (AF)</b>	2	2	0
<b>Asia Pacific (AP)</b>	29	61	32
<b>Europe (EUR)</b>	61	122	61
<b>Latin America (LAC)</b>	3	6	3
<b>North America (NA)</b>	30	59	29

**Notes:**

[1] The number of Phase I registry operator parent companies is the count of registry operator parent companies in each region that were operating at least one TLD as of April 2015. The number of Phase II registry operator parent companies is the count of registry operator parent companies in each region that were operating at least one TLD as of March 2016.

[2] Some registry operator parent companies are active in multiple regions. This analysis counts the same registry operator parent company operating in two separate regions as two separate entities. As of Phase I there were 121 unique registry operator parent companies. As of Phase II there were 244 unique registry operator parent companies.

[3] New gTLD start dates are used to determine whether a registry operator parent company was active as of Phase I or Phase II.

**Sources:**

[1] Registry Operators, parent companies, and locations were provided by ICANN.

[2] gTLD start dates are collected from ICANN's website; <https://newgtlds.icann.org/en/program-status/sunrise-claims-periods>

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<sup>37</sup> When applicable, registry operators are identified with their parent company. Jurisdictions are based on those indicated in registry agreements.

### *Sunrise Price Distribution*

All new gTLDs must have a Sunrise period of at least 30 days. As discussed earlier, the purpose of a Sunrise period is to allow trademark holders the opportunity to register domain names that match their trademarks prior to other parties. New gTLDs are required to have such a Sunrise period, whereas legacy TLDs could elect to have a Sunrise period or not. One perspective is this structure helps trademark holders in that it gives them priority in choosing domain names in the new gTLD. However, others have raised concerns that this structure allows registries to exploit trademark holders by charging high prices. An example lies in .sucks, which had publicly stated Sunrise prices of \$2,499 per registration and was the cause of concern for some entities.<sup>38,39,40</sup>

Given these above concerns, we include a summary of Sunrise prices in our report to determine whether very high prices were observed in Phase II. Sunrise prices were provided by the TLD operating registry for five legacy TLDs and 82 new gTLDs in our sample for our Phase I Assessment. For our Phase II Assessment, we received additional Sunrise price data for one legacy TLD and 22 new gTLDs in our sample. Table 5 below provides data regarding the distribution of Sunrise prices (in USD) for legacy TLDs and new gTLDs from Phase I, and for those TLDs that were added to our sample in Phase II, and shows that the highest observed sunrise price in Phase II was equal to approximately \$254.

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<sup>38</sup> The operating registry for .sucks provides its suggested pricing online, available at <https://www.registry.sucks/products/>.

<sup>39</sup> .sucks is not included in our sample of gTLDs.

<sup>40</sup> For example, see the article “Is the Owner of the .sucks Domain Extorting Brands and Celebrities”, available at <http://www.dailydot.com/technology/dot-sucks-domain-name-icann/>

**Table 5**  
**Sunrise Price Distribution**  
*Phase I and II Comparison – Adjusted for CPI Inflation*

	Phase I Results		TLDs Incremental to Phase II	
	Legacy TLDs	New gTLDs	Legacy TLDs	New gTLDs
<b>Average</b>	\$44.78	\$150.64	\$65.14	\$153.77
<b>Minimum</b>	\$7.78	\$0.00	\$65.14	\$75.84
<b>25th Percentile</b>	\$9.02	\$80.90	\$65.14	\$76.09
<b>Median</b>	\$22.62	\$81.37	\$65.14	\$113.89
<b>75th Percentile</b>	\$66.75	\$81.53	\$65.14	\$252.64
<b>Maximum</b>	\$117.73	\$2,971.85	\$65.14	\$253.95
<b>Number of Obs.</b>	5	82	1	22

**Notes:**

[1] One-year registration prices are reported.

[2] Sunrise prices were not available for all TLDs either due to a lack of a response from the registries or lack of a one-year registration price.

[3] All prices are adjusted for CPI inflation between sunrise period and June 2016.

**Sources:**

[1] New gTLD sunrise price information was provided by operating registries.

[2] Sunrise price information for legacy TLDs was obtained from official ICANN documentation.

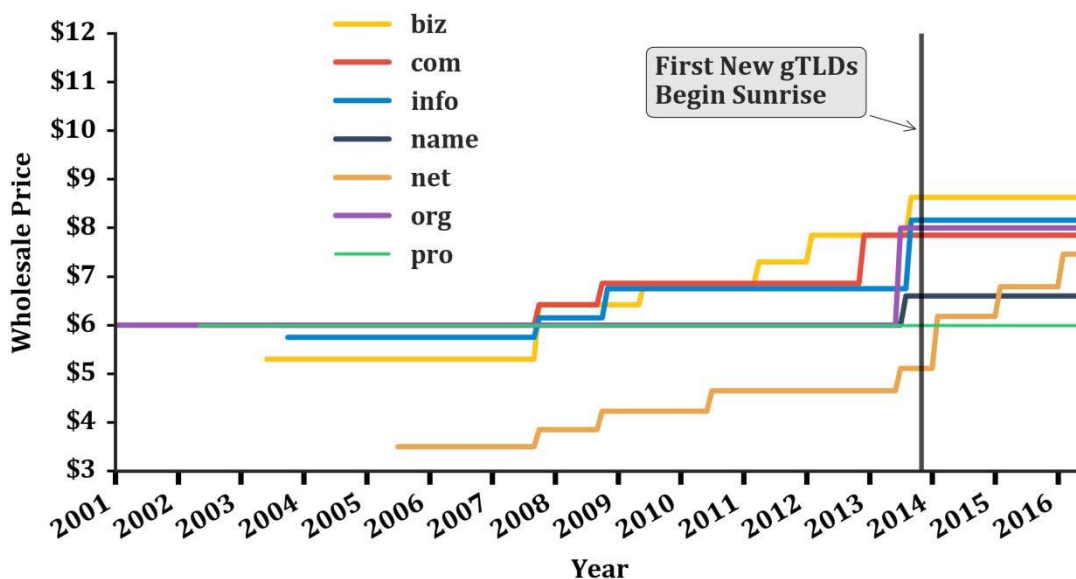
[3] CPI inflation figures from St. Louis Fed website; <https://fred.stlouisfed.org/series/CPIAUCSL>.

*Wholesale Price Distribution*

Figure 2 below shows historical wholesale price caps for the legacy TLDs .com, .net, .info, .org, .name, .pro, and .biz. These data are obtained from public price cap change correspondences between registries and ICANN and show that while price cap changes have been somewhat infrequent, they have trended upward over time. The graph also shows that the largest price cap change occurred in 2013 prior to the entry of the first new gTLDs for six of the seven legacy TLDs plotted below. While these data show legacy TLD price caps rather than actual wholesale prices, it should be noted that all seven legacy TLDs shown, with the exception of .com, have had price caps since 2013 (or earlier) that increase relative to the previous year's price; as a result, any increase in a legacy TLD's price cap can potentially be interpreted as the result of an increase in that TLD's wholesale price.<sup>41</sup> Therefore, Figure 2 allows us to roughly gauge whether these legacy TLDs raised wholesale prices after the entry of new gTLDs began; in doing so, we see that only .net has increased its price since the entry of the new gTLDs and appears to have done so annually.

<sup>41</sup> The price caps for .biz, .info, and .org, adjusted upwards in the second half of 2013 and became adjustable relative to the actual price charged on January 1, 2014. .name has had an adjustable price cap since June 2013, .net since July 2011, and .pro since January 2011. .com has had a fixed price cap since December 2012.

**Figure 2**  
**Historical Legacy Wholesale Price Caps (2001 - 2016)**



Figures 3A and 3B plot the distribution of wholesale price caps and prices for all legacy TLDs and new gTLDs in our sample as of Phase I and Phase II, respectively; these figures suggest that there exists higher price dispersion among new gTLDs as compared to legacy TLDs in both Phase I and Phase II. Although our legacy wholesale price data are represented by price caps, the lack of dispersion among price caps also reflects a lack of dispersion among actual wholesale prices.<sup>42</sup>

In our discussions regarding price dispersion here, and elsewhere in the report, it is important to note several items. First, when comparing legacy TLDs to new gTLDs, we must keep in mind that legacy TLDs historically had greater restrictions on pricing.<sup>43</sup> Second, the presence or absence of price dispersion does not imply a lack of competition since price dispersion can occur for a variety of reasons. For example, price dispersion might be expected if firms or products have been able to differentiate themselves, perhaps by offering better quality, certain product features or characteristics, better customer service, or through persuasive advertising. In this situation, consumers likely view the alternatives as not very good substitutes, and firms will have some ability to set higher prices. Alternatively, price dispersion could be consistent with a situation where consumers face high search costs or lack complete information regarding pricing and availability.<sup>44</sup> At present, we are only able to quantify the extent to which price dispersion exists, and do not have the necessary data to explain why any observed price dispersion exists. Nonetheless,

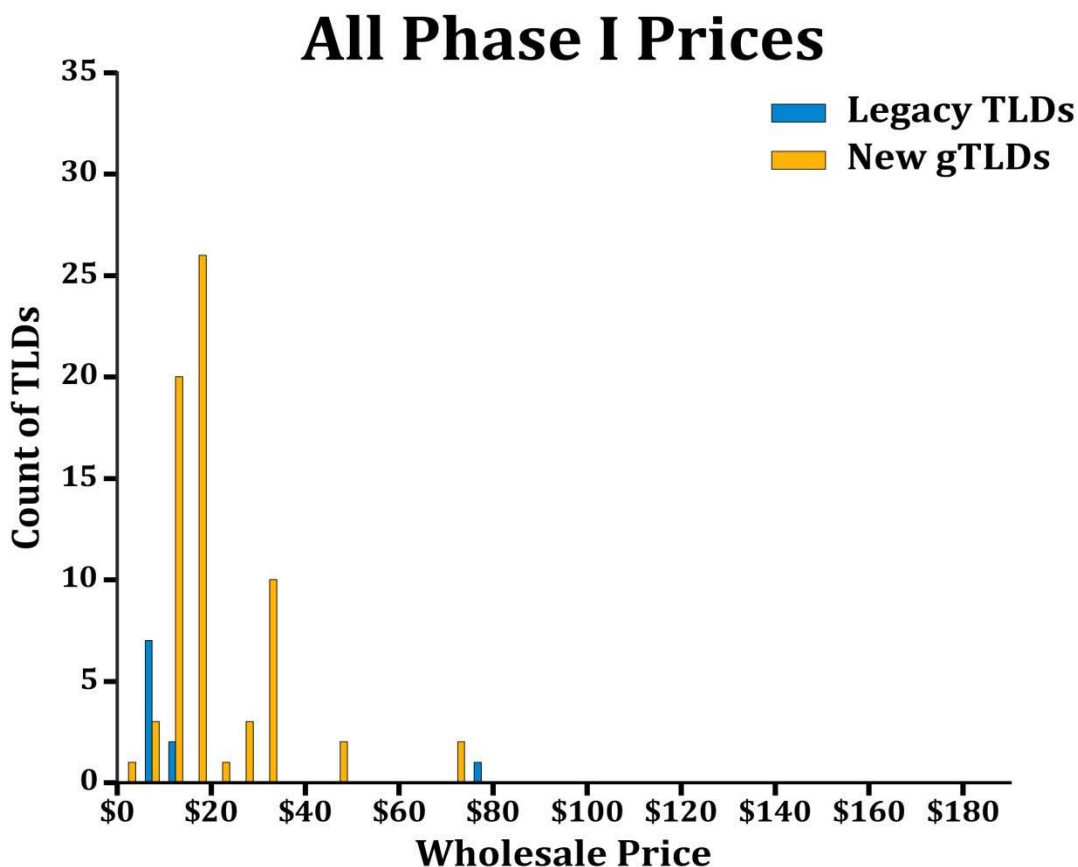
<sup>42</sup> Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis. If those TLDs were included in the analysis, we would continue to find larger price dispersion among new gTLDs than legacy TLDs.

<sup>43</sup> To the extent that we see legacy TLD price caps below the wholesale prices of new gTLDs, we know that legacy TLD wholesale prices must also be lower than the wholesale prices of new gTLDs.

<sup>44</sup> Economic search costs are associated with the time and money that a consumer spends searching for his or her purchase options.

we include a discussion of price dispersion among our analyses because it is a useful way to describe the distribution of prices that we observe in the marketplace. Ultimately, much richer data (such as transaction-level data) is needed to thoroughly examine the underlying causes.

**Figure 3A**  
**Phase I Wholesale Price Caps for Legacy TLDs and Wholesale Prices for New gTLDs**



**Notes:**

[1] Wholesale prices are as of April 2015.

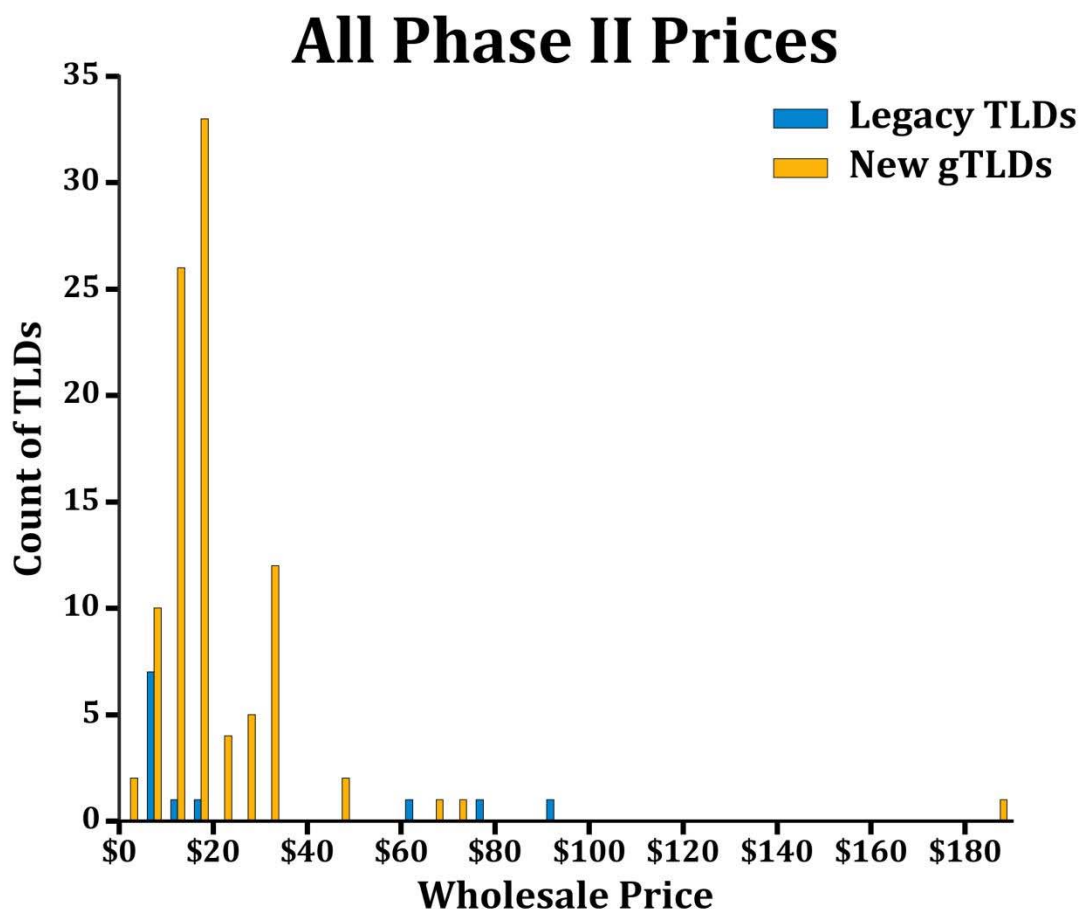
**Sources:**

[1] Legacy wholesale price information were obtained from official price change correspondences between operating registries and ICANN.

[2] New gTLD wholesale prices were provided by registry operators.

[3] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

**Figure 3B**  
**Phase II Wholesale Price Caps for Legacy TLDs and Wholesale Prices for New gTLDs**



**Notes:**

[1] Wholesale prices are as of April 2016.

**Sources:**

[1] Legacy wholesale price information were obtained from official price change correspondences between operating registries and ICANN.

[2] New gTLD wholesale prices were provided by registry operators.

[3] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

Table 6 summarizes the distribution of wholesale prices for TLDs in our sample. (We note that legacy wholesale price data are proxied for by legacy wholesale price cap information.) The first set of columns shows the Phase I wholesale price distribution of legacy TLDs and new gTLDs in our Phase I sample based on the data available during the Phase I Assessment. The middle set of columns allows us to compare the Phase I and Phase II wholesale prices of legacy TLDs and new gTLDs for which we received wholesale pricing in both study phases. And, the last set of columns shows the Phase II wholesale price distribution of legacy TLDs and new gTLDs for which we received wholesale price data in Phase II but not in Phase I. (These TLDs are either new additions to our Phase II TLD sample or the registry operator did not provide data during the Phase I Assessment.)

The middle set of columns illustrates a slight increase in the average wholesale price cap of legacy TLDs since Phase I (from \$16.09 to \$16.72) and a slight decline in the average wholesale price of new gTLDs since Phase I (from \$21.87 to \$21.46); however, these differences are not statistically significant. (The median legacy TLD wholesale price cap increases from \$8.08 to \$9.23, from Phase I to Phase II, while the median new gTLD price remains unchanged.) We also do not see a meaningful change in the price dispersion of new gTLDs or legacy TLDs between Phase I and Phase II, with largely similar minimums, 25<sup>th</sup>, 50<sup>th</sup>, and 75<sup>th</sup> percentiles, and maximums.<sup>45</sup>

**Table 6 Phase I and Phase II Wholesale Price Distribution**

	Phase I Results		TLDs with Prices Recorded in Both Phase I and Phase II				Phase II Price for TLDs Incremental to Phase II	
	Legacy TLDs	New gTLDs	Legacy TLDs		New gTLDs		Legacy TLDs	New gTLDs
			Phase I Price	Phase II Price	Phase I Price	Phase II Price		
<b>Average</b>	\$16.09	\$20.91	\$16.09	\$16.72	\$21.87	\$21.46	\$78.50	\$24.08
<b>Minimum</b>	\$6.00	\$1.00	\$6.00	\$6.60	\$1.00	\$5.00	\$62.00	\$6.00
<b>25th Percentile</b>	\$6.79	\$13.00	\$6.79	\$7.85	\$13.00	\$13.00	\$62.00	\$12.00
<b>Median</b>	\$8.08	\$20.00	\$8.08	\$9.23	\$20.00	\$20.00	\$78.50	\$20.00
<b>75th Percentile</b>	\$14.08	\$20.26	\$14.08	\$12.00	\$24.35	\$25.20	\$95.00	\$25.00
<b>Maximum</b>	\$80.00	\$74.67	\$80.00	\$80.00	\$74.67	\$74.00	\$95.00	\$190.00
<b>Number of Obs.</b>	10	74	10	10	68	68	2	29

**Notes:**

- [1] One-year registration prices are reported. Wholesale prices for Phase I are as of April 2015. Wholesale prices for Phase II are as of April 2016.
- [2] Wholesale prices were not available for all TLDs either due to a lack of a response from the registries or lack of a one-year registration price.
- [3] TLDs with prices recorded in both Phase I and Phase II include all TLDs for which registries provided a wholesale price in both Phase I and Phase II.
- [4] TLDs incremental to Phase II include TLDs for which registries never provided a price as part of Phase I or TLDs that were added as part of the Phase II TLD sample.
- [5] One TLD with a wholesale price of zero is excluded from this analysis because it carries the Spec 9 exemption with ICANN.
- [6] Eight TLDs with wholesale prices below \$1 are excluded from this analysis.
- [7] The median price difference between Phase I and Phase II is not statistically significant at the .05 level for legacy TLDs or new gTLDs. Statistical significance is determined using a bootstrapped analysis of median price differences between Phase I and Phase II.

**Source:**

- [1] Wholesale price information was provided by registry operators.

*Retail Price Distribution*

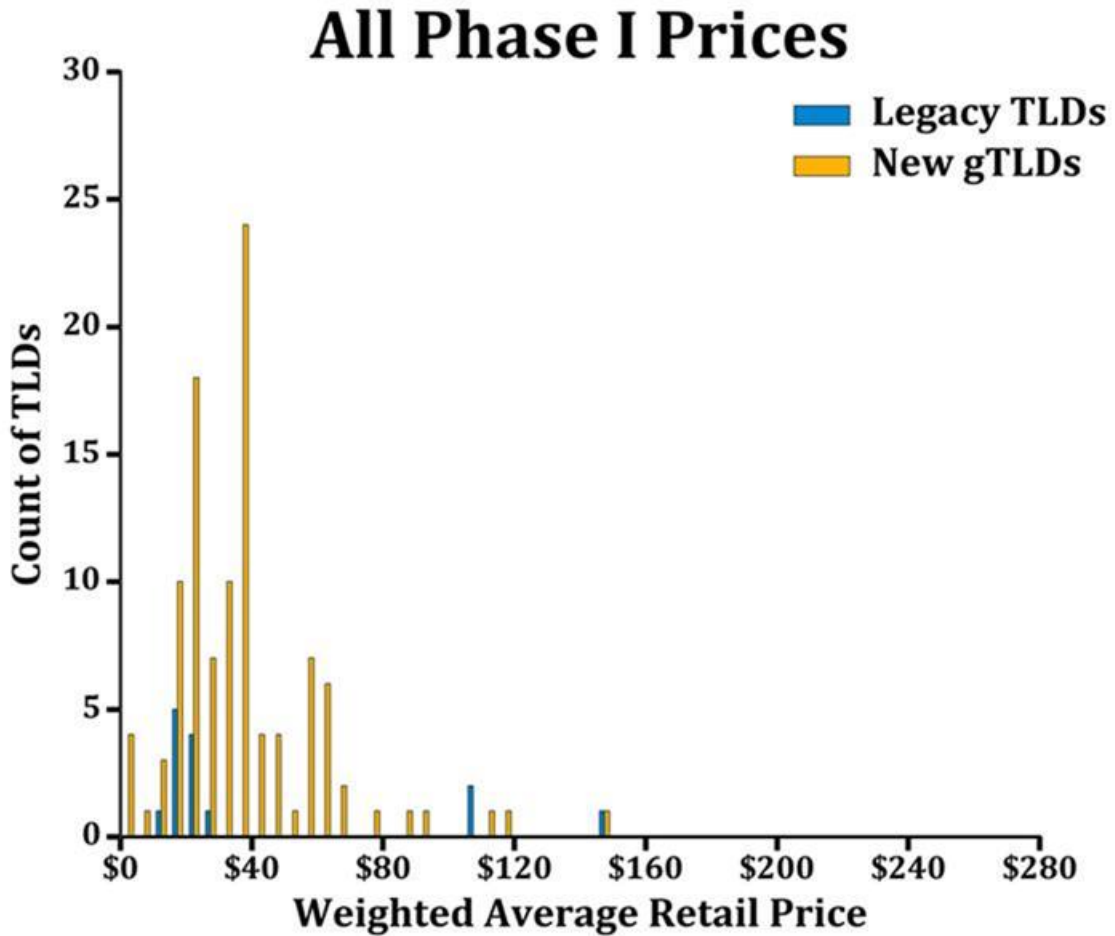
Figures 4A and 4B plot the distribution of retail prices for all legacy TLDs and new gTLDs in our sample as of Phase I and Phase II, respectively; these figures also suggest that there exists higher price dispersion among new gTLDs as compared to legacy TLDs in both Phase I and Phase II.<sup>46</sup>

<sup>45</sup> Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis. If those TLDs were included in the analysis, we would continue to find minimal changes in the average and median prices of TLDs with price information available in Phase I and Phase II. The average Phase II retail price for new gTLDs incremental to Phase II would decrease to \$19.48, and the median price for that set of TLDs would decrease slightly to \$15.

<sup>46</sup> To be consistent with our analyses of wholesale prices, we exclude eight new gTLDs with wholesale prices less than \$1 from our analyses of retail prices and markups. Inclusion of these TLDs in our analyses of retail prices does not have a meaningful impact on the results. These new gTLDs are excluded from the pricing and markup analyses because they exhibit extreme markup values due to their very low wholesale prices.



**Figure 4A**  
**Phase I Weighted Average Retail Price Distribution for Legacy and New gTLDs**



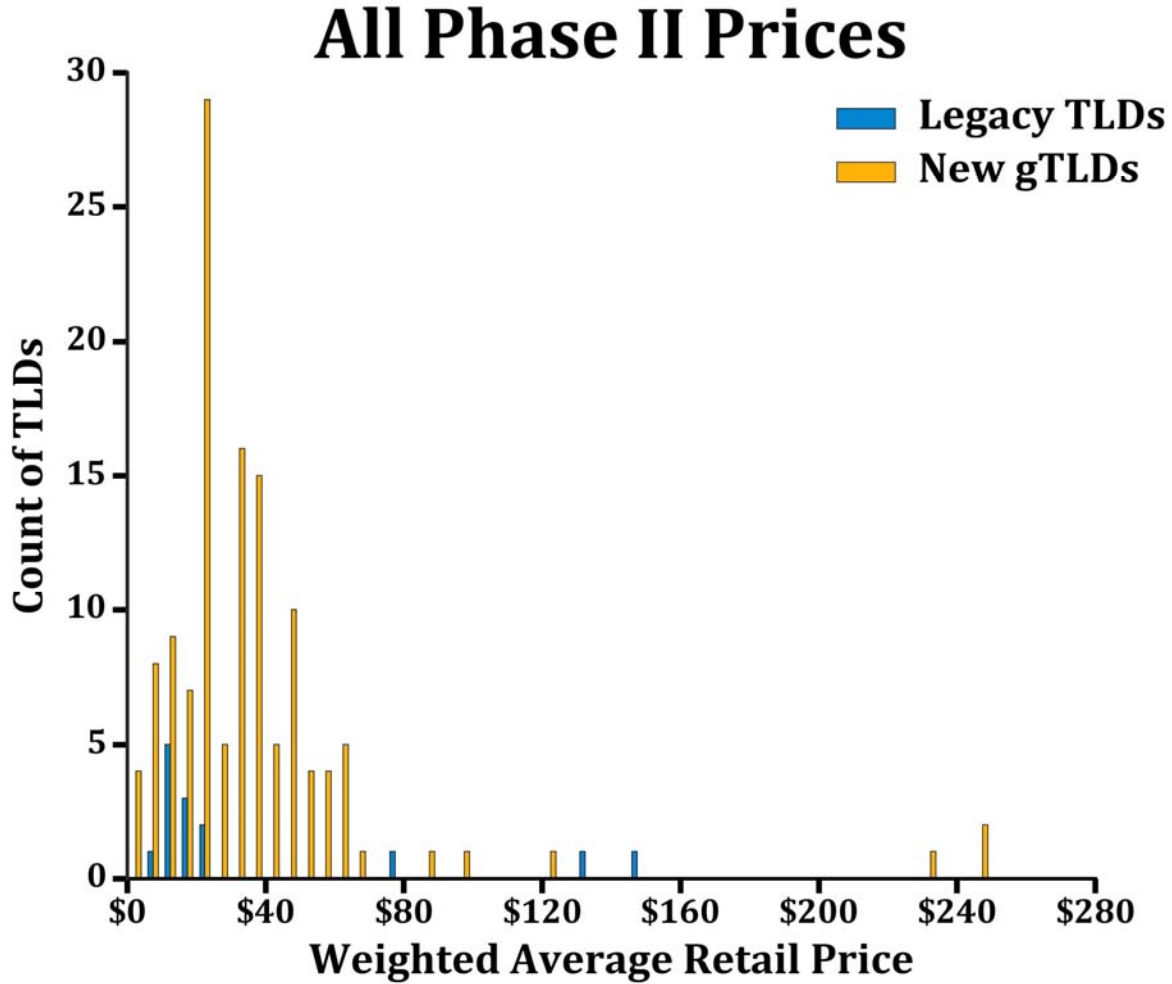
**Notes:**

- [1] Weighted average retail price is calculated as the average of retail prices weighted by the share of registrations accounted for by each registrar from which retail pricing data were collected. Registrations and retail prices for Phase I weighted average prices are as of April 2015.
- [2] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

**Sources:**

- [1] Retail prices were collected from registrar websites or provided by DNPrice.es.
- [2] Registration volume data were obtained from monthly transaction reports provided to ICANN by operating registries.

**Figure 4B**  
**Phase II Weighted Average Retail Price Distribution for Legacy and New gTLDs**



**Notes:**

[1] Weighted average retail price is calculated as the average of retail prices weighted by the share of registrations accounted for by each registrar from which retail pricing data were collected. Registrations for Phase I weighted average prices are as of March 2016. Retail prices are as of June 2016.

[2] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

**Sources:**

[1] Retail prices were collected from registrar websites or provided by DNPrice.es.

[2] Registration volume data were obtained from monthly transaction reports provided to ICANN by operating registries.

Table 7 below summarizes the distribution of retail prices for TLDs in our sample.<sup>47</sup> The first set of columns shows the Phase I retail price distribution of legacy TLDs and new gTLDs, the middle set of columns allows us to compare the Phase I and Phase II retail prices of legacy TLDs and new gTLDs, and the last set of columns shows the Phase II retail price distribution of legacy TLDs and new gTLDs for which we collected retail price data in Phase II but not in Phase I. Similar to wholesale prices, new gTLDs have higher retail prices than legacy TLDs (based on comparing medians so as to control for the influence of outliers). Focusing on the TLDs with prices available in both Phase I and Phase II, we observe a decline in the average retail price of legacy TLDs since Phase I (from \$41.34 to \$37.62) and a decline in the average retail price of new gTLDs since Phase I (from \$37.87 to \$33.35). In comparing changes in median prices from Phase I to Phase II, which helps to control for the impact of outliers, we find that the median legacy TLD retail price declined from \$20.75 to \$16.19 and that the median new gTLD retail price declined from \$35.06 to \$31.73.<sup>48</sup>

**Table 7**  
**Phase I and Phase II Weighted Average Retail Price Distribution**

	Phase I Results		TLDs with Prices Recorded in Both Phase I and Phase II				Phase II Price for TLDs Incremental to Phase II	
	Legacy TLDs	New gTLDs	Legacy TLDs		New gTLDs		Legacy TLDs	New gTLDs
			Phase I Price	Phase II Price	Phase I Price	Phase II Price		
<b>Average</b>	\$41.34	\$37.87	\$41.34	\$37.62	\$37.87	\$33.35	N/A	\$69.89
<b>Minimum</b>	\$14.34	\$3.68	\$14.34	\$7.89	\$3.68	\$2.11	N/A	\$3.18
<b>25th Percentile</b>	\$17.08	\$23.90	\$17.08	\$13.81	\$23.90	\$21.31	N/A	\$13.41
<b>Median</b>	\$20.75	\$35.06	\$20.75	\$16.19	\$35.06	\$31.73	N/A	\$24.92
<b>75th Percentile</b>	\$25.34	\$41.81	\$25.34	\$22.47	\$41.81	\$41.86	N/A	\$60.16
<b>Maximum</b>	\$147.69	\$146.57	\$147.69	\$148.89	\$146.57	\$124.90	N/A	\$420.31
<b>Number of Obs.</b>	14	106	14	14	106	106	N/A	23

**Notes:**

- [1] Phase I Retail Prices are as of April 2015. Phase II retail prices are as of June 2016.
- [2] Weighted averages across registrars of one-year registration prices are reported. Prices are weighted by the share of registrations accounted for by each registrar from which retail pricing data were collected. Registrations for Phase I weighted average prices are as of April 2015. Registrations for Phase II weighted average prices are as of March 2016.
- [3] Only prices from registrars that were able to be linked to an IANA Registrar ID are included in this analysis.
- [4] Retail prices were not available for all TLDs either due to a lack of available information or lack of a one-year registration price.
- [5] TLDs with prices recorded in both Phase I and Phase II include all TLDs for which retail prices were available in both Phase I and Phase II.
- [6] TLDs incremental to Phase II include TLDs for which retail prices were not available in Phase I or TLDs that were added as part of the Phase II sample.
- [7] Eight TLDs with wholesale prices below \$1 are excluded from this analysis.

**Source:**

- [1] Retail prices were collected from registrar websites or provided by DNPric.es.
- [2] Registration volumes were collected from monthly transaction reports provided to ICANN by operating registries.

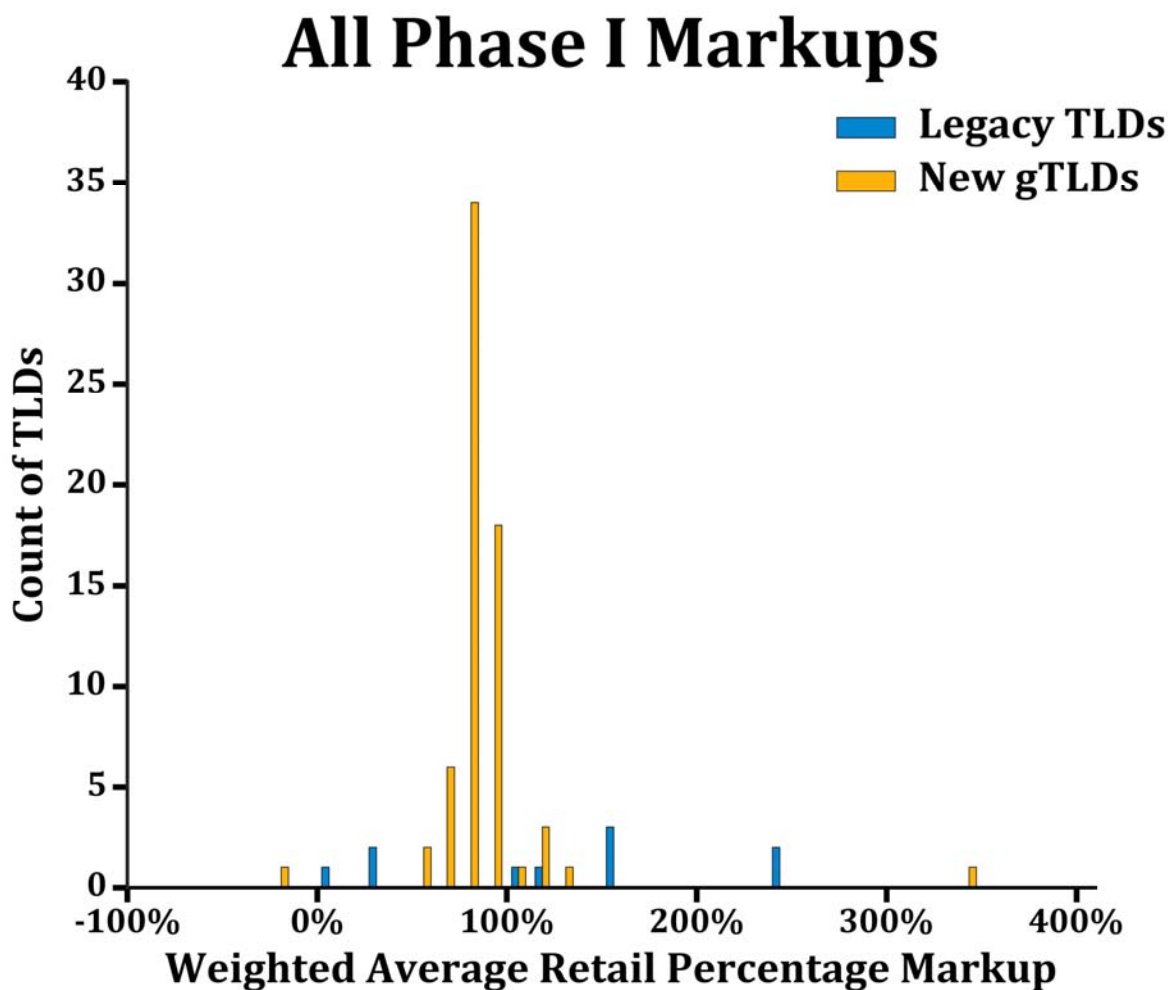
<sup>47</sup> We calculate the average retail price for each TLD weighted by registrations. Our retail price data are as of April 2015 and June 2016 for Phase I and Phase II, respectively, and our registration volume data are from April 2015 and March 2016, respectively. To the extent that retail prices and/or registration activity changed considerably between March 2016 and June 2016, our results may not reflect the true distribution of retail prices or markups. However, we expect that any extreme changes in prices or registration activity are unlikely to be large enough to impact our results in a meaningful way.

<sup>48</sup> Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis. If those TLDs were included in the analysis, we would continue to find minimal changes in the average and median prices of TLDs with price information available in Phase I and Phase II. The average Phase II retail price for new gTLDs incremental to Phase II would decrease to \$58.50, and the median price for that set of TLDs would decrease slightly to \$23.51.

### *Retail Markups*

Combining the data on wholesale and retail prices, Figures 5A and 5B below plot the distribution of retail markups: the percentage increase in retail price compared to wholesale price. (We note that legacy wholesale price data are proxied for by legacy wholesale price cap information.) As shown, legacy TLDs in Phase I typically had a higher markup as compared to new gTLDs; in Phase II, the distributions of legacy TLD and new gTLD mark-ups are more similar. It should be noted, that legacy TLD markups may be understated in this analysis since legacy TLD wholesale prices are being measured by legacy TLD price caps: wholesale prices may be lower than the reported wholesale price cap, making actual legacy TLD markups larger than those shown in this analysis. Below, Table 8 provides summary statistics for the distribution of retail markups across legacy TLDs and new gTLDs. For TLDs with markup data recorded in both Phase I and Phase II, we see that average and median markups have declined in the past year.

**Figure 5A**  
**Phase I Average Retail Percentage Markup for Legacy and New gTLDs**



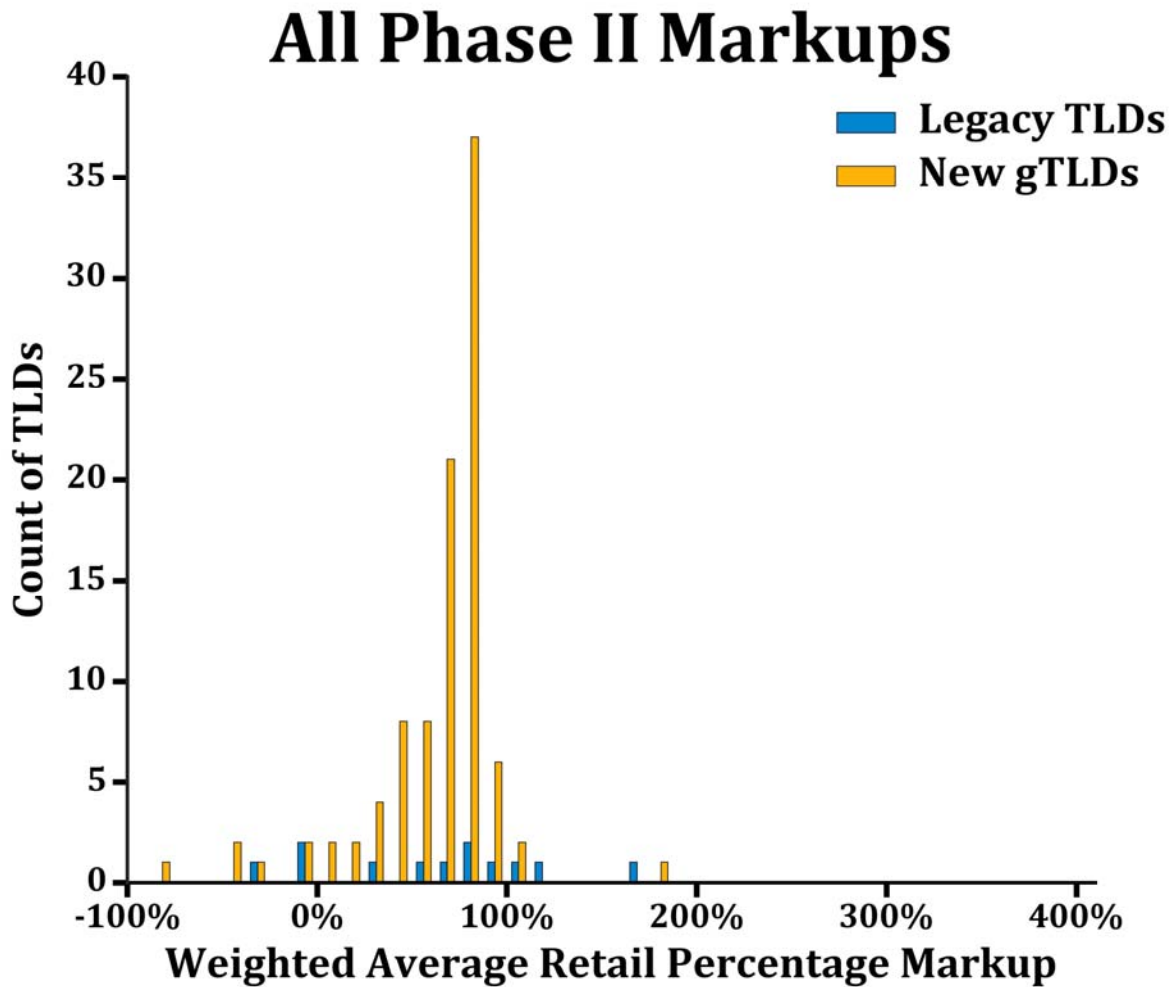
**Notes:**

- [1] Wholesale and retail prices for Phase I retail markups are as of April 2015.
- [2] Retail markup is calculated as (weighted average retail price – wholesale price) / wholesale price. Weighted average retail price is calculated as the average of retail prices weighted by the share of registrations accounted for by each registrar from which retail pricing data were collected. Registrations for Phase I weighted average prices are as of April 2015.
- [3] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

**Sources:**

- [1] Legacy wholesale price information were obtained from official price change correspondences between operating registries and ICANN.
- [2] New gTLD wholesale prices were provided by registry operators.
- [3] Retail prices were collected from registrar websites.
- [4] Registration volume data were obtained from monthly transaction reports provided to ICANN by operating registries.

**Figure 5B**  
**Phase II Average Retail Percentage Markup for Legacy and New gTLDs**



**Notes:**

- [1] Wholesale prices for Phase II retail markups are as of April 2016. Retail prices for Phase II retail markups are as of June 2016.
- [2] Retail markup is calculated as (weighted average retail price – wholesale price) / wholesale price. Weighted average retail price is calculated as the average of retail prices weighted by the share of registrations accounted for by each registrar from which retail pricing data were collected. Registrations for Phase I weighted average prices are as of April 2015. Registrations for Phase II weighted average prices are as of March 2016.
- [3] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

**Sources:**

- [1] Legacy wholesale price information was obtained from official price change correspondences between operating registries and ICANN.
- [2] New gTLD wholesale prices were provided by registry operators.
- [3] Retail prices were collected from registrar websites.
- [4] Registration volume data were obtained from monthly transaction reports provided to ICANN by operating registries.

**Table 8**  
**Retail Markup Distribution**  
*Phase I and II Comparison*

	Phase I Results		TLDs with Prices Recorded in Both Phase I and Phase II				Phase II Markup for TLDs Incremental to Phase II	
	Legacy TLDs	New gTLDs	Legacy TLDs		New gTLDs		Legacy TLDs	New gTLDs
			Phase I Markup	Phase II Markup	Phase I Markup	Phase II Markup		
<b>Average</b>	125%	92%	125%	66%	96%	71%	41%	49%
<b>Minimum</b>	2%	-34%	2%	-37%	-20%	-44%	25%	-84%
<b>25th Percentile</b>	37%	78%	37%	-2%	78%	67%	25%	30%
<b>Median</b>	135%	85%	135%	76%	85%	74%	41%	55%
<b>75th Percentile</b>	162%	89%	162%	111%	89%	81%	57%	83%
<b>Maximum</b>	243%	639%	243%	170%	639%	186%	57%	95%
<b>Number of Obs.</b>	10	74	10	10	68	68	2	29

**Notes:**

- [1] Phase I wholesale and retail prices are as of April 2015. Phase II wholesale prices are as of April 2016. Phase II retail prices are as of June 2016. One-year registration prices are reported. Prices were not available for all TLDs either due to a lack of available information or lack of a one-year registration price.
- [2] Markup percentage is calculated by subtracting the wholesale price from the weighted average retail price weighted and dividing the difference by the wholesale price. Weighted average retail price is calculated as the average of retail prices weighted by the share of registrations accounted for by each registrar from which retail pricing data were collected. Registrations for Phase I weighted average prices are as of April 2015. Registrations for Phase II weighted average prices are as of March 2016.
- [3] TLDs with prices recorded in both Phase I and Phase II include all TLDs for which both retail prices and wholesale prices were collected in both Phase I and Phase II.
- [4] TLDs incremental to Phase II includes TLDs that were added as part of the Phase II TLD sample or TLDs for which operating registries did not provide a wholesale price during Phase I.
- [5] One TLD with a wholesale price of zero is excluded from this analysis because it carries the Spec 9 exemption with ICANN.
- [6] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

**Sources:**

- [1] Retail prices were collected from registrar websites or provided by DNPric.es.
- [2] Wholesale price information was provided by operating registries.
- [3] Registration volumes were collected from monthly transaction reports provided to ICANN by operating registries.

*Wholesale Price Index*

The expansion of new gTLDs has created a market with hundreds of TLD options for consumers. As shown in the above analyses, these TLDs vary substantially in price. A price index is a mathematical way to summarize the distribution of prices in a manner that also accounts for differences in registration volume. As prices and registration patterns change over time, monitoring this index value can help summarize changes in the overall price level for domain name registrations.

In Phase I, we calculated both weighted and un-weighted wholesale price index values for the overall set of TLDs as well as for legacy TLD and new gTLDs separately. (We note that legacy wholesale price data are proxied for by legacy wholesale price cap information.) We calculate both weighted and un-weighted index values: the un-weighted index value treats each TLD the same, whereas the weighted index value places more importance on TLDs with higher registration volumes.<sup>49</sup> This information is provided below in Table 9. Once again, when comparing the overall legacy TLD wholesale price to new gTLDs, we note that many legacy TLDs had historical price caps, as well as different start-up costs compared to

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<sup>49</sup> The weighted-price index value first calculates a weighted average retail price for each TLD, where the weights are determined by each registrar’s registration volume of the TLD. Then, we take the average of these registrar-weighted average prices across all relevant TLDs, weighting each by their total domain registrations. As noted above, we exclude TLDs with extremely low wholesale prices from the analysis.

new gTLDs, both of which may be influencing their current prices relative to new gTLDs. We also again note that legacy TLD prices are measured based on price caps, and may overstate the wholesale price of legacy TLDs. New gTLDs, in contrast to legacy TLDs, are not subject to price caps. For legacy TLDs and new gTLDs with wholesale price information available in both Phase I and Phase II, we see a decline in the weighted price of new gTLDs, while legacy prices have largely remained the same. As discussed earlier, a decline in wholesale prices is consistent with increased competition in the domain name marketplace.

**Table 9**  
**Legacy TLD Wholesale Price Cap and gTLD Wholesale Price Index Values**  
*Phase I and II Comparison*

	Phase I Results		TLDs with Prices Recorded in Both Phase I and Phase II				Phase II Prices for TLDs Incremental to Phase II	
	Legacy TLDs	New gTLDs	Legacy TLD Prices		New gTLD Prices		Legacy TLDs	New gTLDs
			Phase I	Phase II	Phase I	Phase II		
<b>Simple Average Wholesale Price</b>	\$16.09	\$20.91	\$16.09	\$16.72	\$21.87	\$21.46	\$78.50	\$24.08
<b>Weighted Average Wholesale Price</b>	\$7.82	\$13.30	\$7.82	\$7.92	\$17.82	\$15.38	\$69.06	\$15.46
<b>Number of Obs.</b>	10	74	10	10	68	68	2	29

**Notes:**

- [1] Simple average price is the simple average of all available wholesale prices within each category. Weighted average wholesale price is the average of all available wholesale prices weighted by each TLD's share of registrations as of April 2015 for Phase I and March 2016 for Phase II.
- [2] One-year registration prices are used. Phase I wholesale prices and registrations are as of April 2015. Phase II wholesale prices are as of April 2016 and registrations are as of March 2016. Wholesale prices were not available for all TLDs either due to a lack of a response from the registries or lack of a one-year registration price.
- [3] TLDs with prices recorded in both Phase I and Phase II include all TLDs for which registries provided a wholesale price in both Phase I and Phase II.
- [4] TLDs incremental to Phase II include TLDs for which registries never provided a price as part of Phase I or TLDs that were added as part of the Phase II TLD
- [5] One TLD with a wholesale price of zero is excluded from this analysis because it carries the Spec 9 exemption with ICANN.
- [6] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

**Sources:**

- [1] Retail prices were collected from registrar websites or provided by DNPrices.
- [2] Wholesale price information was provided by operating registries.
- [3] Registration volumes were collected from monthly transaction reports provided to ICANN by operating registries.

*Retail Price Index*

In Phase I, we calculated retail price-index values for the overall set of TLDs as well as for legacy TLD and new gTLDs separately. For each TLD, we collected price observations from 39 registrars, and the index values were created from those price observations. We calculate both weighted and un-weighted index values: the un-weighted index value treats each TLD price observation the same, whereas the weighted index value places more importance on TLDs and registrars with higher registration volumes.<sup>50</sup> The end result, shown in Table 10 below, shows a decline in retail both weighted and un-weighted retail prices; this decline is most noticeable for the weighted new gTLD price index. In addition, we find that price declines are greater for new gTLDs than for legacy TLDs. As above, a decline in retail prices is consistent with increased competition among registrars.

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<sup>50</sup> The weighted-price index value weights each TLD by its total domain registrations. The un-weighted index values are higher for both legacy TLDs and gTLDs as compared to their respective weighted index values, reflecting the fact that lower-priced legacy TLDs have a larger number of registrations than more expensive TLDs. As noted above, we exclude TLDs with wholesale prices below \$1 from the analysis.



**Table 10**  
**Legacy TLD and gTLD Retail Price Index Values**  
*Phase I and II Comparison*

	Phase I Results		TLDs with Prices Recorded in Both Phase I and Phase II				Phase II Price Index for TLDs	
			Legacy TLD Price Indices		New gTLD Price Indices		Incremental to Phase II	
	Legacy TLDs	New gTLDs	Phase I	Phase II	Phase I	Phase II	Legacy TLDs	New gTLDs
<b>Un-Weighted Index Value</b>	\$41.34	\$37.87	\$41.34	\$37.62	\$37.87	\$33.35	N/A	\$69.89
<b>Weighted Index Value</b>	\$17.45	\$26.90	\$17.45	\$14.82	\$26.90	\$11.09	N/A	\$36.92
<b>Number of Obs.</b>	14	106	14	14	106	106	N/A	23

**Notes:**

[1] The weighted price index value first calculates a weighted average retail price for each TLD, where each retail price is weighted by the registration volume of the registrar from which the retail price was collected. The un-weighted index value the simple average of the weighted average retail price across TLDs. The weighted index value is the weighted average across TLDs of the weighted average retail price weighted by each TLD's share of all registrations.

[2] One-year registration prices are used. For Phase I price indices, prices and registrations are as of April 2015. For Phase II price indices, retail prices are as of June 2016 and registrations are as of March 2016.

[3] TLDs with prices recorded in both Phase I and Phase II include all TLDs for which a retail price was collected in both Phase I and Phase II.

[4] TLDs incremental to Phase II include TLDs that were added as part of the Phase II TLD sample.

[5] Eight new gTLDs with wholesale prices below \$1 are excluded from this analysis.

**Sources:**

[1] Retail prices were collected from registrar websites or provided by DNPric.es.

[2] Registration volumes were collected from monthly transaction reports provided to ICANN by operating registries.

*Add-On Prices and Availability*

In our Phase I Assessment, we analyzed the presence of competition across non-price dimensions by evaluating registrar pricing and offering of add-on services. We found that there is a large variety of add-on categories registrars offer, and within an add-on category, a registrar may offer multiple products, each varying in price. Hosting, email, and server-related products were the most frequently offered.

Within each add-on category, we noted that some add-on categories had very little price dispersion (e.g., forwarding), while other categories have a large amount of variation. One possible explanation is that add-ons with lower price dispersion are add-ons where customers tend to be more sensitive to and well-informed about the pricing. However, without detailed transaction information from multiple registrars, we cannot investigate if hypotheses such as this are likely to be correct. In Phase II, we confirmed that registrar add-on services continue to have a large amount of variation, making it difficult to conduct an analysis of how registrars price similar comparable services. The diversity of add-on service offerings from registrars potentially reflects differentiation across registrar services in the retail domain name marketplace. As discussed in our overview of the marketplace for domain names, the availability of a diverse set of services is one way for sellers in a marketplace to compete along a non-price dimension.

### *Registration Shares*

In Phase I, we defined several groups of new gTLDs that are similar, either in name and/or in their likely target consumers. For example, .career, .careers, .jobs, and .work might constitute such a group. As discussed in Section III, such groups were included as part of our sample construction process. After selecting new gTLDs based on total and recent registration volume, related new gTLDs were then added. For each proposed group, we ran domain name searches on two large-volume registrar websites<sup>51</sup> and recorded which new gTLDs were included in the “Suggested Domain Name” list immediately following the search. Every new gTLD in the groupings below had at least one other group member displayed as a suggested domain name alternative. For our Phase II Assessment, we have expanded on our TLD groups based on new gTLDs that have become available since our Phase I Assessment.

For each new gTLD in a group, Table 11 below shows its share of registrations within its corresponding group as of March 2016 and the number of months it has been available. We see that ten of the 15 TLD families listed that had new gTLDs in Phase I have experienced entry by a new gTLD in the past year. Of those ten families, eight experienced a decrease in the registration shares of the largest pre-existing new gTLDs in the same family. The entry of a new gTLD in ten of 15 TLD families suggests that new gTLDs that are focused at different types of registrants continue to be introduced to the marketplace. In addition, the finding that registration shares decreased in eight of ten TLD families that experienced entry by a new gTLD suggests those entries could have pro-competitive effects on other new gTLDs within those families: for example, when a new gTLD enters a TLD family and attracts registrants (associated with a decline in the registration share of pre-existing new gTLDs within that family), registry operators and registrars offering pre-existing new gTLDs in that TLD family may need to reduce prices in order to compete with the new gTLD entrant.

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<sup>51</sup>Specifically, we ran the checks using GoDaddy and 101 Domain.

**Table 11**  
**TLD Groups – Registration Shares**

TLD Family	TLD	Registration Share			Months Available	
		Phase I	Phase II	Difference (Phase II - Phase I)	Phase I	Phase II
Beer	pub	37.8%	59.0%	21.2%	10	21
Beer	bar	22.5%	25.4%	2.9%	9	20
Beer	beer	39.6%	15.6%	-24.1%	7	18
Car	auto	N/A	35.9%	N/A	N/A	2
Car	car	N/A	32.7%	N/A	N/A	2
Car	cars	N/A	31.4%	N/A	N/A	2
Deals	kaufen	28.1%	28.7%	0.6%	10	21
Deals	deals	21.8%	24.3%	2.5%	7	18
Deals	discount	13.4%	14.2%	0.8%	8	19
Deals	gratis	11.6%	11.9%	0.3%	8	19
Deals	cheap	13.1%	11.0%	-2.1%	12	23
Deals	bargains	10.1%	8.3%	-1.8%	12	23
Deals	qpon	1.9%	1.7%	-0.2%	11	22
Dental	dental	74.5%	68.1%	-6.3%	8	19
Dental	dentist	25.5%	31.9%	6.3%	4	15
Education	academy	32.8%	26.0%	-6.8%	13	24
Education	education	29.3%	23.7%	-5.6%	13	24
Education	training	28.0%	21.4%	-6.5%	13	24
Education	college	N/A	9.7%	N/A	N/A	6
Education	school	N/A	8.9%	N/A	N/A	10
Education	university	6.7%	5.9%	-0.8%	9	20
Education	schule	2.5%	2.5%	-0.1%	8	19
Education	degree	0.7%	1.9%	1.2%	3	14
Expert/Consulting	expert	70.1%	62.8%	-7.4%	11	22
Expert/Consulting	consulting	29.9%	37.2%	7.4%	10	21
Finance	loan	N/A	90.4%	N/A	N/A	7
Finance	bank	N/A	2.4%	N/A	N/A	9
Finance	finance	23.0%	1.9%	-21.2%	7	18
Finance	financial	17.3%	1.3%	-16.0%	9	20
Finance	loans	15.8%	1.1%	-14.7%	7	18
Finance	investments	16.2%	1.1%	-15.1%	8	19
Finance	credit	14.3%	1.0%	-13.3%	8	19
Finance	mortgage	13.4%	0.9%	-12.5%	6	17
Global	world	29.1%	38.8%	9.7%	3	14
Global	global	32.6%	31.1%	-1.5%	7	18
Global	international	38.3%	25.9%	-12.4%	13	24
Global	earth	N/A	4.2%	N/A	N/A	4
Help	review	N/A	19.5%	N/A	N/A	8
Help	guru	28.7%	18.0%	-10.7%	15	26
Help	help	10.0%	13.6%	3.6%	5	16
Help	solutions	14.9%	12.6%	-2.3%	13	24
Help	tips	14.4%	9.6%	-4.7%	14	25
Help	expert	11.4%	7.6%	-3.8%	11	22
Help	wiki	4.3%	5.5%	1.2%	11	22
Help	reviews	5.6%	4.7%	-0.9%	11	22
Help	support	5.8%	4.5%	-1.2%	13	24
Help	guide	3.9%	3.5%	-0.5%	7	18
Help	how	1.0%	0.8%	-0.2%	3	14
Home	realtor	43.2%	32.2%	-11.0%	6	17
Home	property	17.8%	18.0%	0.2%	5	16
Home	casa	1.3%	8.4%	7.1%	2	13
Home	house	6.5%	6.5%	0.0%	13	24
Home	rentals	5.9%	4.9%	-1.0%	11	22
Home	immo	4.6%	4.8%	0.2%	4	15
Home	properties	5.1%	4.7%	-0.4%	11	22
Home	estate	5.7%	4.7%	-1.0%	14	25
Home	rent	N/A	3.8%	N/A	N/A	6
Home	immobilien	3.8%	3.5%	-0.3%	12	23
Home	forsale	2.4%	3.4%	1.0%	3	14

TLD Family	TLD	Registration Share			Months Available	
		Phase I	Phase II	Difference (Phase II - Phase I)	Phase I	Phase II
		Home	haus	1.3%	1.5%	0.2%
Home	apartments	N/A	1.3%	N/A	N/A	10
Home	condos	1.2%	1.0%	-0.2%	11	22
Home	lease	0.7%	0.7%	0.0%	9	20
Home	maison	0.6%	0.5%	-0.1%	11	22
Jobs	work	29.9%	65.4%	35.4%	2	13
Jobs	jobs	59.5%	29.4%	-30.1%	101	112
Jobs	careers	9.5%	4.6%	-4.9%	14	25
Jobs	career	1.1%	0.7%	-0.5%	8	19
Legal	lawyer	50.0%	38.0%	-12.0%	6	17
Legal	legal	15.3%	23.5%	8.2%	1	12
Legal	attorney	34.7%	23.4%	-11.3%	6	17
Legal	law	N/A	15.1%	N/A	N/A	6
Medical	care	43.9%	45.5%	1.7%	8	19
Medical	healthcare	24.1%	26.2%	2.1%	6	17
Medical	clinic	22.7%	20.4%	-2.3%	8	19
Medical	surgery	9.3%	7.9%	-1.4%	8	19
Photography	photography	47.9%	34.5%	-13.3%	14	25
Photography	pics	8.7%	21.1%	12.3%	12	23
Photography	photo	16.3%	17.6%	1.3%	12	23
Photography	photos	17.1%	12.9%	-4.2%	14	25
Photography	studio	N/A	5.8%	N/A	N/A	5
Photography	pictures	4.9%	4.4%	-0.4%	9	20
Photography	camera	5.1%	3.6%	-1.5%	14	25
Science and Technology	science	85.2%	70.8%	-14.3%	2	13
Science and Technology	tech	N/A	19.7%	N/A	N/A	8
Science and Technology	technology	9.4%	5.2%	-4.2%	14	25
Science and Technology	software	2.2%	2.0%	-0.2%	4	15
Science and Technology	computer	1.8%	1.0%	-0.8%	13	24
Science and Technology	engineering	1.0%	0.7%	-0.3%	9	20
Science and Technology	engineer	0.4%	0.5%	0.1%	5	16
Travel	travel	47.8%	42.5%	-5.3%	109	120
Travel	reisen	11.3%	11.6%	0.3%	9	20
Travel	vacations	12.1%	10.7%	-1.3%	11	22
Travel	tours	N/A	10.6%	N/A	N/A	9
Travel	voyage	9.7%	7.6%	-2.0%	14	25
Travel	cruises	5.9%	5.4%	-0.5%	11	22
Travel	flights	5.7%	4.8%	-0.9%	11	22
Travel	reise	3.6%	3.5%	-0.1%	8	19
Travel	viajes	4.0%	3.1%	-0.8%	12	23

**Notes:**

- [1] Registration shares are as of April 2015 for Phase I and March 2016 for Phase II.
- [2] TLDs are grouped into families that consist of TLDs with similar topic areas and are likely to have a large overlap in their respective target groups of consumers.
- [3] Registration share is calculated as the percent of volume the TLD represents compared to the total registrations within its family grouping.
- [4] Months available is calculated as the number of months from the beginning of each TLD's general availability until April 2015 for Phase I and March 2016 for Phase II.

**Sources:**

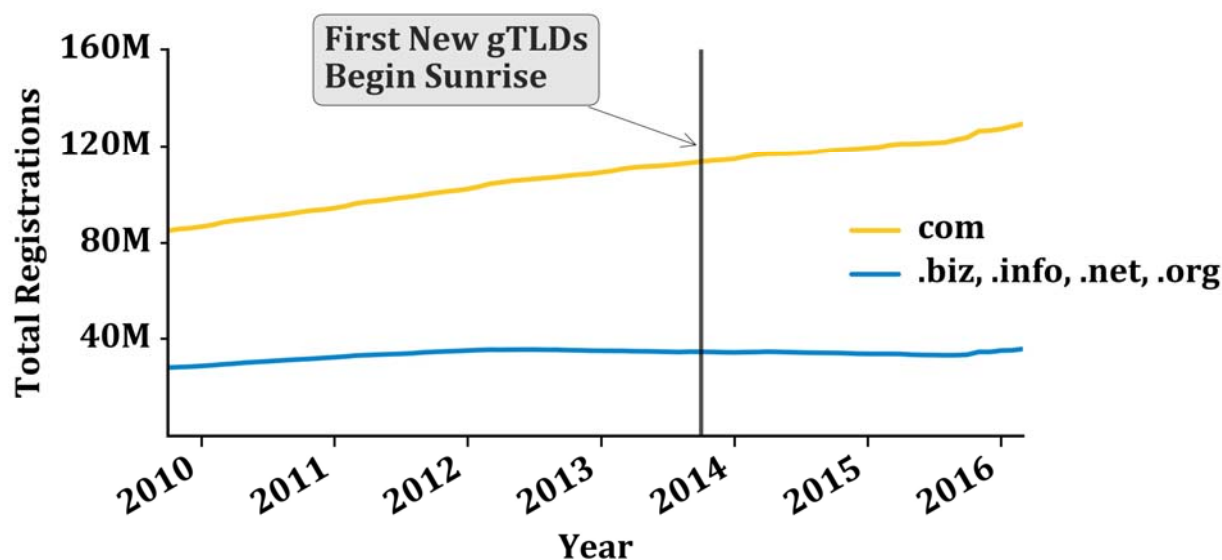
- [1] Registration volumes are collected from monthly transaction reports provided to ICANN by operating registries.
- [2] General availability of new gTLDs is collected from <https://newgtlds.icann.org/en/program-status/sunrise-claims-periods>.
- [3] General availability of legacy TLDs is identified as the first available monthly transaction report for each TLD from <https://www.icann.org/resources/pages/registry-reports/#j>.

## Effects on Legacy TLD Registration Volumes

### Registration Volumes

If consumers view new gTLDs as substitutes for legacy TLDs, one might expect that the release of new gTLDs would lower the registrations, rate of registrations, or renewals seen in legacy TLDs. On the other hand, if consumers do not view them as substitutes, we might not expect to see any changes in legacy TLD registrations. Using data from monthly transaction reports submitted to ICANN by registry operators, Figure 6 below shows total (cumulative) registrations for the top five legacy TLDs over time. The chart contrasts the largest legacy TLD in terms of registrations (.com), against the next four largest TLDs (.biz, .info, .net, and org).

**Figure 6**  
**Historical Legacy Registration Volumes (2010 - 2016)**



### Note:

[1] Top five legacy TLDs by volume are included.

### Sources:

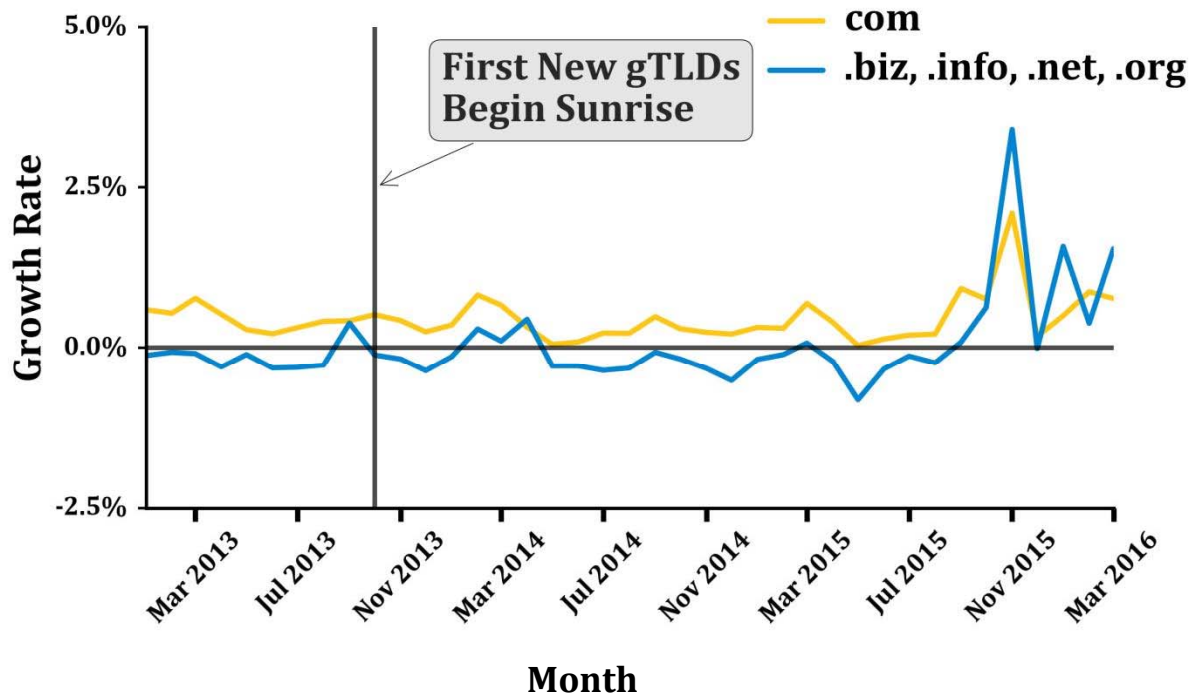
[1] Registration volume data were obtained from March 2016 monthly transaction reports provided to ICANN by operating registries.

[2] New gTLD entrance dates collected from ICANN's website;

<https://newgtlds.icann.org/en/program-status/sunrise-claims-periods>

As we saw in the Phase I Assessment, no clear effects are revealed in the above graph – legacy TLDs appear to be continuing to follow their previous registration trends. One possible explanation for this result is multi-year registrations have remained active in the past year even though they may not be renewed in the future (i.e., those registrations may shift to new gTLDs in the future). We therefore also present alternative measure of registration activity: growth rates. Figure 7 below plots monthly growth rates for each of the above five legacy TLDs with .biz, .info, .net, and .org again grouped together.

**Figure 7**  
**Legacy TLD Registration Growth Rates**



**Notes:**

- [1] Growth rates are calculated as total registration count in month n less total registration count in month n - 1 divided by total registration count in month n - 1.
- [2] Top five legacy TLDs by volume are included.

**Sources:**

- [1] Registration volume data were obtained from March 2016 monthly transaction reports provided to ICANN by operating registries.
- [2] New gTLD entrance dates collected from ICANN’s website; <https://newgtlds.icann.org/en/program-status/sunrise-claims-periods>

From this graph, we see that the growth rates of these legacy TLDs generally do not appear to have been affected by the entry of new gTLDs. There is a large uptick in legacy TLD growth rates in November 2015, however, the general trend since the entrance of the new gTLDs has been steady rates close to zero.

While we see that growth rates and registration trends for legacy TLDs do not yet suggest any reduction in registrations related to the New gTLD Program, it is important to note that since legacy TLD registrations have not fallen and new gTLD registrations are growing, overall registration activity has increased since the date on which new gTLDs first entered. As such, output, where output is measured by the total number of registrations, has increased.

It is possible that the introduction of new gTLDs affects legacy registration rates differently across regions and countries. In Table 12, we examine how regional TLDs that are targeted at registrants from certain geographic areas (e.g., .nyc) affect registrations made in legacy TLDs and other new gTLDs. Table 12 shows the average monthly registration counts in new gTLDs and legacy TLDs, respectively, for geographic areas associated with several regional TLDs that began their general availability period in 2014. Across nearly all regions, we observe a decline in new registrations after the entry of a relevant regional TLD, which suggests that regional TLDs may be viewed as substitutes for other new gTLDs and legacy TLDs. Although these results are suggestive, they do not measure a causal relation between the entry of a geo-TLD and changes in registrations of other TLDs.

**Table 12**  
**Change in Average Monthly Registration by TLD Type**  
**After the Entry of a Regional TLD**

Regional TLD <sup>1</sup>			New gTLDs				Legacy			
gTLD	Region	Entry Date <sup>2</sup>	Before <sup>3</sup>	After <sup>4</sup>	Abs. Change	% Change	Before <sup>3</sup>	After <sup>4</sup>	Abs. Change	% Change
.berlin	Berlin	3/18/2014	140.0	5.3	-134.7	-96.2%	136	127	-9	-7%
.capetown	Capetown	11/4/2014	5.0	2.8	-2.2	-43.6%	44	31	-14	-31%
.cologne	Cologne	8/26/2014	106.6	18.4	-88.2	-82.7%	1,623	364	-1,259	-78%
.hamburg	Hamburg	8/27/2014	16.1	3.3	-12.8	-79.5%	85	70	-15	-17%
.london	London	9/9/2014	26.9	9.0	-17.9	-66.7%	314	261	-53	-17%
.nyc	New York City	10/8/2014	14.9	7.8	-7.1	-47.5%	418	357	-61	-15%
.quebec	Quebec	11/18/2014	7.5	5.0	-2.5	-33.7%	179	167	-12	-7%
.scot	Edinburgh	9/23/2014	3.6	1.9	-1.6	-45.5%	25	18	-7	-29%
.scot	Glasgow	9/23/2014	5.2	2.4	-2.8	-54.4%	22	18	-5	-21%
.tokyo	Tokyo	7/22/2014	2.9	11.5	8.6	299.2%	22	109	87	389%
.vegas	Las Vegas	8/14/2014	12.4	4.1	-8.3	-66.9%	218	191	-27	-12%

**Notes:**

- [1] Regional TLD refers to the region-specific gTLD assigned to a given area. Regional TLDs are matched to areas based on a correspondence between a city name and the regional TLD name (e.g., City of New York = .nyc).
- [2] Regional TLD Entry Date refers to a given regional TLD's general availability date.
- [3] Figures in the “Before” column refer to the average number of TLD registrations of legacy and new gTLDs, respectively, before the general availability date of the area's regional TLD.
- [4] Figures in the “After” column refer to the average number of TLD registrations of legacy and new gTLDs, respectively, after the general availability date of the area's regional TLD.
- [5] This analysis only includes TLDs in city-level regions with registration data before and after the general availability date of the area's regional TLD.

**Source:**

- [1] Monthly data on new registrations by TLD and region from January 2014 to January 2016 were provided by DomainTools.

## SECTION V – CONCLUSIONS

Our Phase II Assessment describes how the competition metrics established in the Phase I Assessment have changed (or remained the same) as the New gTLD Program has expanded in the past year. As only one year has passed since our initial assessment and the New gTLD Program continues to introduce new gTLDs, the marketplace for domain names will continue to change in the future. It should also be noted that our analyses are descriptive in nature and do not measure the causal impact of the New gTLD Program on competition.

While we are unable to draw conclusions about whether the New gTLD Program has caused a change in competition in the domain name marketplace, we have observed some changes in the past year that are consistent with what one would expect to see in a marketplace with increased competition. For example, we see a decline in the share of new gTLD registrations attributable to the four and eight registries with the most registrations. We also see volatility in the registration shares held by registry operators. This may be due to the entry of new gTLDs being offered by new registry operators or general volatility in the marketplace. Consistent with the first explanation, we see that when new gTLDs enter the marketplace, there is a decline in the registration shares of other new gTLDs within the same topic or subject area. One might also expect that increased competition among new gTLD registry operators would result in lower new gTLD wholesale prices, which we do not observe.

We observe similar volatility in new gTLD registration shares made by registrars, with the largest registrar in the Phase I Assessment dropping out of the top 15 registrars ranked by total domain registrations and being replaced by a registrar whose share of new gTLD registrations increased by nearly 22 percent. Registrars located in China have also become more prevalent among registrars with the largest shares of new gTLD registrations. We also observe that retail prices and markups have declined since Phase I, consistent with increased competition.

We also have evaluated how the entry of new gTLDs is related to the registration activity of other TLDs, such as legacy TLDs. Since legacy TLD registrations have not fallen and new gTLD registrations are growing, total TLD registration has increased since the beginning of the New gTLD Program. In both our Phase I and Phase II Assessments, we found no aggregate (worldwide) effect of new gTLD entry or registrations on legacy TLD registrations: registrations of legacy TLDs continued to follow the same pattern before and after the beginning of the New gTLD Program. This is consistent with new gTLDs generally not being treated as substitutes for legacy TLDs. We then analyzed if the entry of regionally-specific TLDs (e.g., nyc) is related to other TLD registration activity by registrants in the regional TLD's geographic area. We typically observe a decline in new gTLD and legacy registrations after the entry of the regional TLD in the region relevant to that TLD, which suggests that regional TLDs may be viewed as substitutes for other new gTLDs and legacy TLDs. We however do not have sufficient data to fully analyze the substitutability of new gTLDs for the legacy TLDs.



**RM 196**

# Submitting a Complaint to ICANN (Internet Corporation for Assigned Names and Numbers) Contractual Compliance

This page is available in:

English |

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Español (<https://www.icann.org/resources/pages/complaints-2013-07-16-es>) |

Français (<https://www.icann.org/resources/pages/complaints-2013-03-22-fr>) |

Русский (<https://www.icann.org/resources/pages/complaints-2013-03-22-ru>) |

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To submit a complaint, select the form next to the issue which best describes your concern in the chart below. Before submitting your complaint, please read the information on this page in its entirety.

If you have submitted or are submitting a complaint involving **Net 4 India Limited**, please read the information available [\*\*here\*\*](#) (</en/system/files/files/complaints-regarding-net4india-05may21-en.pdf>).

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Additional information on how to submit complaints concerning requests for access to non-public registration data can be found [here \(/en/system/files/files/submitting-3pa-complaint-02dec20-en.pdf\)](#).

Information regarding existing policies and requirements, and ongoing policy development work involving Domain Name (Domain Name) Registration Data is available [here \(/resources/pages/domain-name-registration-data-policies-requirements-2021-08-12-en\)](#).

The Registration Data associated with a domain name may be available by performing a search [here \(https://lookup.icann.org/\)](https://lookup.icann.org/).

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The information provided to ICANN (Internet Corporation for Assigned Names and Numbers) via the complaint forms is subject to Section 2 of ICANN (Internet Corporation for Assigned Names and Numbers)'s [Privacy Policy](/en/help/privacy) (/en/help/privacy).

Issue	Additional information & Submit Complaint
<p>A domain name that is being used to conduct an illegal or abusive activity</p> <p>A TLD (Top Level Domain) that is not displaying its contact details for handling inquiries related to malicious conduct in the TLD (Top Level Domain)</p>	<p><b><u>Abuse (involving a domain name)</u></b>  <a href="https://icannportal.force.com/compliance/s/abuse-domain">(<a href="https://icannportal.force.com/compliance/s/abuse-domain">https://icannportal.force.com/compliance/s/abuse-domain</a>)</a></p> <p><b><u>Abuse contact details of a TLD (Top Level Domain)</u></b>  <a href="https://icannportal.force.com/compliance/s/abuse-contact">(<a href="https://icannportal.force.com/compliance/s/abuse-contact">https://icannportal.force.com/compliance/s/abuse-contact</a>)</a></p>
<p>The transfer of a domain name to a</p>	<p><b><u>Transfer</u></b>  <a href="https://icannportal.force.com/compliance/s/transfer">(<a href="https://icannportal.force.com/compliance/s/transfer">https://icannportal.force.com/compliance/s/transfer</a>)</a></p>

different registrar and/or registrant	
The renewal and/or redemption of a domain name	<p><u>Renewal/Redemption</u>  <a href="https://icannportal.force.com/compliance/s/renewal-redemption"> (https://icannportal.force.com/compliance/s/renewal-redemption)</a></p>
The Registration Data associated with a domain name	<p><u>Registration Data is inaccurate or missing</u>  <a href="https://icannportal.force.com/compliance/s/registration-data"> (https://icannportal.force.com/compliance/s/registration-data)</a></p> <p><u>Request for disclosure of Registration Data by a third party with legitimate interest was denied or not responded to</u>  <a href="https://icannportal.force.com/compliance/s/registration-data"> (https://icannportal.force.com/compliance/s/registration-data)</a></p> <p><u>Registrant (Registrant) requested and consented to the display of their own Registration Data, but it is not displayed</u>  <a href="https://icannportal.force.com/compliance/s/registration-data"> (https://icannportal.force.com/compliance/s/registration-data)</a></p>
The suspension or deletion of a domain name for which I am or was the holder	<p><u>Domain name remains suspended or deleted even after responding to Registration Data verification inquiries</u>  <a href="https://icannportal.force.com/compliance/s/registration-data"> (https://icannportal.force.com/compliance/s/registration-data)</a></p>
The service	<p><u>The WHOIS (WHOIS (pronounced "who is"; not an</u></p>

<p>through which a registrar or registry operator is displaying Registration Data</p>	<p><u>acronym)/RDAP service is not operative</u>  <u>(<a href="https://icannportal.force.com/compliance/s/registration-data">https://icannportal.force.com/compliance/s/registration-data</a>).</u></p>
<p>Dispute Resolution Policies &amp; Procedures</p>	<p><u>Uniform Domain-Name Dispute-Resolution Policy (UDRP (Uniform Domain-Name Dispute Resolution Policy)).</u>  <u>(<a href="https://icannportal.force.com/compliance/s/udrp">https://icannportal.force.com/compliance/s/udrp</a>).</u></p> <p><u>Uniform Rapid Suspension System (URS (Uniform Rapid Suspension)).</u>  <u>(<a href="https://icannportal.force.com/compliance/s/urs">https://icannportal.force.com/compliance/s/urs</a>).</u></p> <p><u>Public Interest Commitments Dispute Resolution Procedure (PICDRP (Public Interest Commitment Dispute Resolution Procedure)).</u>  <u>(<a href="https://icannportal.force.com/compliance/s/picdrp">https://icannportal.force.com/compliance/s/picdrp</a>).</u></p> <p><u>Registry-Restriction Dispute Resolution Procedure (RRDRP (Registration Restrictions Dispute Resolution Procedure)).</u>  <u>(<a href="https://icannportal.force.com/compliance/s/rrdrp">https://icannportal.force.com/compliance/s/rrdrp</a>).</u></p> <p><u>Trademark Post-Delegation Dispute Resolution Procedure (Trademark PDDRP (Post-Delegation Dispute Resolution Procedure)).</u>  <u>(<a href="https://icannportal.force.com/compliance/s/trademark-post-delegation-dispute">https://icannportal.force.com/compliance/s/trademark-post-delegation-dispute</a>).</u></p>
<p>A Privacy/Proxy registration or service</p>	<p><u>Privacy/Proxy</u>  <u>(<a href="https://icannportal.force.com/compliance/s/privacy-proxy">https://icannportal.force.com/compliance/s/privacy-proxy</a>).</u></p>

<p>Access to the zone file of a TLD (Top Level Domain)</p>	<p><b><u>Zone File Access</u></b>  <a href="https://icannportal.force.com/compliance/s/zfa">(<u>https://icannportal.force.com/compliance/s/zfa</u>)</a></p>
<p>A name that has been or must have been reserved by the registry operator</p>	<p><b><u>Reserved Names</u></b>  <a href="https://icannportal.force.com/compliance/s/reserved-names">(<u>https://icannportal.force.com/compliance/s/reserved-names</u>)</a></p>
<p>A registry operator not abiding by the code of conduct of its Registry Agreement</p>	<p><b><u>Code of Conduct</u></b>  <a href="https://icannportal.force.com/compliance/s/code-of-conduct">(<u>https://icannportal.force.com/compliance/s/code-of-conduct</u>)</a></p>
<p>A contractual compliance issue not identified above</p>	<p><b><u>Generic Registrar Complaint</u></b>  <a href="https://icannportal.force.com/compliance/s/generic-registrar">(<u>https://icannportal.force.com/compliance/s/generic-registrar</u>)</a></p> <p><b><u>Generic Registry Complaint</u></b>  <a href="https://icannportal.force.com/compliance/s/generic-registry">(<u>https://icannportal.force.com/compliance/s/generic-registry</u>)</a></p>

**RM 197**



[العربية\(/ar/public-comment\)](#)

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## Public Comment

Public Comment is a vital part of our multistakeholder model. It provides a mechanism for stakeholders to have their opinions and recommendations formally and publicly documented. It is an opportunity for the ICANN community to effect change and improve policies and operations.

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## Public Comment

ICANN org publishes information about Upcoming Proceedings, Open Proceedings, Submissions, and Summary Reports. You can also search and review Closed Proceedings. Proceedings are open for a minimum of 40 days with exceptions as documented in the ICANN Bylaws or ICANN community operational procedures. All dates and times are based on UTC, and Open Proceedings close at 23:59 UTC.

## Open Proceedings

### Proceedings

[ICANN Draft FY23-27 Operating and Financial Plan and Draft FY23 Operating Plan and Budget](#) (/en/public-comment/proceeding/draft-fy23-27-operating-and-financial-plan-and-draft-fy23-operating-plan-and-budget-15-09-2021)

[Show description](#) ▾

## Recent Submissions

### Andreas Musielak

Submitted on [ICANN Draft FY23-27 Operating and Financial Plan and Draft FY23 Operating Plan and Budget](#) (/en/public-comment/proceeding/draft-fy23-27-operating-and-financial-plan-and-draft-fy23-operating-plan-and-budget-15-09-2021)

[Read more](#) (/en/public-comment/proceeding/draft-fy23-27-operating-and-financial-plan-and-draft-fy23-operating-plan-and-budget-15-09-2021/submissions/musielak-andreas-04-02-2022)

[Additional Unicode Scripts for Support in Internationalized Domain Names \(/en/public-comment/proceeding/additional-unicode-scripts-for-support-in-internationalized-domain-names-05-01-2022\)](/en/public-comment/proceeding/additional-unicode-scripts-for-support-in-internationalized-domain-names-05-01-2022)

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[ICANN Bylaws Amendments: ccNSO-Proposed Changes to Article 10 and Annex B \(/en/public-comment/proceeding/icann-bylaws-amendments-ccnso-proposed-changes-to-article-10-and-annex-b-21-01-2022\)](/en/public-comment/proceeding/icann-bylaws-amendments-ccnso-proposed-changes-to-article-10-and-annex-b-21-01-2022)

[Show description](#) ▾

[Proposal for Myanmar Script Root Zone Label Generation Rules \(/en/public-comment/proceeding/proposal-for-myanmar-script-root-zone-label-generation-rules-13-01-2022\)](/en/public-comment/proceeding/proposal-for-myanmar-script-root-zone-label-generation-rules-13-01-2022)

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[Name Collision Analysis Project \(NCAP\) Study 2 Documents \(/en/public-comment/proceeding/name-collision-analysis-project-ncap-study-2-documents-27-01-2022\)](/en/public-comment/proceeding/name-collision-analysis-project-ncap-study-2-documents-27-01-2022)

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#### ICANN Business Constituency (BC)

Submitted on [ccNSO Proposed Policy on the Retirement of ccTLDs \(/en/public-comment/proceeding/ccnso-proposed-policy-on-the-retirement-of-cctlds-22-11-2021\)](#)

[Read more \(/en/public-comment/proceeding/ccnso-proposed-policy-on-the-retirement-of-cctlds-22-11-2021/submissions/icann-business-constituency-bc-19-01-2022\)](#)

#### At-Large Advisory Committee (ALAC) Policy staff in support of the At-Large Community

Submitted on [ccNSO Proposed Policy on the Retirement of ccTLDs \(/en/public-comment/proceeding/ccnso-proposed-policy-on-the-retirement-of-cctlds-22-11-2021\)](#)

[Read more \(/en/public-comment/proceeding/ccnso-proposed-policy-on-the-retirement-of-cctlds-22-11-2021/submissions/policy-staff-in-support-of-the-at-large-community-at-large-advisory-committee-alac-19-01-2022\)](#)

## Pending Reports

There are no pending reports.

## Upcoming Proceedings

Proceedings
Root Zone Update Process Study
<a href="#">Show description</a> ▾
NCAP Study 2 Draft Report
<a href="#">Show description</a> ▾
Updates to the GNSO Operating Procedures
<a href="#">Show description</a> ▾

## Recent Reports

[Public Comment Summary Report: ccNSO Proposed Policy on the Retirement of ccTLDs \(PDF, 91.22 KB\)](#)  
(<https://itp.cdn.icann.org/en/files/country-code-top-level-domains-cc-tlds/ccnso-proposed-policy-retirement-cctlds-ppc-summary-report-02-02-2022-en.pdf>)

[Public Comment Summary Report: EPDP Phase 2A Policy Recommendations \(PDF, 94.85 KB\)](#)  
(<https://itp.cdn.icann.org/en/files/generic-names-supporting-organization-council-gnso-council/public-comment-summary-report-epdp-phase-2a-31-01-2022-en.pdf>)

[Summary Report: Proposed Revisions to the ICANN DIDP \(PDF, 233.31 KB\)](#)  
(<https://itp.cdn.icann.org/en/files/documentary-information-disclosure-policy-didp/summary-report-revisions-didp-28-01-2022-en.pdf>)

[See All Upcoming Proceedings \(/en/public-comment/upcoming-proceedings\)](/en/public-comment/upcoming-proceedings)

## Closed Proceedings

Search for Closed Public Comment Proceedings, and their respective Reports and Submissions by clicking the Search Closed Proceedings button below.

[Search Closed Proceedings \(/en/public-comment/closed-proceedings\)](/en/public-comment/closed-proceedings)

### How Public Comment Works

The ICANN Board, Supporting Organizations, Advisory Committees, or ICANN org can open a proceeding, outlining specific issues for feedback. Stakeholders provide opinions and recommendations, and their submissions are public.

[Learn More \(/en/public-comment/about\)](/en/public-comment/about)

### How to Provide Input

Interested in making a submission? You need to create or log in to ICANN Account to make submissions. Read our guide to learn more.

[Download Guide\(https://itp.cdn.icann-](https://itp.cdn.icann.org/tool/icann-)

### ICANN Expected Standards of Behavior

Submissions must adhere to the ICANN Expected Standards of Behavior.

[ICANN Expected Standards of Behavior \(https://www.icann.org/standards-](https://www.icann.org/standards-)

### ICANN Terms of Service

Submissions are subject to the ICANN Terms of Service. All submissions are captured and displayed for each proceeding and are visible by the public.

[ICANN Terms of Service \(https://www.icann.org/terms-of-service\)](https://www.icann.org/terms-of-service)



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[Participate \(/en/about/participate\)](/en/about/participate)

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[Staff \(/organization\)](/organization)

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[Public Responsibility \(/dprd\)](/dprd)

### CONTACT US

[Locations \(/contact\)](/contact)

[Global Support \(/resources/pages/customer-support-2015-06-22-en\)](/resources/pages/customer-support-2015-06-22-en)

[Report Security Issues \(/resources/pages/report-security-issues-2018-05-24-en\)](/resources/pages/report-security-issues-2018-05-24-en)

[PGP Keys \(/en/contact/pgp-keys\)](/en/contact/pgp-keys)

[Certificate Authority \(/contact/certificate-authority\)](/contact/certificate-authority)

[Registry Liaison \(/resources/pages/contact-f2-2012-02-25-en\)](/resources/pages/contact-f2-2012-02-25-en)

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### ACCOUNTABILITY &

#### TRANSPARENCY

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[Request for](#)

[Reconsideration \(/resources/pages/accountability-certification\)](/resources/pages/accountability-certification)

[Ombudsman \(/help/ombudsman\)](/help/ombudsman)

[Empowered Community \(/ec\)](#)

[Employee Anonymous Hotline Policy and Procedures \(/employee-anonymous-hotline-policy-procedures-whistleblower\)](/employee-anonymous-hotline-policy-procedures-whistleblower)

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[RFPs \(/en/news/rfps\)](/en/news/rfps)

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[Correspondence \(/en/news/correspondence\)](/en/news/correspondence)

### HELP

[Dispute Resolution \(/en/help/dispute-resolution\)](/en/help/dispute-resolution)

[Domain Name Dispute Resolution \(/en/help/dndr\)](/en/help/dndr)

[Name Collision \(/en/help/name-collision\)](#)

[Registrar Problems \(/en/news/announcements/announcement-06mar07-en.htm\)](/en/news/announcements/announcement-06mar07-en.htm)

[WHOIS \(https://whois.icann.org/en\)](https://whois.icann.org/en)

### DATA PROTECTION

[Data Privacy Practices \(/privacy\)](/privacy)

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[Privacy Policy \(/privacy/policy\)](/privacy/policy)

[Terms of Service \(/privacy/tos\)](/privacy/tos)

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**RM 198**



# ICANN PUBLIC COMMENT

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## Step-by-Step Submission Guidelines for the ICANN Community



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26 July 2021

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# About Public Comment

## What is Public Comment?

Public Comment gives the ICANN community, Internet stakeholders, and the general public an opportunity to provide input on ICANN's work and policies. It is a vital part of our multistakeholder model and contributes to our transparency and accountability commitments.

## How Does Public Comment Work?

The ICANN Board, Supporting Organizations, Advisory Committees, or ICANN organization (org) can open a Public Comment proceeding that outlines specific issues or questions for feedback. Stakeholders provide opinions and recommendations, and their submissions are public and archived. ICANN org summarizes the submissions and identifies common themes into a summary report. The group that opened the proceeding then reviews the submissions and summary report, addresses the input, and proposes next steps.

## How Do You Provide Input?

Any individual or organization can submit comments to any open proceeding located at: <https://www.icann.org/public-comment>. You will need to create or log in to [ICANN Account](#) in order to leave a comment on an open proceeding. Once the Public Comment proceeding closes, ICANN org produces a summary report that summarizes the input and feedback received.

## Subscribe to Public Comment Alerts

You can receive the latest Public Comment content directly to your inbox by signing up to [ICANN News Subscriptions](#). When new content is added or updated on <https://www.icann.org/public-comment>, an email will be sent to your email inbox on a daily or weekly basis depending on your selected preferences.

## Subscribe to All Public Comment Proceedings

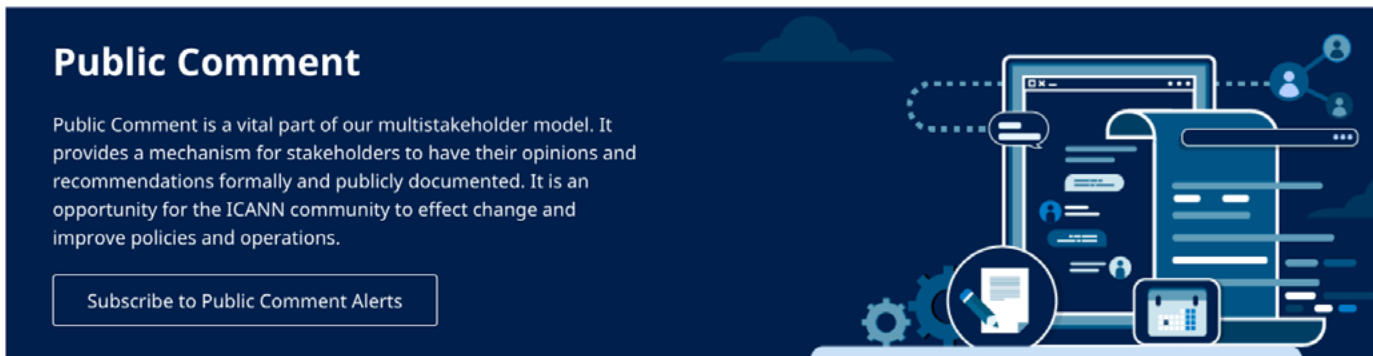
By subscribing to all Public Comment proceedings, you will receive an email alert when any of the following updates occur:

- A new upcoming Public Comment proceeding is published
- An upcoming proceeding is opened
- The close date of an open proceeding is extended
- An open proceeding is closed for submissions
- The report is published for a closed proceeding



To subscribe to Public Comment, follow these steps:

1. Click **Subscribe to Public Comment Alerts** via the landing page banner at the top of any Public Comment page. This will redirect you to ICANN News Subscriptions.



Or you can also navigate directly to <https://subscribe.icann.org/>.

2. Once on the ICANN News Subscriptions page, check **Subscribe** on the Public Comment tile. Then, click **Add Subscriptions**.

You can choose whether you receive a daily or weekly email alert regarding Public Comment proceedings.

### Sign Up for ICANN News Subscriptions

Receive the latest <https://icann.org> content directly to [jana.juginovic@icann.org](mailto:jana.juginovic@icann.org). When new content is added or updated on <https://icann.org>, an email will be sent to [jana.juginovic@icann.org](mailto:jana.juginovic@icann.org), on a daily or weekly basis.

You will receive your daily news email between 12:10-12:40am UTC and the weekly news email on Saturday between 01:10-01:40am UTC.

Select how often you would like to receive your customized content to [jana.juginovic@icann.org](mailto:jana.juginovic@icann.org).

Once a Day  Once a Week (Fridays)

#### What Content Are You Interested In?

<p><b>Subscribe to Announcements</b></p> <p>Read ICANN Announcements to stay informed of the latest policy-making activities, regional events, and more.</p> <p><input type="checkbox"/> Subscribe</p>	<p><b>Subscribe to Blogs</b></p> <p>Read Blogs from ICANN's Chair, President &amp; CEO, and many more to keep up-to-date on the latest Board, org, and community activities and work.</p> <p><input type="checkbox"/> Subscribe</p>	<p><b>Subscribe to Registry Agreements</b></p> <p>Read the latest updates to gTLD Registry Agreements, which establish the rights, duties, liabilities, and obligations ICANN requires of registry operators to run gTLDs.</p> <p><input type="checkbox"/> Subscribe</p>
<p><b>Subscribe to Public Comment</b></p> <p>Read the latest Public Comment Proceedings to stay up-to-date on proposals initiated by ICANN working groups and functions. Get notified about new Proceedings and status changes for existing Proceedings.</p> <p><input checked="" type="checkbox"/> Subscribe</p>		

**Add Subscriptions**

# Subscribe to Individual Public Comment Proceedings

To receive updates for a specific Public Comment proceeding, go to the individual proceeding page and click the **Get alerts about this proceeding** button.

## Updated Operating Standards for Specific Reviews

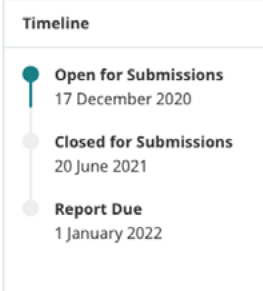
[Get alerts about this proceeding](#)

Category: Operations  
Requester: ICANN org  
ICANN org Contact(s): [lars.hoffmann@icann.org](mailto:lars.hoffmann@icann.org)

### What We Need Your Input On

This public comment proceeding seeks to solicit input on the updated Draft Operating Standards for Specific Reviews (Operating Standards). The Operating Standards aim to ensure that ICANN's Specific Reviews are conducted in a transparent, consistent, efficient, and predictable manner, while supporting the community's work to derive the expected benefit and value from review processes. Areas of guidance in the Operating Standards, as mandated by the ICANN Bylaws, include review

OPEN: 20 DAYS  
REMAINING



By subscribing to an individual Public Comment proceeding, you will receive an email alert when any of the following changes occur:

- The close date of the open proceeding is extended
- The proceeding is closed for submissions
- The report is published for the closed Proceeding
- A Public Comment submission is published or retracted

# Create an ICANN Account

In order to participate in Public Comment, you will need an ICANN Account. If you do not already have an ICANN Account, you will need to create one.

1. Go to <http://accounts.icann.org/>.
2. Click **Create an account**.

## Welcome to ICANN Account

Email Address or Username\*

Password\*

[Log In](#)

[Forgot Your Password?](#)

Are you a new user?

[Create an account](#)

By submitting my personal data to create and manage an ICANN Account, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#) and ICANN [Cookies Policy](#), and agree to abide by the electronic [Terms of Service](#)

3. Complete the form and click **Submit**

## ICANN Account Setup (Step 1 of 2)

- 1** Create Account and Verify Identity — **2** Set Password and Complete profile

### Create Account and Verify Identity

A message will be sent to your email address to verify your identity


Email Address\*

Username\*

First Name\*

Last Name\*

- By submitting my personal data to create and manage an ICANN Account, I agree that my personal data will be processed in accordance with the ICANN [Privacy Policy](#) and ICANN [Cookies Policy](#), and agree to abide by the electronic [Terms of Service](#)

I'm not a robot  reCAPTCHA  
Privacy - Terms

Submit

Clear

4. Go to your email inbox and click the confirmation link to complete account setup.

## ICANN Account Setup (Step 1 of 2)

- 1** Create Account and Verify Identity — **2** Set Password and Complete profile

### Request Submitted

A confirmation link has been sent to your email address. Please click the link to activate your account.

Didn't receive an email? [Resend activation email.](#)













# View Public Comment Proceedings

Once you have created an ICANN Account and are signed in, you can view Public Comment proceedings by going to <http://www.icann.org/public-comment>.

You can also go to <http://accounts.icann.org/> and click **Public Comment**.

## Welcome to Your ICANN Account

ICANN Account gives you access to many ICANN services using only one login. This is your one-stop-shop to launch the ICANN services you have signed-up for. To get started, select a service from your list below.

<b>Centralized Zone Data Service</b> 	<b>Community Travel</b> 	<b>Fellowship Application</b> 	<b>Fellowship Selection Committee</b> 
<b>ICANN Learn</b> 	<b>ICANN News Subscriptions</b> 	<b>ICANN.org</b> 	<b>Meetings &amp; Events</b> 
<b>NextGen Application</b> 	<b>NextGen Selection Committee</b> 	<b>Open Data Platform</b> 	<b>Public Comment</b> 

# Create a Public Comment Submission

1. From the main Public Comment page, scroll down to Open Proceedings and click the title of the proceeding.

## Public Comment

ICANN org publishes information about Upcoming Public Comment Proceedings, Open Proceedings, Submissions, and Proceeding Reports. You can also search and review Closed Proceedings.

## Open Proceedings

Proceedings	Submissions	Close Date ▼
<p><b><u>Updated Operating Standards for Specific Reviews</u></b></p> <p><b><u>Hide description</u></b> ^</p> <p>This public comment proceeding seeks to solicit input on the updated Draft Operating Standards for Specific Reviews (Operating Standards). The Operating Standards aim to ensure that ICANN's Specific Reviews are conducted in a transparent, consistent, efficient, and predictable manner, while supporting the community's work to derive the expected benefit and value from review processes. Areas of guidance in the Operating Standards, as mandated by the ICANN Bylaws, include review team selection process, conflict of interest practices, confidential disclosure to review teams, review team decision-making practices, and guidelines on how review teams are to work with and consider independent expert advice. Specific Review teams currently conducting reviews are encouraged to use these Draft Operating Standards as a reference for their work.<b>Category</b></p> <p>Operations</p> <p><b>Requester</b></p> <p>ICANN org</p> <p><b>ICANN org Contact(s)</b></p> <p><a href="mailto:lars.hoffmann@icann.org">lars.hoffmann@icann.org</a></p>	<p><b><u>41</u></b></p>	<p>12 Nov 2018</p> <p><b>Final Day</b></p>

2. This will take you to the Proceeding page.

## Updated Operating Standards for Specific Reviews

Get alerts about this proceeding

Category: Operations

Requester: ICANN org

ICANN org Contact(s): [lars.hoffmann@icann.org](mailto:lars.hoffmann@icann.org)

### What We Need Your Input On

This public comment proceeding seeks to solicit input on the updated Draft Operating Standards for Specific Reviews (Operating Standards). The Operating Standards aim to ensure that ICANN's Specific Reviews are conducted in a transparent, consistent, efficient, and predictable manner, while supporting the community's work to derive the expected benefit and value from review processes. Areas of guidance in the Operating Standards, as mandated by the ICANN Bylaws, include review team selection process, conflict of interest practices, confidential disclosure to review teams, review team decision-making practices, and guidelines on how review teams are to work with and consider independent expert advice. Specific Review teams currently conducting reviews are encouraged to use these Draft Operating Standards as a reference for their work.

#### Proposals for Your Input

[Updated Draft Operating Standard for Specific Reviews \(Operating Standards\) \(PDF, 345 KB\)](#)

Provide Your Input

### Background

The Operating Standards aim to ensure that ICANN's Specific Reviews are conducted in a transparent, consistent, efficient, and predictable manner, while supporting the community's work to derive the expected benefit and value from review processes. The Operating Standards are subject to the relevant provisions in the ICANN Bylaws that govern specific reviews (see Article IV, [Section 4.6](#)).

The updated Draft Operating Standards for Specific Reviews address, among other things:

- Review team candidate nomination and member selection
- Scope setting
- Roles and responsibilities
- Review team working methods
- Dispute resolution
- Review output
- Amending the Operating Standards

### Next Steps

ICANN organization will incorporate feedback from this public comment proceeding into an updated final document. The final document will be presented to the ICANN Board, with the aim of Board adoption in April / May 2020. A public session on the final document is planned for ICANN67.

### Supporting Information

This additional information from ICANN org provides more context for this Public Comment Proceeding and may help you review the proposals for input and publish a submission.

#### Supporting Information

[Draft Operating Standards for Specific Reviews for public comment \(October 2017\) \(PDF, 583 KB\)](#)

[Cross-Community Session: Operating Standards for Specific Reviews \(ICANN60 Abu Dhabi, October 2017\) \(PDF, 1.65 MB\)](#)

[Long-Term Options to Adjust the Timeline for Reviews for public comment \(May 2018\) \(PDF, 583 KB\)](#)

[Proposed updates to the Draft Operating Standards \(October 2018\) \(PDF, 1.65 MB\)](#)

[Webinars on proposed updates to the Draft Operating Standards \(October 2018\) \(PDF, 583 KB\)](#)

OPEN: 20 DAYS  
REMAINING

#### Timeline

- **Open for Submissions**  
17 December 2020
- **Closed for Submissions**  
20 June 2021
- **Report Due**  
1 January 2022

Provide Your Input

#### Recent Submissions to this Proceeding

##### Gowtham Raghunathan

Submitted on  
23 May 2021

[Read more](#)

##### Lieng Hui

This Submission has been removed.

[Read more](#)

##### Thin Zar Phyo

Submitted on  
18 Jun 2020

[Read more](#)

[See all submissions to this proceeding >](#)

#### How to Provide Input

Interested in making a submission? You need to create or log in to ICANN Account to make submissions. Read our guide to learn more.

[Download Guide >](#)

3. After reviewing the proceeding, click **Provide Your Input** to begin the Public Comment submission process.

Note: If you are not already logged into ICANN Account, you will be prompted to log in and then will be redirected to the submission form.

4. Begin filling out the submission form.

Save Draft Document Actions Not Saved

## Updated Operating Standards for Specific Reviews

[View Public Comment](#)

**Category:** Operations  
**Requester:** ICANN Org  
**ICANN org Contact(s):** [lars.hoffmann@icann.org](mailto:lars.hoffmann@icann.org)

Required Fields \*

**Please Read These Important Instructions Before Submission.**

This Public Comment forum seeks community feedback on the Work Track 5 on Geographic Names at the Top Level - Supplemental Initial Report. There is no obligation to complete all sections within this form. You can respond to as many or as few questions as desired.

If you would like to submit your answers as an attachment, you can do so under the Attachment section location towards the bottom of the page.

The top three fields (Category, Requester, and ICANN org Contact[s]) are auto populated from the proceeding on which you are providing input. Your personal details (name and email) are automatically added from your ICANN Account profile.

5. Depending on the proceeding, there will be one of three ways to complete the submission form.

Note: Regardless of how you complete a Public Comment submission form, both the **Email** and **Summary for Submission** field are always required for submitting a comment. Other questions may be required depending on the proceeding submission form you are completing.

a. Answering guided questions.

The types of answers you will be asked to provide in the submission form can be single select, multi-select, ranker, and open-ended as depicted in the example form below.

1. In developing recommendations for future treatment of country and territory names, Work Track 5 has considered several alternatives related to translation. In your view, which alternative is the best option?

- Continue to reserve as unavailable translations in any language
- Reserve as unavailable translations in UN languages
- Reserve as unavailable translations in UN languages and the official languages of the country
- Reserve as unavailable translations in official languages of the country
- Reserve as unavailable translations in official and commonly used languages
- Reserve as unavailable translations in official and relevant national, regional, and community languages
- Reserve as unavailable translations in "principal languages" where the principal languages are the official or de facto national languages and the statutory or de facto provincial languages of that country
- A combination of two or more categories above

2. Which of the following should serve as a basis for the development of policies regarding geographic names?

- International law
- National/local law and policy
- Norms and values

Another basis not categorized above (please specify)

3. Work Track members have considered a series of principles that may be used to guide the development of future policy on geographic names. The principles were discussed in the context of city names and terms not included in the 2012 Application Guidebook, but they may be applicable more broadly. Please rank these principles in order of importance from 1 to 4 (1=most important and 4=least important).

- In alignment with Principle C from the 2007 GNSO recommendations on new gTLDs, the program should allow for the introduction of new gTLDs.
- In alignment with Principle A from the 2007 GNSO recommendations on new gTLDs, enhance the predictability for all parties.
- Reduce the likelihood of conflicts within the process, as well as after the process concludes and TLDs are delegated.
- Policies and processes should be simple to the extent possible.

4. The definition of the term "geographic name" could impact development of policy and implementation guidance, as well as program implementation details, such as guidance for the Geographic Names Panel in the New gTLD application process. In your view, how should the term "geographic name" be defined for the 9 Preliminary Recommendations, Questions for Community Input, and Options/Proposals purposes of the New gTLD Program?

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b. Attaching your submission as a document.

Some submission forms may only ask you to submit your responses as a document. You can attach it by dropping your file(s) directly into the **Attachment** section from your desktop or click browse to find the file(s) from your desktop.

Note: Attachments are limited to the following types: .DOC, .DOCX, .PDF, .XLS, .XLSX



## Attachment

If you have additional feedback on this Public Comment Proceeding, upload your attachment here.

Attachments are limited to the following types: .DOC, .DOCX, .PDF, .XLS, .XLSX

Drop files to attach, or [browse](#)

File Name	Size
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It is highly recommended that you also add a summary of your attachment.

### Summary of Attachment

Please provide a summary of your attachment. This summary should include whether your attachment is in addition to completing the Public Comment Proceeding form or if your attachment is in lieu of completing this form (max. of 2,000 characters).

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Insert text here

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- c. Answering the guided questions and attaching a supporting document.

Some submission forms may ask that you answer guided questions and attach a supporting document.

- 6. Add a summary of your submission. This is a required in order to publish your submission.

### Summary of Submission \*

Please provide a summary of your Public Comment Submission. This summary should include a statement that reflects the overall position of your Submission and other high-level observations or recommendations. This summary is public and published on the Public Comment Submission page along with a link to your Submission (max. of 2,000 characters).

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- By submitting your personal data, you agree that your personal data will be processed in accordance with ICANN Privacy Policy, and agree to abide by the website Terms of Service \*

7. While working on your submission, click **Save Draft** to save your progress if you need to return to it later.

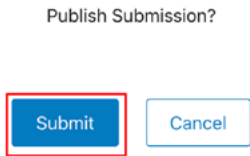


8. After you have completed your submission, click **Publish** at the bottom of the page.



9. Click **Submit** to confirm your Public Comment submission.

### Submission Confirmation ✕



## View All Submissions for a Specific Proceeding

Submissions for a specific proceeding can be accessed two ways:

1. On the main Public Comment landing page, go to Open Proceedings and click the number in the **Submissions** column.

### Open Proceedings

Proceedings	Submissions	Close Date <span>▼</span>
<p><b><u>Updated Operating Standards for Specific Reviews</u></b></p> <p><b><u>Hide description</u></b> <span>^</span></p> <p>This public comment proceeding seeks to solicit input on the updated Draft Operating Standards for Specific Reviews (Operating Standards). The Operating Standards aim to ensure that ICANN's Specific Reviews are conducted in a transparent, consistent, efficient, and predictable manner, while supporting the community's work to derive the expected benefit and value from review processes. Areas of guidance in the Operating Standards, as mandated by the ICANN Bylaws, include review team selection process, conflict of interest practices, confidential disclosure to review teams, review team decision-making practices, and guidelines on how review teams are to work with and consider independent expert advice. Specific Review teams currently conducting reviews are encouraged to use these Draft Operating Standards as a reference for their work.<b>Category</b></p> <p>Operations</p> <p><b>Requester</b></p> <p>ICANN org</p> <p><b>ICANN org Contact(s)</b></p> <p><a href="mailto:lars.hoffmann@icann.org">lars.hoffmann@icann.org</a></p>	<p><b>41</b></p>	<p>12 Nov 2018</p> <p><b>Final Day</b></p>

2. From a proceeding page, click **See all submissions to this proceeding** at the bottom of the **Recent Submissions to the Proceeding** box in the right column of the page.

## Updated Operating Standards for Specific Reviews

Get alerts about this proceeding

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Requester: ICANN org

ICANN org Contact(s): [lars.hoffmann@icann.org](mailto:lars.hoffmann@icann.org)

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[Read more](#)

**Liang Hai**

This Submission has been removed.

[Read more](#)

**Thin Zar Phyo**

Submitted on  
18 Jun 2020

[Read more](#)

[See all submissions to this proceeding >](#)

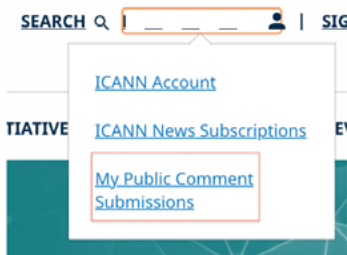
# Managing Your Public Comment Submissions

While a proceeding is still open, you can edit or retract your submission at any time. Once the proceeding closes, your submission cannot be altered or retracted. You will still be able to download your published submission as a PDF or Word document.

## View Your Previous Public Comment Submissions

Your Public Comment submission history can be viewed on the **My Submissions** page. It can be accessed two different ways:

1. Click the user icon at the top of the page and select **My Public Comment Submissions**. You need to be signed in to your ICANN Account.



2. Click the **My Submissions** card on the submissions page of a proceeding. **See View All Submissions on a Specific Proceeding.**

### Submissions for this Proceeding

Draft PTI and IANA FY20 Operating Plan and Budgets

**View this Proceeding**  
View available materials for this proceeding.

**Provide Your Input**  
Submit your feedback for this proceeding.

**My Submissions**  
View, edit, or download all of your Public Comment submissions.

Either path will take you to the My Submissions page where you can view and manage all of your submissions.

## My Submissions

Edit, view, or download your submissions below. If your submission is for a proceeding that is closed, you can no longer edit the submission.

Proceeding	Status	Actions	Date Submitted ▼
Revisions to the ICANN Bylaws re SSAC and RSSAC Leadership	Draft	<a href="#">Edit</a>	
ICANN Draft FY20 Operating Plan and Budget and Five-Year Operating Plan Update	Published	<a href="#">View</a> <a href="#">Edit</a>	26 May 2016
Proposal for Hebrew Script Root Zone Label Generation Rules	Closed	<a href="#">View</a> <a href="#">Download PDF</a> <a href="#">Download Word</a>	26 July 2015

# Edit a Public Comment Submission

Public Comment submissions can only be edited if a Public Comment proceeding is open and it is in a draft or published state. Once a proceeding is closed, submissions can no longer be edited.

## Edit a Draft Submission

1. From the **My Submissions** page under the **Actions** column, click **Edit** on the row for the submission you are editing.

### My Submissions

Edit, view, or download your submissions below. If your submission is for a proceeding that is closed, you can no longer edit the submission.

Proceeding	Status	Actions	Date Submitted ▼
Revisions to the ICANN Bylaws re SSAC and RSSAC Leadership	Draft	<a href="#">Edit</a>	
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Proposal for Hebrew Script Root Zone Label Generation Rules	Closed	<a href="#">View</a> <a href="#">Download PDF</a> <a href="#">Download Word</a>	26 July 2015

2. Edit the submission.
3. Save the draft or publish.

## Edit a Published Submission

To edit a submission that has already been published, you will need to retract it first. You can only edit a submission while a proceeding is open.

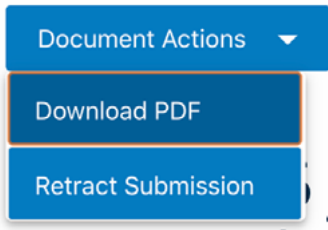
1. From the **My Submissions** page, under the **Actions** column, click **Edit** on the row for the submission you are editing.

### My Submissions

Edit, view, or download your submissions below. If your submission is for a proceeding that is closed, you can no longer edit the submission.

Proceeding	Status	Actions	Date Submitted ▼
Revisions to the ICANN Bylaws re SSAC and RSSAC Leadership	Draft	<a href="#">Edit</a>	
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Proposal for Hebrew Script Root Zone Label Generation Rules	Closed	<a href="#">View</a> <a href="#">Download PDF</a> <a href="#">Download Word</a>	26 July 2015

2. On the Document Actions dropdown, click **Retract Submission**.



3. Click **Yes** to confirm your retraction.

## Submission Retraction ×

Are you sure you want to retract your submission?



4. Edit the submission.

5. After you have revised your submission, click **Publish** at the bottom of the page.



6. Click **Submit** to confirm your submission.

## Submission Confirmation ×

Publish Submission?



## Retract a Public Comment Submission

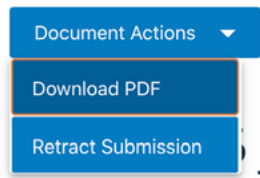
1. From the **My Submissions** page, under the **Actions** column, click **Edit** for the submission you are editing. You can only retract a submission when a proceeding is open.

### My Submissions

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2. From the **Document Actions** dropdown, click **Retract Submission**.



3. Click **Yes** to confirm your retraction.

### Submission Retraction ×

Are you sure you want to retract your submission?

4. Once your submission has been retracted, it will no longer be publicly available on the submissions page and a note will appear next to your submission indicating that it has been removed.

**Draft PTI and IANA FY20 Operating Plan and Budgets – Panton, Gary**  
26 July 2017

This Submission has been removed.

# Connect with us

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**RM 199**

# ICANN (Internet Corporation for Assigned Names and Numbers) Complaints Office

## [Click Here to Submit a Complaint](https://survey.clicktools.com/app/survey/go.jsp?iv=3u2cvgocq0ml5)

<https://survey.clicktools.com/app/survey/go.jsp?iv=3u2cvgocq0ml5>

NOTE: If you are experiencing issues with **Net 4 India Ltd.**, please visit [this page \(https://publicdomainregistry.com/net4india-registrant-faqs/\)](https://publicdomainregistry.com/net4india-registrant-faqs/) for help.

## Overview

The Complaints Office is a function within the [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](https://www.icann.org) that:

- Provides a centralized location to submit complaints related to the [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](https://www.icann.org).
- Receives complaints, researches them, collects facts, reviews, analyzes, and resolves issues as openly as possible.
- Helps the [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](https://www.icann.org) build on its effectiveness, and contributes to increased transparency from the Org.
- Aggregates the data from complaints to identify and solve for operational trends that should be improved.

The Complaints Office handles complaints regarding the [ICANN \(Internet Corporation for Assigned Names and Numbers\) org](https://www.icann.org) that don't fall into an existing complaints mechanism, such as [Contractual Compliance \(/resources/pages/compliance-2012-02-25-en\)](https://www.icann.org/resources/pages/compliance-2012-02-25-en), [Request for Reconsideration \(/groups/board/governance/reconsideration\)](https://www.icann.org/groups/board/governance/reconsideration) and the [Ombudsman \(/ombudsman\)](https://www.icann.org/ombudsman). This may include complaints about how a request has been handled, a process that appears to be broken, insufficient handling of an issue, or something that may be an indication of a systemic issue, among other things. To learn more about the kinds

of complaints the Complaints Office handles, please visit the [Complaints Office Report page \(/complaints-report\)](/complaints-report).

The Complaints Office reviews verifiable information to ensure recommendations and resolutions are based in fact. It strives to be open and transparent, responsive and accountable to all parties, and to make recommendations that are constructive and actionable. Above all else, the Complaints Office acts with the utmost integrity in service of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission.

## Submitting a Complaint

Anyone wishing to submit a complaint related to the ICANN (Internet Corporation for Assigned Names and Numbers) org may do so by completing this [web-form \(https://survey.clicktools.com/app/survey/go.jsp?iv=3u2cvgocq0ml5\)](https://survey.clicktools.com/app/survey/go.jsp?iv=3u2cvgocq0ml5).

When submitting a complaint, please be sure to include all relevant information. Once a complaint is received, it will be reviewed to ensure it falls within the scope of the office and you will be notified of next steps via email. Out of scope submissions are forwarded and responded to by ICANN (Internet Corporation for Assigned Names and Numbers)'s Global Support Center team who has expertise in navigating the entire ICANN (Internet Corporation for Assigned Names and Numbers) org and will get the submitter the information and/or assistance they are looking for.

Submissions that fall within the scope of the Complaints Office, will be handled in the following stages:

<p><b>1. Receive, Acknowledge and Publish</b></p>	<ul style="list-style-type: none"> <li>• Acknowledge receipt of the complaint.</li> <li>• Remind submitter that the process is transparent, that the complaint will be published on the <a href="/complaints-report">Complaints Office Report page (/complaints-report)</a> with personal information redacted (as appropriate), and provide estimated timeframe for next update.</li> </ul>

<p><b>2. Evaluate and Consider</b></p>	<ul style="list-style-type: none"> <li>• The Complaints Officer interviews <u>ICANN (Internet Corporation for Assigned Names and Numbers) org</u> employees with subject-matter expertise, collects, reviews and analyzes facts, researches appropriate data, and works with management to determine if improvements are warranted and if so—what can be done.</li> <li>• The Complaints Officer is independent and will make recommendations based on research and facts.</li> <li>• If there is disagreement regarding improvements between the Complaints Officer and relevant department executives, the issue is escalated to the Complaints Officer's supervisor and the ICANNCEO.</li> </ul>
<p><b>3. Response Drafting</b></p>	<ul style="list-style-type: none"> <li>• Once a complaint is fully researched, a path forward is identified.</li> <li>• A path forward can be many things, for example: improvements to a process, an educational opportunity, no improvements can be implemented, among others.</li> <li>• The path forward is agreed upon and the Complaints Officer drafts a response to the submitter.</li> </ul>
<p><b>4. Response Issued and Published</b></p>	<ul style="list-style-type: none"> <li>• The Complaints Officer provides the complainant with the response and the response is published on the <u><a href="#">Complaints Office Report Page (/complaints-report)</a></u>.</li> </ul>

## Resources about the Complaints Office

- [Complaints Report \(/complaints-report\)](/complaints-report)
- [Complaints Office Semi-Annual Report for 1 January – 30 June 2018 \(/en/system/files/files/complaints-office-semi-annual-report-12dec18-en.pdf\)](/en/system/files/files/complaints-office-semi-annual-report-12dec18-en.pdf)
- [Complaints Office Semi-Annual Report for 15 March 2017 – 31 December 2017 \(/en/system/files/files/complaints-office-semi-annual-report-07mar18-en.pdf\)](/en/system/files/files/complaints-office-semi-annual-report-07mar18-en.pdf)
- [Frequently Asked Questions \(/en/system/files/files/complaints-office-faqs-18may17-en.pdf\)](/en/system/files/files/complaints-office-faqs-18may17-en.pdf) [PDF, 296 KB] (18 May 2017)
- [العربية \(/en/system/files/files/complaints-office-faqs-18may17-ar.pdf\)](/en/system/files/files/complaints-office-faqs-18may17-ar.pdf) [PDF, 368 KB]
- [Español \(/en/system/files/files/complaints-office-faqs-18may17-es.pdf\)](/en/system/files/files/complaints-office-faqs-18may17-es.pdf) [PDF, 41 KB]
- [Français \(/en/system/files/files/complaints-office-faqs-18may17-fr.pdf\)](/en/system/files/files/complaints-office-faqs-18may17-fr.pdf) [PDF, 42 KB]
- [Português \(/en/system/files/files/complaints-office-faqs-18may17-pt.pdf\)](/en/system/files/files/complaints-office-faqs-18may17-pt.pdf) [PDF, 43 KB]
- [Русский \(/en/system/files/files/complaints-office-faqs-18may17-ru.pdf\)](/en/system/files/files/complaints-office-faqs-18may17-ru.pdf) [PDF, 196 KB]
- [中文 \(/en/system/files/files/complaints-office-faqs-18may17-zh.pdf\)](/en/system/files/files/complaints-office-faqs-18may17-zh.pdf) [PDF, 135 KB]

## Announcements, Blogs, and More

- [\[Announcement\] ICANN \(Internet Corporation for Assigned Names and Numbers\) Publishes First Complaints Office Semi-Annual Report \(/news/announcement-2018-03-07-en\)](/news/announcement-2018-03-07-en) (7 March 2018)
- [\[ICANN60 Session\] A Conversation with the ICANN \(Internet Corporation for Assigned Names and Numbers\) Complaints Officer \(https://icann60abudhabi2017.sched.com/event/CbEw/a-](https://icann60abudhabi2017.sched.com/event/CbEw/a-)

[conversation-with-the-icann-complaints-officer](#) (30 October 2017)

- [\[Webinar - APAC\] A Conversation With The ICANN \(Internet Corporation for Assigned Names and Numbers\) Complaints Officer](#)  
(<https://community.icann.org/display/GSEAPAC/APAC+Webinars>)  
(22 August 2017)
- [\[Blog\] Publishing Submissions to the Complaints Office](#)  
(</news/blog/publishing-submissions-to-the-complaints-office>)  
(24 June 2017)
- [\[Blog\] Clarifying the Roles of the ICANN \(Internet Corporation for Assigned Names and Numbers\) Complaints Office and Ombudsman](#) (</news/blog/clarifying-the-roles-of-the-icann-complaints-office-and-ombudsman>) (18 May 2017)
- [\[Blog\] Complaints Office Update: Objectives & Next Steps](#)  
(</news/blog/complaints-office-update-objectives-next-steps>) (27 April 2017)
- [\[Announcement\] Krista Papac Named as ICANN \(Internet Corporation for Assigned Names and Numbers\) Complaints Officer](#) (</news/announcement-2017-03-10-en>) (10 Mar 2017)

## Terms and Conditions for Submission to the Complaints Office

Submitted complaints will be handled in accordance with the [ICANN \(Internet Corporation for Assigned Names and Numbers\) bylaws](#) (</resources/pages/governance/bylaws-en>) and the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Privacy Policy](#) (</resources/pages/privacy-2012-12-21-en>). By submitting this [web-form](https://survey.clicktools.com/app/survey/go.jsp?iv=3u2cvgocq0ml5) (<https://survey.clicktools.com/app/survey/go.jsp?iv=3u2cvgocq0ml5>) you acknowledge that the complaints process shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Except as noted above, information you submit is subject to being published on the [ICANN \(Internet Corporation for Assigned Names and Numbers\) website](#) ([/](#)).

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**RM 200**



### **For Strickling and Marby**

Some have expressed concern that this transition will somehow allow ICANN to avoid the jurisdiction of antitrust enforcement authorities here in the U.S. and possibly to take advantage of consumers.

**Mr. Strickling, how does NTIA's transition plan ensure that consumers will be protected from anti-competitive practices after the transition?**

**Was the importance of market competition and consumer protection considered in the development of the IANA transition plan?**

**Q1Marby: Mr. Marby, what will ICANN's obligations be as a non-governmental actor in the marketplace?**

Answer to Q1Marby:

ICANN has been, since its inception, a non-governmental entity. ICANN remains a California Nonprofit Public Benefit Corporation, subject to state and U.S. Federal laws.

The transition that occurred on 1 October 2016 was the ending of a zero-cost technical services contract between ICANN and the National Telecommunications and Information of the U.S. Department of Commerce ("NTIA") called the IANA Functions Contract, through which ICANN performed a set of interdependent technical functions that enable the continued efficient operation of the Internet's domain name system (DNS). The IANA functions include: (1) the coordination of the assignment of technical Internet protocol parameters; (2) the processing of change requests to the authoritative root zone file of the DNS and root key signing key (KSK) management; (3) the allocation of Internet numbering resources; and (4) other services related to the management of the ARPA and INT top-level domains (TLDs). ICANN still performs all of this work today, after the transition, though it no longer holds a contract with the U.S. Government to perform this service.

ICANN is not, and never has been exempted from antitrust laws. ICANN has not been granted an antitrust exemption through any of its contracts with NTIA or the

U.S. Department of Commerce. No court ruling in favor of ICANN has ever cited an antitrust exemption to support its ruling. ICANN anticipates that it will continue to be, named as a defendant to suits which may contain allegations or assertions involving antitrust laws. For a view of litigation about ICANN and its role, please see <https://www.icann.org/resources/pages/governance/litigation-en>.

**Q2Marby: What sort of scrutiny will your organization be exposed to after the transition, in terms of competition policy and consumer protection?**

Answer to Q2Marby:

As explained above in answer to Q1, ICANN remains subject to the exact same laws to which it has always been subject.

Issues of competition and consumer choice and trust have been prominent within ICANN for years. Part of ICANN’s longstanding core values are to “depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market [and] [i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest.” See <https://www.icann.org/resources/pages/governance/bylaws-en>.

In 2012, ICANN launched its New gTLD Program, which is the most recent program through which the domain name system is expanded. During the work to implement the community-developed policy on the introduction of new top-level domains, there was significant participation from consumer protection agencies and advocates, intellectual property rights advocates, privacy advocates and others to build in protections into the Program. As committed to the U.S. Government through the 2009 Affirmation of Commitments, and as now embedded into ICANN’s Bylaws, ICANN is committed to performing reviews over the introduction of new top-level names into the DNS specifically to consider issues of competition, consumer choice and consumer trust. See <https://www.icann.org/resources/pages/governance/bylaws-en>, Section 4.6(d).

Currently, the first such review is underway. That Competition, Consumer Trust and Consumer Choice Review Team's work can be followed at <https://community.icann.org/pages/viewpage.action?pageId=56135383>.

**Q3Marby: How can ICANN reassure us that consumers and the public at large will not be harmed by this transition?**

Answer to Q3Marby:

As explained in response to Q1 above, the transition is about the ending of a technical services contract. The IANA functions are technical in nature, and everyday Internet users, including consumers and the general public at large, should not experience any change in how they use and experience the Internet as a result of the end of this contract. The transition does not impact ICANN's role as a home for the community-based policy development with respect to gTLD registries or registrars, or the contracts that ICANN holds with those entities. All consumer protections that are in place through those contracts remain in place after transition.

With the end of the IANA Functions Contract, ICANN now has a series of community-based agreements in place that allow the customers of the IANA functions to hold a direct oversight role on how ICANN performs that work. Each of the communities served by the IANA functions had an opportunity to directly negotiate new service level agreements to make sure that the functions are performed to their needs.

The transition actually increases the ability for those who believed they are harmed by ICANN's actions (or inaction) to bring challenges against ICANN. Instead of only having to resort to litigation, with the transition comes enhanced accountability measures through which ICANN can be required to reconsider its action or be subject to an independent review of whether its actions were consistent with its Bylaws.

With the transition, ICANN's work already has continued, and is expected to continue, with no impact on the end users of the Internet. As witnessed on 1

October 2016, the Internet's functionality did not change with the ending of the IANA Functions Contract. Further, the ICANN community has more tools to hold ICANN directly accountable for its actions. Taken together, ICANN has already demonstrated that the transition will not bring harm to the consumers and public at large.

**RM 201**

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS  
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**ICDR Case No. 01-18-0004-2702**

**AFILIAS DOMAINS NO. 3 LIMITED,  
(n/k/a ALTANOVO DOMAINS LTD.)  
*Claimant***

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,  
*Respondent***

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**DECISION ON AFILIAS' ARTICLE 33 APPLICATION**

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21 December 2021

Members of the IRP Panel

Catherine Kessedjian  
Richard Chernick  
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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## I. OVERVIEW

1. In this decision the Panel rules on an application by the Claimant presented under Article 33 of the International Arbitration Rules of the ICDR (amended and effective 1 June 2014) (**ICDR Rules**) entitled “Afilias Domains No. 3 Limited’s Rule 33 Application for an Additional Decision and for Interpretation”, dated 21 June 2021 (**Application**). The Application states that it requests an additional decision and interpretation of the Panel’s Final Decision in this IRP (**Final Decision**).<sup>1</sup>
2. For the reasons set out below, the Panel unanimously denies the Application in its entirety.

## II. HISTORY OF PROCEEDINGS

3. The history of the proceedings in this IRP up to 12 February 2020, the date of the Decision on Phase I, is set out at paragraphs 33 to 67 of that decision. The history of the proceedings between 12 February 2020 and 20 May 2021, the date of the Final Decision, is set out at paragraphs 35 to 81 of the Final Decision. Both narratives are incorporated by reference in this decision.
4. In its Final Decision, the Panel found, among others, that the Respondent had acted contrary to its Articles and Bylaws in the manner in which it had dealt with the Claimant’s complaints that NDC had breached the Guidebook and Auction Rules through its arrangements with Verisign in connection with NDC’s application for .WEB.<sup>2</sup> However, the Panel denied the Claimant’s request that the Respondent be ordered to disqualify NDC’s bid for .WEB and proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.<sup>3</sup>
5. On 21 June 2021, the Parties filed a Joint Request for Corrections to the Panel’s Final Decision pursuant to Article 33 of the ICDR Rules, seeking the correction of certain clerical or typographical errors and of the numbering of certain paragraphs in the Final Decision. On 15 July 2021, the Panel issued a Decision on the Parties’ Joint Request for Corrections confirming that the requested corrections all related to errors that were clerical or typographical in nature and, as such, fell within the scope of Article 33. The Panel granted the Parties’ Joint Request for Corrections, held that the Final Decision should be corrected as jointly requested by the Parties, and attached for the Parties’ convenience a corrected version dated 15 July 2021 of the Final Decision.

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<sup>1</sup> Unless otherwise indicated, all capitalized terms in the present decision have the meaning ascribed to these defined terms in the Final Decision dated 20 May 2021. All references to, and citations from, the Final Decision in the present decision are to the corrected version of the Final Decision dated 15 July 2021.

<sup>2</sup> Final Decision, para. 8.

<sup>3</sup> *Ibid*, para. 9.



6. As already indicated, Afiliias' own Application under Article 33 was also filed on 21 June 2021. Following receipt of the Application, the Panel, by email dated 23 June 2021, invited the Parties to consult and submit either a joint proposal for a briefing schedule on Afiliias' Application or the Parties' respective positions as to the procedure to be followed in respect of this Application. The Panel also asked that the Parties reach out to the *Amici* to ascertain their positions in respect of the Application.
7. On 28 June 2021, the Parties proposed the following briefing schedule for the Application:

6 August 2021	ICANN Response to Claimant's Rule 33 Application (If permitted to participate in these additional proceedings, the <i>Amici</i> would file a joint submission on this date.)
20 September 2021	Afiliias Rejoinder to ICANN Response (if <i>Amici</i> are not permitted to participate)
30 September 2021	Afiliias Rejoinder to ICANN Response and Response to <i>Amici</i> Observations (if <i>Amici</i> are permitted to participate)
8. In the same communication Afiliias noted that it objected to the *Amici*'s announced intention to participate in this new phase of the IRP, while ICANN indicated that it had no objection to their participation. The Parties added that they proposed to leave it to the Panel to decide whether there should be a hearing on Afiliias' Application.
9. On 28 June 2021, the *Amici* requested an opportunity to make submissions in response to Afiliias' Application and suggested the adoption of a more expedited briefing schedule than that proposed by the Parties. On 1 July 2021, Afiliias objected to the *Amici*'s request to make submissions on its Article 33 Application as well as to their suggestion regarding the briefing schedule.
10. On 3 July 2021, the Panel granted the *Amici*'s request to make submissions on Afiliias' Article 33 Application. The Panel reasoned that the *Amici* having participated in Phase II of the IRP to the full extent permitted by the Panel's Decision on Phase I, it was both appropriate and just that they be given an opportunity to make representations on Afiliias' Article 33 Application, which directly relates to the Final Decision.
11. In its communication of 3 July 2021, the Panel indicated that it was prepared to accept the briefing schedule proposed by the Parties even though it was longer than what might be expected for an application of that nature. The Panel's acceptance of that schedule came, however, with the caveat that by reason of pre-existing commitments on the part of its members, the Panel might not be in a position to issue its decision on Afiliias' Article 33 Application within thirty (30) days after 30 September 2021, the date proposed for the filing of the last submission on the Application, as required under Article 33(2) of the ICDR Rules. The Panel added that while in its experience

it would be exceptional for a hearing to be held in connection with an application for interpretation, correction, and/or for an additional award, the matter would be left open pending consideration of the written submissions to be made by the Parties and *Amici* in connection with the Application.

12. On 3 July 2021, the Respondent confirmed its waiver of the 30-day requirement provided by Article 33(2) with respect to the Panel's determination of Afilias' Article 33 Application. The Claimant and the *Amici* did the same on 5 July 2021.
13. In the event, the Parties and the *Amici* filed their respective submissions in accordance with the agreed Briefing Schedule. These submissions are summarized in the next section of this decision.
14. On 5 October 2021, having considered the comprehensive submissions contained in the Application, the Respondent's Response thereto, the *Amici*'s Submission, and the Claimant's Reply to the Application, the Panel advised the Parties and the *Amici* that it did not see a need to hold a hearing in relation to the Application.
15. As noted in the Final Decision,<sup>4</sup> in late 2020 the Claimant's former parent company, Afilias, Inc., merged with Donuts, Inc. The Claimant explains in the Application that it and its .WEB application were carved out of the merger transaction and that the Claimant is now known as Altanovo Domains Ltd. While the Claimant is now part of a group of companies that is separate from Afilias, Inc. and Donuts, Inc., the Claimant has chosen "for the sake of consistency and ease of reference"<sup>5</sup> to continue to refer to itself as "Afilias" throughout the Application. Having noted the Claimant's change of corporate name and affiliation, the Panel adopts the same approach and refers to the Claimant as "Afilias" throughout this decision.

### **III. POSITIONS OF THE PARTIES AND RELIEF REQUESTED**

16. The Application and the submissions filed in relation thereto are voluminous, running in total to more than 250 pages. While summaries of these submissions are included below to provide context, the Panel notes that in coming to its decision on the Application it has carefully considered all of the Parties' and *Amici*'s arguments and submissions, as well as the authorities submitted in support thereof.

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<sup>4</sup> Final Decision, paras. 11 and 247-252.

<sup>5</sup> Application, para. 1, fn. 1.

## **A. Afilias' Article 33 Application**

### **1. Overview**

17. In its Application, Afilias requests both an additional decision<sup>6</sup> and an interpretation of the Final Decision.<sup>7</sup> In Afilias' submission, by failing to resolve all the "claims and issues" presented by Afilias, the Panel "failed to satisfy its mandate" and "undermined the very purposes of the IRP", especially by its decision to refer Afilias' claim arising from NDC's alleged violation of the New gTLD Program Rules back to ICANN's Board and Staff to "pronounce" upon "in the first instance".<sup>8</sup>

### **2. Request for an Additional Decision**

18. Afilias argues that the purpose of an additional award is to ensure that an arbitral tribunal fulfills its mandate and avoids rendering an award that is *infra petita*, that is, that fails to resolve all claims presented to the tribunal as required by the arbitration agreement. In Afilias' view, such an award is subject to set aside, including under the English Arbitration Act (**EAA**), is unjust to the party that has presented the claim and constitutes a waste of the parties' time and resources.<sup>9</sup>
19. Afilias contends that any omission to decide a properly submitted claim is grounds for an additional award, and that the Panel must resolve all of the claims and issues before it in a manner consistent with its mandate as set out in Section 4.3(g) of the Bylaws.<sup>10</sup> That section provides that the "IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written response". Afilias argues that the term "Claim" (with a capital "C") refers to a claimant's "written statement of a Dispute" which describes the Covered Actions that the claimant considers has given rise to a Dispute. In turn, the Bylaws define "Covered Actions" as "any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members, that give rise to a Dispute."<sup>11</sup> Afilias adds that each "IRP Panel shall conduct an objective, *de novo* examination of the Dispute",<sup>12</sup> that the "IRP is intended as a final, binding arbitration

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<sup>6</sup> The Panel agrees with the Claimant that the term "decision" can, in the context of this IRP, be used interchangeably with the term "award", which is used in the ICDR Rules. See Application, para. 1, fn. 2.

<sup>7</sup> Application, para. 1.

<sup>8</sup> *Ibid*, para. 2.

<sup>9</sup> *Ibid*, paras. 5-7.

<sup>10</sup> *Ibid*, paras. 8-11.

<sup>11</sup> *Ibid*, para. 11, quoting from Sections 4.3(d), 4(3)(b)(iii)(A) and 4.3(b)(ii) of the Bylaws, Ex. C-1 [emphasis omitted].

<sup>12</sup> Application, para. 12, quoting from Section 4.3(i) of the Bylaws, Ex. C-1.

process”,<sup>13</sup> and that IRP decisions “are intended to be enforceable in any court with jurisdiction over ICANN”.<sup>14</sup>

20. According to Afilias, the Panel failed to fulfill its mandate with respect to three (3) claims that were put to it for resolution.<sup>15</sup>
21. First, Afilias argues that the Panel did not resolve its claim regarding the following Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC’s application, and/or (b) not declaring NDC’s bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder. Afilias defines this claim as its **Rules Breach Claim**.<sup>16</sup> Afilias stresses that its claim was not that ICANN failed to decide or pronounce on the propriety of the DAA, and NDC’s and Verisign’s other conduct. Rather, the question raised by Afilias was whether ICANN’s failure to disqualify NDC and to offer .WEB to Afilias was consistent with the Articles, Bylaws and New gTLD Program Rules, and that question was fully argued in this IRP.<sup>17</sup>
22. Afilias avers that ICANN supported the *Amic*’s request to participate in these proceedings for the specific purpose of responding substantively to Afilias’ Rules Breach Claim.<sup>18</sup> According to Afilias, the Panel’s findings of fact cannot be reconciled with its referral of the claim back to the Board for “pronouncement” “in the first instance”.<sup>19</sup> In Afilias’ view, the Panel failed to resolve the Rules Breach Claim as required by its mandate<sup>20</sup> and invented a prerequisite that the Board must “pronounce”, “decide” or “determine” the matter in the first instance before a claimant can assert in an IRP that ICANN has breached its Articles and Bylaws by failing to act as required based on that violation.<sup>21</sup> This, argues the Claimant, eliminates ICANN’s accountability.<sup>22</sup> Afilias adds that

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<sup>13</sup> Application, para. 14, quoting from Section 4.3(x) of the Bylaws, Ex. C-1.

<sup>14</sup> Application, para. 14, quoting from Section 4.3(x)(ii) of the Bylaws, Ex. C-1.

<sup>15</sup> Application, para. 15.

<sup>16</sup> *Ibid*, para. 16.

<sup>17</sup> *Ibid*, paras. 21-27 and 35-36.

<sup>18</sup> *Ibid*, paras. 28-31.

<sup>19</sup> *Ibid*, paras. 17 and 52-58.

<sup>20</sup> *Ibid*, paras. 37-43, 49-50 and 62.

<sup>21</sup> *Ibid*, paras. 44-48, 51, 54 and 63.

<sup>22</sup> *Ibid*, paras. 64-66.

the issue of remedy for the Rules Breach Claim had also been properly submitted and fully arbitrated before the Panel.<sup>23</sup>

23. Second, Afilias contends that the Panel failed to resolve its claim that ICANN violated its obligation to conduct its activities in accordance with relevant principles of international law. Afilias defines this as its **International Law Claim**, a claim it argues was properly presented to the Panel. Afilias avers that it elaborated as to what the four (4) following specific facets of the international law principle of good faith required of ICANN: (1) procedural fairness and due process, (2) impartiality and non-discriminatory treatment, (3) openness and transparency, and (4) respect for legitimate expectations. In Afilias' view, the Panel never denied that obligations under international law apply to ICANN, but did not address Afilias' International Law Claim or provide reasoning for its failure to do so.<sup>24</sup> According to Afilias, the Panel must now resolve in an additional decision the International Law Claim regarding ICANN's failure to disqualify NDC contrary to ICANN's international law obligations.<sup>25</sup>
24. Third, Afilias submits that the Panel did not resolve its claim that ICANN violated its Articles and Bylaws through its inequitable and disparate treatment of Afilias as compared to its treatment of NDC and Verisign. That is what Afilias defines in the Application as its **Disparate Treatment Claim**. It is argued that the Panel failed to determine that claim even though the Panel made findings of fact establishing its validity. Afilias therefore argues that the Panel must issue an additional decision resolving its Disparate Treatment Claim. Afilias characterizes as manifestly unfair the Panel's view, expressed in the Final Decision, that it was not "necessary, based on the allegations of disparate treatment, to add to its findings in relation to the Claimant's core claims". According to Afilias, it is not open to an IRP panel to determine that it is not "necessary" to decide a claim that was put to it, and then fail to resolve the claim on that basis.<sup>26</sup>

### 3. Requests for Interpretation

25. In addition to its request for an additional decision, Afilias asks the Panel to provide an interpretation of several allegedly "ambiguous and vague points of substance and reasoning contained in the Final Decision".<sup>27</sup> According to Afilias, the precise meaning and scope of certain aspects of the Final Decision are required for any future resolution of the Dispute, and indeed also for

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<sup>23</sup> Application, paras. 67-70.

<sup>24</sup> *Ibid*, paras. 18 and 71-84.

<sup>25</sup> *Ibid*, paras. 80-84.

<sup>26</sup> *Ibid*, paras. 19 and 85-89, quoting from para. 350 of the Final Decision.

<sup>27</sup> Application, paras. 90-114.

the pronouncement to be made by the Respondent's Board.<sup>28</sup> Afilias underscores that an IRP results in a precedent-setting decision which serves as the basis for the global Internet community to hold ICANN accountable. In that context, Afilias asks the Panel to provide interpretations of the Final Decision that are sufficient to remove all ambiguity and obscurity from the terms and phrasing employed as well as from the broader reasoning relied upon to reach its conclusions.<sup>29</sup>

26. The issues which, according to Afilias, require interpretation are the following:<sup>30</sup>

- a) What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints?<sup>31</sup>
- b) Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?<sup>32</sup>
- c) What law (if any) did the Panel apply in this IRP – just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law?<sup>33</sup>
- d) On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel?<sup>34</sup>
- e) What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims?<sup>35</sup>

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<sup>28</sup> Application, para. 91.

<sup>29</sup> *Ibid*, paras. 90-94.

<sup>30</sup> *Ibid*, para. 94.

<sup>31</sup> *Ibid*, paras. 95-99.

<sup>32</sup> *Ibid*, paras. 100-103.

<sup>33</sup> *Ibid*, paras. 104-107.

<sup>34</sup> *Ibid*, paras. 108-111.

<sup>35</sup> *Ibid*, paras. 112-114.

27. It bears mentioning that some of the above-cited issues as to which Afiliias requests interpretation are further distilled in series of additional questions that Afiliias requests the Panel to address. For example, Afiliias' request for interpretation of the terms pronounce and pronouncement (issue a) above) includes the request that the Panel address the following questions "regarding the nature of a 'pronouncement'":

- a) What constitutes a "pronouncement" and what is the foundation in ICANN's documents or applicable law for the "pronouncement" requirement, particularly in light of the Bylaws' definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?
- b) What should have been the form and substance of ICANN's "pronouncement" on Afiliias' complaints?
- c) On what sources did the Panel rely to fashion its "pronouncement" remedy?
- d) Before ICANN issues the "pronouncement" recommended by the Panel, must Afiliias and other Internet community members be given an opportunity to be heard by the Board?
- e) Must the Respondent's "pronouncement" be issued following an opportunity for Afiliias and other Internet community members to receive and comment on all relevant evidence and argument?
- f) What materials, documentary or otherwise, must ICANN consider before it issues the "pronouncement" recommended by the Panel?
- g) Must the "pronouncement" be issued in a written form and made public on ICANN's website?
- h) Must the "pronouncement" be issued with full and adequate supporting reasoning following Board deliberation?
- i) Must the "pronouncement" be issued with findings of fact and conclusions of law?
- j) Must the "pronouncement" be issued without the participation of Board members with conflicts of interest?

28. By way of further example, the last of the issues as to which Afiliias seeks interpretation of the Final Decision, relating to the standard of proof applied by the Panel (issue e) in paragraph 26 above), includes the request that:

... the Panel provide this interpretation regarding the following issues:

- a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afiliias' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?
- b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?
- c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?
- d) Whether the failure to disclose the "decision" from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?
- e) Whether the failure to "pronounce" on Afiliias' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?

f) Whether proceeding toward delegation of .WEB to NDC without a “pronouncement” violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?

g) Whether the disparate treatment of Afiliás violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?

h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?<sup>36</sup>

29. Afiliás concludes the Application by deploring that the Panel, in its view, failed to address all of the claims presented to it for decision and resolution and to provide a sufficiently well-reasoned decision free of ambiguity as required by the Bylaws and good arbitral practice. The Final Decision, Afiliás complains, has seriously undermined the dispute resolution system upon which the global Internet community relies to hold ICANN accountable, and put the Board in an untenable position by failing to provide it with any guidance as to the considerations that should inform its “pronouncement”.<sup>37</sup>

#### **4. Request for Relief**

30. By way of relief, Afiliás requests the Panel to issue:

... an Amended Final Decision:

- (1) Finally deciding and resolving in a well-reasoned manner Afiliás’ Rules Breach Claim, International Law Claim and Disparate Treatment Claim; and
- (2) Providing the interpretations as set out in [the section requesting interpretation of the Application].<sup>38</sup>

### **B. Respondent’s Response to Afiliás’ Article 33 Application**

#### **1. Overview**

31. In its Response to the Application (**Response**), ICANN submits that the Application is an abuse of Article 33 of the ICDR Rules. In spite of its title, which the Respondent characterizes as misleading, the Respondent contends that the Application does not seek an additional decision on any claim purportedly omitted from the Final Decision or an interpretation of any purported ambiguity in the Final Decision. According to the Respondent, the Application in reality seeks that the Panel reconsider and reverse its determination that ICANN, rather than the Panel, is charged with interpreting and applying the New gTLD Program Rules and resolving disputes among

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<sup>36</sup> Application, para. 114.

<sup>37</sup> *Ibid*, paras. 115-123.

<sup>38</sup> *Ibid*, para. 124.



applicants. Requests for reconsideration, the Respondent contends, are not permitted by Article 33 of the ICDR Rules, nor by the EAA.<sup>39</sup>

32. The Respondent argues that Article 33 provides for a limited exception to the *functus officio* doctrine and does not allow a party to seek reconsideration of the substance of a final award, nor offers a tribunal for a Panel to issue an amended award that conflicts with and supersedes a final award.<sup>40</sup> The *infra petita* doctrine, it is argued, does not apply to an application to the tribunal for an additional award, but rather to a challenge to the final award in court on the basis that the tribunal has failed to consider and decide all claims properly submitted to it.<sup>41</sup> As for Afiliias' requests for interpretation, the Respondent avers that they are based on a series of willful misreadings and distortions of the Final Decision.

## 2. Request for an Additional Decision

33. ICANN submits that the Panel resolved Afiliias' Rules Breach Claim. According to ICANN, Afiliias wrongly suggests that ICANN never argued that the Panel should not act as the decision-maker of first instance for the Rules Breach Claim. On the contrary, the Respondent submits, its principal defense to Afiliias' Rules Breach Claim was that ICANN, not an IRP Panel, was the appropriate decision-maker.<sup>42</sup>
34. ICANN underscores that the Guidebook and Auction Rules give it discretion with regard to the interpretation and application of the New gTLD Program Rules.<sup>43</sup> ICANN submits that the Panel unequivocally denied Afiliias' request for a declaration that the Bylaws and Articles require that ICANN find NDC in breach of the New gTLD Program Rules, disqualify NDC and proceed to enter a Registry Agreement for .WEB with Afiliias.<sup>44</sup> In ICANN's view, Afiliias now seeks a different decision and is re-arguing its case.<sup>45</sup>
35. ICANN contends that the Panel did not act *extra petita* in determining that it is for ICANN to pronounce in the first instance on the Rules Breach Claim, and that that determination cannot be revisited through an Article 33 application. In this regard, the Respondent avers that Afiliias mischaracterizes the Panel's decision in order to attack it. By rejecting Afiliias' request for a

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<sup>39</sup> Response, paras. 1-2.

<sup>40</sup> *Ibid*, paras. 1 and 8-11.

<sup>41</sup> *Ibid*, paras. 12-14.

<sup>42</sup> *Ibid*, para. 19.

<sup>43</sup> *Ibid*, paras. 18-22.

<sup>44</sup> *Ibid*, para. 23.

<sup>45</sup> *Ibid*, paras. 24-26.

declaration that ICANN violated its Bylaws and Articles by not finding NDC in breach of the New gTLD Program Rules, and by not disqualifying NDC's application for .WEB, the Panel was acting within its authority under Article 4.3(o)(iii) of the Bylaws, as the authority to grant declaratory relief necessarily entails the authority to deny it.<sup>46</sup>

36. With respect to the International Law Claim, ICANN avers that Afilias did not assert any discrete "international law claim", but rather sought an undifferentiated declaration "that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the [Guidebook], and violated international law."<sup>47</sup> ICANN argues that the Panel resolved this issue in two ways: (1) it found that ICANN violated its Bylaws by never determining whether NDC violated the New gTLD Program Rules, and (2) it rejected Afilias' claim that ICANN was subject to a competition mandate that compelled it to reject NDC's application.<sup>48</sup> According to ICANN, the Panel would not have had jurisdiction to adjudicate a freestanding international law claim had one in fact been presented by the Claimant.<sup>49</sup>
37. ICANN further argues that while Afilias made various arguments based on international law, those added little to the plain terms of the Bylaws.<sup>50</sup> In ICANN's words, the International Law Claim "is just a repackaging of Afilias' Rules Breach Claim" and Afilias' "gripe" is that the Panel did not refer to international law in determining whether ICANN violated the Articles and Bylaws. ICANN opines that that complaint is misguided because the Panel did refer to international law and, even if the Panel had omitted any reference to international law, that would not be ground for an additional decision.<sup>51</sup> ICANN states that the Panel granted Afilias' claim regarding the violation by ICANN of its Articles and Bylaws by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC, so that claim did not demand a more in-depth examination of international law.<sup>52</sup> ICANN also contends that an additional decision addressing Afilias' international law argument is unnecessary and beyond the scope of the Panel's authority, since there is no "claim" that has not been dealt with.<sup>53</sup>

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<sup>46</sup> Response, paras. 27-36.

<sup>47</sup> *Ibid*, paras. 37-38, quoting from Afilias' Amended Request for IRP, para. 89(1).

<sup>48</sup> Response, para. 39.

<sup>49</sup> *Ibid*, paras. 40-41.

<sup>50</sup> *Ibid*, paras. 42-44.

<sup>51</sup> *Ibid*, paras. 45-48.

<sup>52</sup> *Ibid*, para. 49.

<sup>53</sup> *Ibid*, paras. 50-51.

38. ICANN likewise argues that the Claimant's Amended Request for IRP, Reply Memorial, and List of Phase II Issues do not state a "Disparate Treatment Claim", and only refer to disparate treatment in support of the Rules Breach Claim or competition claim.<sup>54</sup> ICANN argues that Afilias substantially expanded its "disparate treatment" arguments in its Post-Hearing Brief and its accompanying Revised Issues List, but (assuming those could be considered claims) that Afilias could not introduce new claims in its post-hearing submissions, after the evidentiary record had closed and when ICANN had no opportunity to respond.<sup>55</sup>
39. In ICANN's submission, the Panel correctly found that the substance of Afilias' allegations of disparate treatment were considered in the analysis of Afilias' core claims. ICANN argues that Afilias cannot use its Article 33 Application to ask the Panel to reconsider its deliberate decision not to make additional findings with respect to the Claimant's allegations of disparate treatment.<sup>56</sup>

### 3. Requests for Interpretation

40. ICANN notes at the outset that requests for interpretation should be granted only where an award is ambiguous in such a way that the parties may legitimately disagree as to their obligations under it.<sup>57</sup> ICANN argues that Afilias' requests for interpretation are based on improperly isolating particular words and phrases to create the appearance of ambiguity where none exists.<sup>58</sup> Moreover, it is contended that nearly all of the matters on which Afilias seeks further interpretation do not go to the dispositive part of the Final Decision and are therefore not appropriate subjects for interpretation under Article 33.<sup>59</sup>
41. ICANN argues that there is no ambiguity in the Panel's use of the term "pronounce", which is used interchangeably in the Final Decision with "decide", "determine" or "resolve".<sup>60</sup> In its view, Afilias is misusing Article 33 to seek a further decision on a series of issues that have never been briefed by the Parties or put to the Panel, notably on the procedure the Board should follow in its consideration and resolution of Afilias' complaints against NDC. ICANN avers that the Panel has no jurisdiction to provide advice on such issues.<sup>61</sup>

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<sup>54</sup> Response, paras. 52-53.

<sup>55</sup> *Ibid*, para. 54.

<sup>56</sup> *Ibid*, paras. 55-56.

<sup>57</sup> *Ibid*, paras. 57-60.

<sup>58</sup> *Ibid*, para. 61.

<sup>59</sup> *Ibid*, paras. 62-63.

<sup>60</sup> *Ibid*, paras. 64-66.

<sup>61</sup> *Ibid*, paras. 67-68.

42. According to ICANN, Afiliis wrongly asserts that the Final Decision holds that, for all future IRP challenges, the action or inaction at issue must first be submitted to the Board for pronouncement before an IRP may be pursued.<sup>62</sup> On the contrary, ICANN gives several examples of findings by the Panel, in Afiliis' favor, in respect of actions and inactions on which the Board never pronounced.<sup>63</sup> In ICANN's submission, what Afiliis is arguing is that the Panel reached the wrong conclusion or that its reasoning or analysis is insufficient, and that type of challenge is meritless in the context of an Article 33 application.<sup>64</sup>
43. Turning to the request for interpretation concerning the law applied by the Panel, ICANN argues that the Panel addressed the governing law at Section I.H of the Final Decision, when stating that the "rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures," including the section of the Bylaws requiring ICANN "to carr[y] out its activities in accordance with relevant principles of international law and international conventions and applicable local law". According to ICANN, Afiliis wrongly asserts that the Panel determined that California law is the primary governing law for ICANN, whereas the Panel stated only that the Interim Supplementary Procedures, Articles and Bylaws are to be interpreted in accordance with California law in case of ambiguity.<sup>65</sup> With respect to Afiliis' contention that the Panel failed to consider its submissions inviting application of international law, ICANN notes that the Panel repeatedly stated in the Final Decision that ICANN must carry "out its activities in conformity with relevant principles of international law and international conventions."<sup>66</sup>
44. ICANN argues that the Panel should reject the request that it set out in detail the basis on which it determined that ICANN has the knowledge, expertise, and experience to act as first-instance decision-maker for disputes among applicants under the New gTLD Program Rules, as this is not a proper subject for an additional award under Article 33 of the ICDR Rules.<sup>67</sup> In Respondent's submission, a request for interpretation cannot be used to seek revision, reformulation, or additional explanation for a given decision. In addition, ICANN contends that this determination by the Panel is correct and self-evident considering that ICANN created the New gTLD Program Rules and has ultimate responsibility for the program and for resolving disputes thereunder.<sup>68</sup>

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<sup>62</sup> Response, para. 69.

<sup>63</sup> *Ibid*, para. 70.

<sup>64</sup> *Ibid*, paras. 71-73.

<sup>65</sup> *Ibid*, paras. 74-77.

<sup>66</sup> *Ibid*, paras. 78-79, referring to the Final Decision at paras. 28, 290 and 292.

<sup>67</sup> Response, paras. 80-81.

<sup>68</sup> *Ibid*, para. 82.

45. ICANN argues finally that the Panel set out the standard of proof in the Final Decision, namely the balance of probabilities, and applied that standard in the normal manner under which more startling propositions such as allegations of fraud require more cogent evidence.<sup>69</sup>

#### **4. Costs**

46. ICANN claims that it is entitled to recover its costs and legal fees in responding to Afilias' Article 33 Application. ICANN contends that Afilias' application is abusive because it is unquestionably an improper use of Article 33, seeking as it does reconsideration of core elements of the Final Decision, and requesting that the Panel issue additional declarations and advisory opinions on a series of questions that were never put to the Panel during the course of the IRP.<sup>70</sup>
47. ICANN also submits that the Application is frivolous since it has no sound basis and is based on a series of indefensible and willful misreadings of the Final Decision.<sup>71</sup>

#### **5. Request for Relief**

48. ICANN submits that Afilias' Article 33 Application should be denied in its entirety and that it as Respondent should be awarded its costs and legal fees incurred as a result of Afilias' Application, in the amount of US \$ 236,884.39, plus the Panel's fees to resolve the Application.<sup>72</sup>

### **C. *Amici's* Submission on Afilias' Article 33 Application**

#### **1. Overview**

49. The *Amici* aver that the Final Decision comprehensively addressed and resolved all of the claims and material issues raised by Afilias, consistent with both the evidence presented at the hearing and the limits on the Panel's jurisdiction and remedial authority under the Bylaws. Nonetheless, the *Amici* argue, "Afilias is back again, seeking the same relief based on the same arguments."<sup>73</sup> The *Amici* state that while Afilias styled its demand as an application pursuant to Article 33, in reality Afilias seeks reconsideration of the Final Decision – a reconsideration that is improper and unauthorized by Article 33 or any other rule. In the *Amici's* submission, there can be no doubt that

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<sup>69</sup> Response, paras. 83-87.

<sup>70</sup> *Ibid*, paras. 88-91.

<sup>71</sup> *Ibid*, para. 92.

<sup>72</sup> *Ibid*, paras. 93-94 and its Appendix B.

<sup>73</sup> *Amici's* Submission on Afilias' Article 33 Application (***Amici's* Submission**), para. 4.

the Application seeks reversal of the Panel's decision rejecting what Afiliias characterizes as its "core claims" in this IRP.

## 2. Request for an Additional Decision

50. The *Amici* submit that Afiliias' request for an additional decision with respect to the three (3) purported claims identified in the Application are unjustified and should be rejected. The *Amici* stress that an arbitral tribunal has wide discretion to determine whether a request for an additional decision is "justified".<sup>74</sup>
51. According to the *Amici*, each of the "claims" asserted in the Application is in reality an argument rather than a claim, and is therefore not suitable for an additional decision pursuant to Article 33 of the ICDR Rules.<sup>75</sup> The *Amici* contend that, in each case, acceptance of Afiliias' additional argument or ground would require a reversal of the Final Decision with respect to the considered claim. In the *Amici*'s submission, the only "claim" at issue in this IRP that the Panel was obligated to decide was whether ICANN breached its Articles and Bylaws. As for ICANN's impugned "actions or failures to act", these were not distinct claims but grounds or arguments on which that claim was based.<sup>76</sup>
52. The *Amici* argue alternatively that, even if Afiliias' additional arguments or grounds were characterized as claims, the Panel sufficiently addressed each of them such that there still would be no basis for an additional decision.<sup>77</sup>
53. The *Amici* set out the applicable standard required to be met for a tribunal to issue an additional decision under Article 33. For starters, it is impressed that, exactly as the Panel did in this case, a tribunal can avoid any ambiguity concerning the fact that it has resolved all claims put to it by recording in the *Dispositif* that it rejects all other claims and submissions.<sup>78</sup> The *Amici* then contend that requests for an additional decision are intended to cover only obvious cases of omission; that a tribunal may decide claims impliedly; and that additional decisions are unavailable where an arbitral tribunal intentionally has chosen not to address a claim.<sup>79</sup> The *Amici* also aver that requests for an additional decision are not intended to be used by an aggrieved party to reargue a

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<sup>74</sup> *Amici*'s Submission, paras. 21-23.

<sup>75</sup> *Ibid*, paras. 24-25.

<sup>76</sup> *Ibid*, paras. 26-29.

<sup>77</sup> *Ibid*, paras. 30-32.

<sup>78</sup> *Ibid*, para. 33.

<sup>79</sup> *Ibid*, paras. 34-36.

particular point.<sup>80</sup> The *Amici* argue as well that Afilias attempts to confuse the issues by conflating the standard for an additional decision with the scope of the Panel’s so-called “mandate”.<sup>81</sup> Finally, the *Amici* say that Afilias is mistaken where it suggests that the Final Decision would be subject to set aside in the English courts on the ground that it is *infra petita*. On the contrary, it is argued that the standard to set aside an award as *infra petita* under the EAA is consistent with the high standard for an additional decision under Article 33 of the ICDR Rules and international arbitration practice.<sup>82</sup>

54. Applying those principles to the case at hand, the *Amici* argue that, even if the Rules Breach Claim were a “claim”, it was sufficiently addressed in the Final Decision.<sup>83</sup> The *Amici* first note that the Panel having dismissed all of the Parties’ other claims in the *Dispositif*, that necessarily encompassed the Rules Breach Claim. They go on to argue that the scope and detail of Afilias’ argument itself demonstrate that the alleged omission of a decision on the Rules Breach Claim does not constitute an “obvious case of omission”. The *Amici* also submit that the Panel impliedly rejected the Rules Breach Claim by denying the affirmative relief that Afilias had been seeking and by concluding instead that ICANN must pronounce in the first instance as to the propriety of NDC’s alleged conduct.<sup>84</sup> In this regard, the *Amici* reject the Claimant’s assertion that the Panel never reached the issue of the remedies requested by the Claimant.
55. In the submission of the *Amici*, the route by which the Panel approached the issues in the IRP rendered an express decision on the so-called Rules Breach Claim moot. That is so because the Panel found that it did not have the authority to decide what Afilias characterizes as the threshold issue of the Rules Breach Claim, namely, whether the DAA and NDC’s other conduct violated the New gTLD Program Rules. Likewise, the Claimant’s contention that the Respondent’s “failure” to disqualify NDC or other purported inaction violated the Articles and Bylaws is a false premise in so far as the Panel determined that it was reasonable for the Board to defer consideration of the complaints that had been raised in relation to NDC’s application and its auction bids.
56. The *Amici* also say that Afilias used its request concerning the Rules Breach Claim to dispute the soundness of the Panel’s reasoning and findings, and to reargue its case in the underlying IRP.<sup>85</sup> The *Amici* argue that Afilias’ complaints about the Panel’s reasoning are unfounded and that there

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<sup>80</sup> *Amici’s* Submission, para. 37.

<sup>81</sup> *Ibid*, paras. 38-39.

<sup>82</sup> *Ibid*, paras. 40-41.

<sup>83</sup> *Ibid*, para. 43.

<sup>84</sup> *Ibid*, paras. 44-47.

<sup>85</sup> *Ibid*, paras. 47-51.

was ample IRP precedent for the Panel’s decision that ICANN must indeed pronounce in the first instance as to whether there has been a violation of the New gTLD Program Rules.<sup>86</sup>

57. Turning to the International Law Claim, the *Amici* reiterate the submission that this is an argument – or a reason in support of an argument – rather than a “claim”, and that, in any event, it was sufficiently addressed in the Final Decision in so far as the same facts and circumstances that underpin the Rules Breach Claim form the basis for the International Law Claim.<sup>87</sup> The *Amici* add that the International Law Claim added nothing to Afiliás’ claim that ICANN breached the Articles and Bylaws by violating commitments in those instruments because the principles of international law invoked by Afiliás are equally reflected in the Bylaws.<sup>88</sup> In addition, the *Amici* aver that since the International Law Claim relates to the same request for affirmative relief that Afiliás sought in connection with its Rules Breach Claim, the rejection of such request for relief in the Final Decision impliedly rejected the International Law Claim associated with this request.<sup>89</sup>
58. As for the Disparate Treatment Claim, the *Amici* submit that, even if it were a “claim”, it was sufficiently addressed in the Final Decision. The *Amici* note that the Panel found that ICANN breached its commitment to apply documented policies objectively and fairly.<sup>90</sup> According to the *Amici*, the Panel did not decline to decide the Disparate Treatment Claim, but rather declined to add additional findings of fact because the claim was already upheld based on findings of fact that the Panel had made in connection with Afiliás’ “core claims”.<sup>91</sup>
59. In any event, the *Amici* describe as mistaken the assertion that it is not open to an IRP panel to determine that it is not necessary to decide a claim or issue, and cites another IRP panel that has adopted this approach.

### 3. Requests for Interpretation

60. The *Amici* submit that the Claimant’s requests for interpretation are unjustified, misuse Article 33 for improper purposes, and should be summarily dismissed.
61. The *Amici* say that Afiliás seeks to transform the purpose and narrow interpretation process contemplated by Article 33 into an *ex-post* review of the Final Decision to effectively appeal that

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<sup>86</sup> *Amici’s* Submission, paras. 52-53.

<sup>87</sup> *Ibid*, paras. 56-58.

<sup>88</sup> *Ibid*, paras. 59-66.

<sup>89</sup> *Ibid*, para. 67.

<sup>90</sup> *Ibid*, paras. 69-70.

<sup>91</sup> *Ibid*, paras. 71-74.



decision, delay resolution of the .WEB gTLD and influence ICANN's future actions. According to the *Amici*, interpretation of an arbitral award is only really helpful where the ruling is so ambiguous that the parties could legitimately disagree as to its meaning.<sup>92</sup>

62. Turning to Afiliás' specific requests for interpretation, the *Amici* argue that it is not necessary to interpret the term "pronounce". In their submission, there is no ambiguity as to the meaning of the term "pronounce", which, in context, is a transitive verb meaning to declare officially or authoritatively.<sup>93</sup> The *Amici* further contend that Afiliás' requests regarding (1) the basis for the Panel's use of the term "pronounce" and (2) the process, form and substance of an adequate pronouncement would exceed the Panel's authority under Article 33. The *Amici* insist that Article 33 cannot be used to seek an explanation of the factual basis for the Panel's determinations or reasoning.<sup>94</sup> According to the *Amici*, Afiliás' request that the Panel state whether the Board must always "pronounce" on Staff's action or inaction is also not a proper request for interpretation since it concerns ICANN's future obligations and is therefore beyond the Panel's jurisdiction.<sup>95</sup>
63. The *Amici* argue that Article 33 does not permit Afiliás to request a detailed explanation regarding the law the Panel applied in reviewing and reaching its conclusions.<sup>96</sup> Moreover, the real complaints advanced under this rubric are that the Panel's application of the law and reasoning was erroneous, not, as it must under Article 33, that there is ambiguity.
64. According to the *Amici*, Afiliás' request regarding ICANN's knowledge, expertise, and experience is also improper because a party cannot use interpretation requests to ascertain which precise documents and other evidence the tribunal relied on in support of its findings. The *Amici* state that such evidence was presented in pre-hearing submissions and at the IRP hearing itself. In the *Amici*'s submission, this is another attempt to argue that the Panel's conclusion is wrong.<sup>97</sup>
65. The *Amici* submit that Afiliás' request regarding the standard of proof is similarly beyond the scope of Article 33 and should also be denied. According to the *Amici*, the Panel unambiguously applied the principle that, in international arbitration, the standard is the balance of probabilities and that allegations of dishonesty will attract close scrutiny in order to ensure that that standard is met.

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<sup>92</sup> *Amici*'s Submission, paras. 76-81.

<sup>93</sup> *Ibid*, paras. 83-85.

<sup>94</sup> *Ibid*, paras. 86-90.

<sup>95</sup> *Ibid*, paras. 91-92.

<sup>96</sup> *Ibid*, paras. 93-94.

<sup>97</sup> *Ibid*, paras. 95-98.

The *Amici* add that, in any event, that question would not affect how the award should be carried out and that Afiliias impermissibly asks the Panel to correct the substance of its decision.<sup>98</sup>

66. Finally, the *Amici* aver that the Final Decision is fully consistent with the purposes of the IRP and that, in any event, those purposes have no relevance to the narrow issues permitted to be addressed by an Article 33 Application. According to the *Amici*, Afiliias' "purposes of the IRP" argument is a near *verbatim* repeat of the same argument it has made throughout these proceedings in an attempt to induce the Panel to ignore the limits on its jurisdiction set forth in the Bylaws.<sup>99</sup>
67. The *Amici* reject as ill-founded the contention that the Panel did not follow IRP precedents by finding that it is for ICANN to pronounce first on Afiliias' objections regarding the .WEB auction, and point to a number of IRP decisions declining to go beyond declaring whether ICANN's action violated the Articles or Bylaws.
68. In sum, the *Amici* say that the Panel's decision not to issue a ruling on the underlying dispute and instead to defer to ICANN to first pronounce on the dispute affirms, rather than undermines, the IRP process and policies set forth in the Bylaws and confirmed in prior IRP decisions.<sup>100</sup>

#### **D. Afiliias' Reply in Support of the Application**

69. In its 70-page Reply in support of the Application (**Afiliias' Reply**), Afiliias revisits each of the grounds set out in the Application and takes issue with the submissions of the Respondent and *Amici* concerning the scope of Article 33 of the ICDR Rules.

##### **1. Framework for Interpreting Article 33**

70. According to Afiliias, ICANN and the *Amici* urge the Panel to adopt an extremely narrow interpretation of Article 33. Afiliias argues that based on the text and purpose of Article 33, the applicable provisions of the EAA, and the Parties' dispute resolution agreement, any omission to decide a properly submitted claim is grounds for an additional award.<sup>101</sup>
71. Regarding the Parties' dispute resolution agreement included in the Guidebook, Afiliias argues that ICANN's decision to delegate .WEB to NDC was a "final decision", which decision would have

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<sup>98</sup> *Amici's* Submission, paras. 99-104.

<sup>99</sup> *Ibid*, paras. 105-115.

<sup>100</sup> *Ibid*, p. 58 (unnumbered paragraph).

<sup>101</sup> Afiliias' Reply, paras. 2 and 10-18.

taken effect and been irreversible had Afilias not commenced a CEP.<sup>102</sup> Afilias adds that Article 33 must be interpreted and given effect based on the IRP's dispute resolution system or framework – and not in the abstract with reference to general arbitral practice and scholarly commentary.<sup>103</sup> Afilias also denies that it is asking the Panel to “reverse” or “reconsider” any dispute that was resolved by the Panel consistent with its mandate.<sup>104</sup>

## 2. Request for an Additional Decision

72. In relation to the so-called Rules Breach Claim, Afilias argues that ICANN's failure to conclude that NDC breached the Auction Rules, and to disqualify NDC's application were “covered actions”, and that ICANN was required to take those actions to satisfy its obligation to make decisions by applying its documented policies neutrally, objectively and fairly.<sup>105</sup> Afilias argues further that while the Panel denied the “affirmative” or “binding declaratory” relief that it was seeking in relation to the Rules Breach Claim, it omitted to resolve Afilias' requests for declaratory relief on this Rules Breach Claim, *i.e.*, that ICANN was required to enforce the New gTLD Program Rules as specified by Afilias, and that ICANN's failure to do so violated the Articles, Bylaws, and New gTLD Program Rules.<sup>106</sup>
73. Afilias rejects the notion that the Panel resolved the claim for declaratory relief on the Rules Breach Claim on jurisdictional grounds, as submitted by the Respondent and the *Amici*. However, it adds that if that is indeed what the Panel intended, then the Panel must say so in a well-reasoned decision consistent with the Bylaws.<sup>107</sup>
74. Afilias argues that ICANN's jurisdictional objection based on the Panel's alleged lack of jurisdiction to resolve disputes under the New gTLD Program Rules is untimely and incorrect.<sup>108</sup> Afilias further avers that if the Panel resolved the Rules Breach Claim on jurisdictional grounds, then Afilias has been deprived of due process and its right to be heard because ICANN never made any jurisdictional objection to Afilias' claim for declaratory relief in connection with the New gTLD Program Rules.<sup>109</sup> Besides, still in Afilias' submission, there are no legal or factual bases on which

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<sup>102</sup> Afilias' Reply, paras. 19-20.

<sup>103</sup> *Ibid*, paras. 20-28.

<sup>104</sup> *Ibid*, para. 31.

<sup>105</sup> *Ibid*, para. 32.

<sup>106</sup> *Ibid*, para. 34.

<sup>107</sup> *Ibid*, para. 35.

<sup>108</sup> *Ibid*, para. 36.

<sup>109</sup> *Ibid*, paras. 38-43.

the Panel could have resolved the claim for lack of jurisdiction.<sup>110</sup> Afilias takes issue with ICANN and the *Amici's* position that the Board functions as a first instance decision-maker on all matters arising from the New gTLD Program Rules.<sup>111</sup> Afilias insists that the Panel did not state in the Final Decision that it did not have jurisdiction to determine the Rules Breach Claim, and that in any event such conclusion could not be reconciled with other findings of fact and rulings made in the Final Decision.<sup>112</sup>

75. Afilias argues that the Panel's conclusion that ICANN violated its Articles and Bylaws by failing to "pronounce" on Afilias' complaint constituted a declaration that Afilias had never requested.<sup>113</sup> Afilias considers that the Panel's recommendation that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as [ICANN's] Board has considered the opinion of the Panel in this Final Decision" is illogical and inconsistent with the Panel's conclusion regarding ICANN's persistent refusal to take any position on Afilias' complaints.<sup>114</sup>
76. Afilias concludes this section of its Reply by clarifying that it is not seeking an order that ICANN conclude that NDC violated the New gTLD Program Rules, and that it should disqualify NDC's application on that basis, but rather an additional decision that "declares on Afilias' requested declaratory relief in connection to the Rules Breach Claim", and recommendations with respect to that declaration.<sup>115</sup>
77. With respect to the International Law Claim, Afilias argues that the Panel acknowledged the claim but did not address it, whether as a matter of jurisdiction or on the merits.<sup>116</sup> According to Afilias, a finding in its favor on the International Law Claim would not require the Panel to overturn the decisions that it has already rendered; it would rather necessitate that the Panel declare that ICANN failed to interpret and apply the New gTLD Program Rules in accordance with the international principle of good faith.<sup>117</sup> That declaration is especially important if the Panel declines to make an additional decision on Afilias' Rules Breach Claim, and simply remands the core claims to the Respondent's Board with no further guidance.

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<sup>110</sup> Afilias' Reply, para. 44.

<sup>111</sup> *Ibid*, paras. 45-48.

<sup>112</sup> *Ibid*, paras. 49-51.

<sup>113</sup> *Ibid*, paras. 52-54.

<sup>114</sup> *Ibid*, paras. 55-57.

<sup>115</sup> *Ibid*, para. 58.

<sup>116</sup> *Ibid*, para. 59.

<sup>117</sup> *Ibid*, para. 61.

78. Afilias urges that it presented a distinct International Law Claim for the Panel's determination and that there is no mention of the claim in the body of the Panel's reasoning nor any reference to it in the Final Decision's *Dispositif*.<sup>118</sup> In Annex A of the Reply, Afilias sets out the various instances where it allegedly made clear that it was presenting an independent claim based on an alleged breach of international law. Afilias argues that it explicitly took the position that international law is an independent source of obligation and basis for decision.<sup>119</sup>
79. According to Afilias, its International Law Claim is within the Panel's jurisdiction. In this regard, Afilias avers that the Bylaws require ICANN to carry out its activities in conformity with relevant principles of international law in addition to its obligations under the Articles and Bylaws.<sup>120</sup> In Afilias' submission, ICANN is wrong to argue that the Panel sufficiently referred to the International Law Claim in the part of the Final Decision preceding the *Dispositif*.<sup>121</sup> Afilias argues that the Panel did not implicitly resolve Afilias' International Law Claim in its decision either, as the Panel announced that the law applicable to the "quasi-contractual documents of ICANN" was California law and did not mention international law except in the section entitled "Applicable Law".<sup>122</sup>
80. Turning to the Disparate Treatment Claim, Afilias argues that there is no debate that this claim was not decided since the Panel explicitly stated that it did "not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims".<sup>123</sup> Afilias rejects the notion that its Disparate Treatment Claim was sufficiently dealt with through Afilias' core claims. According to Afilias, the Panel's factual findings in dealing with its core claims are more than sufficient for the Panel to conclude that Afilias was treated disparately, and what is lacking is a decision to that effect and a declaration in the Final Decision's *Dispositif*.<sup>124</sup>
81. Afilias also rejects ICANN and the *Amici's* assertion that any resolution now of its allegedly unresolved claims would in some way be inconsistent with the *Dispositif* in the Decision. In this respect, Afilias denies that it is seeking "reconsideration", "revocation" or "reversal" of the Final Decision on the claims that were decided and contends that the Panel would not need to alter a

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<sup>118</sup> Afilias' Reply, paras. 63-64.

<sup>119</sup> *Ibid*, paras. 65-68.

<sup>120</sup> *Ibid*, paras. 69-71.

<sup>121</sup> *Ibid*, paras. 72-76.

<sup>122</sup> *Ibid*, paras. 77-83.

<sup>123</sup> *Ibid*, paras. 84-87.

<sup>124</sup> *Ibid*, paras. 88-89.

single word of the Decision's existing *Dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each of these claims.<sup>125</sup>

### 3. Requests for Interpretation

82. Afilias states that it requests interpretation of the Final Decision “simply because there are core elements of the Decision that struck [its counsel] as simply inconsistent, incongruous and hard to follow”.<sup>126</sup> Afilias contends that Article 33 of the ICDR Rules expressly provides the Parties with a proper method to request formally that the Panel clarify its decision.<sup>127</sup> According to Afilias, both ICANN and the *Amici* reinforce the Final Decision's ambiguity and thus the need for the requested interpretations.<sup>128</sup> In the Claimant's submission, those clarifications would go a long way towards minimizing any future unfair or discriminatory treatment of Afilias by ICANN in the context of ICANN's implementation of the Panel's Final Decision.<sup>129</sup>
83. Afilias argues that interpretation is rarely granted simply because it is rarely sought. Afilias stresses that this IRP being the first to be conducted under ICANN's new enhanced accountability rules, it is certainly one that falls within the purview of the rare instances where interpretation is warranted.<sup>130</sup>
84. Afilias argues that its requested interpretation of the term “pronounce” is necessary so that Afilias and future IRP applicants can understand whether there is a jurisdictional pre-requisite requiring some form of formal Board pronouncement before an IRP may be commenced; what form such a pronouncement must take; and what the interrelationship is between the requirement of a pronouncement and the fact that the Bylaws provide a clear jurisdictional basis for an IRP based on Board or Staff inaction and action.<sup>131</sup> What Afilias characterizes as a disagreement between ICANN and the *Amici* on the meaning of the term “pronounce” shows that the *Dispositif* is vague and ambiguous.<sup>132</sup> Afilias contends that it is critical that the Panel interpret this holding for the effective execution of the Final Decision in this case and beyond.<sup>133</sup>

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<sup>125</sup> Afilias' Reply, paras. 91-94 and Annex B thereto.

<sup>126</sup> *Ibid*, para. 96.

<sup>127</sup> *Ibid*, para. 97.

<sup>128</sup> *Ibid*, paras. 98 and 102-104.

<sup>129</sup> *Ibid*, para. 99.

<sup>130</sup> *Ibid*, paras. 100-104.

<sup>131</sup> *Ibid*, para. 106.

<sup>132</sup> *Ibid*, paras. 107-110.

<sup>133</sup> *Ibid*, paras. 111-114.

85. According to Afilias, without the requested clarification on ICANN's knowledge, expertise and experience, Afilias, ICANN and the *Amici* will be unable to determine when a future panel addressing .WEB (or other future claims in an IRP) might decline to decide claims otherwise properly before it.<sup>134</sup> In Afilias' view, it is puzzling that the Panel afforded deference to ICANN based on the latter's knowledge, expertise and experience, considering that the Panel is required to resolve Disputes consistent with the Articles and Bylaws, in the context of prior IRP decisions, and that prior IRP decisions have consistently rejected the application of a deferential standard when reviewing ICANN's decisions.<sup>135</sup>
86. With respect to the requested clarification of the applicable law, Afilias contends that it is necessary for the effective execution of the Final Decision since the applicable law determines the content of ICANN's legal obligations.<sup>136</sup>
87. Afilias argues that an interpretation of the standard of proof, including precisely where the Panel applied a heightened standard, is critical to the effective execution of the Decision since the standard applied by the Panel will necessarily guide any analysis performed by the Board and any future IRP panels.<sup>137</sup>
88. According to Afilias, fairness and due process also require the Panel to interpret and clarify its decision. The Panel's decision to give the Board a "second chance" to consider and pronounce upon NDC's conduct and the DAA's compliance with the New gTLD Program Rules, without providing any guidance on important issues such as those as to which an interpretation is requested, gives ICANN a "free hand". Afilias avers that ICANN's hands are by no means clean and that it "should not be allowed to use the Panel's opaque reasoning to wash them clean".<sup>138</sup>

#### 4. Costs

89. Afilias accepts that the Panel has, in principle, the power to allocate the costs of the Application as between the Parties.<sup>139</sup> However, Afilias submits that ICANN's costs claim is without merit because even if Afilias does not prevail (in whole or in part), the Respondent is not entitled to its costs since

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<sup>134</sup> Afilias' Reply, paras. 115-117.

<sup>135</sup> *Ibid*, paras. 118-119.

<sup>136</sup> *Ibid*, paras. 120-123.

<sup>137</sup> *Ibid*, paras. 124-126.

<sup>138</sup> *Ibid*, paras. 127-129.

<sup>139</sup> *Ibid*, para. 131.

the Application cannot be said to be frivolous or abusive as these terms have been defined and applied in the Final Decision.<sup>140</sup>

#### **IV. ANALYSIS**

90. As the Claimant correctly points out at the outset of its Reply, the Panel must first decide the scope of Article 33 of the ICDR Rules.<sup>141</sup> This is so as a matter of logic and in view of the diametrically opposed positions taken by the Claimant and the Respondent on this question, whether it be in regard to the Claimant's request for an additional decision or its requests for interpretation.

91. Having identified the applicable standards to a request for an additional decision and a request for interpretation, the Panel will turn to considering, first, the request for an additional decision in respect of each of the three (3) claims the Panel is said to have failed to decide or resolve; and second, the various requests for interpretation of the Final Decision.

##### **A. Article 33 of the ICDR Rules**

###### **1. Overview**

92. Article 33 of the ICDR Rules reads as follows:

###### **Article 33: Interpretation and Correction of Award**

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.

2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.

3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.

4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

93. It is generally accepted that the opportunity given to an arbitral tribunal to correct or interpret an award, and to make an additional award on claims presented but omitted from the award, is a

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<sup>140</sup> Afiliias' Reply, paras. 130-138.

<sup>141</sup> *Ibid*, para. 2.



narrow exception to the basic rule of finality of awards, and the principle that once an arbitral tribunal has issued a final award it is “*functus officio*”.<sup>142</sup> To quote from a leading treatise:

There are strong policies counseling against alteration of an award after it has been made. One of the most fundamental purposes of the arbitral process is to obtain a speedy, final resolution of the parties’ disputes, without the costs and delays of litigation. Further, as discussed below, most national legal systems provide that an arbitral tribunal is “*functus officio*” once it has made its award. This again reflects the powerful interest in the finality of awards, free from continuing dispute about their correctness, completeness, or meaning. A liberal approach to “corrections” or “interpretations” is in obvious tension with these policies.<sup>143</sup>

94. It is noted in this same treatise that while the EAA does not expressly provide that the issuance of a final award terminates the arbitral tribunal’s mandate, the *functus officio* doctrine is “well-settled in England as a common law rule.”<sup>144</sup>
95. It follows from the foregoing that unless a request for correction, interpretation or for an additional award meets the conditions laid out in Article 33 of the ICDR Rules, an arbitral tribunal has no authority to reconsider, supplement or vary a final award. The same is true of the Panel’s Final Decision which, under English law and pursuant to the Respondent’s Bylaws, is final and binding.<sup>145</sup> As noted by the Claimant in its Reply, the Parties agree that the “final decision” of an IRP panel under the Respondent’s Articles, Bylaws and Interim Procedures is the same as an “award” under the New York Convention and the EAA.<sup>146</sup>

## 2. Applicable Standard to a Request for an Additional Award

96. Article 33 of the ICDR Rules sets out explicitly the basic conditions that must be met for a party to obtain an additional award from an arbitral tribunal. The request must first identify “claims, counterclaims or setoffs presented but omitted from the award”; second, the moving party must persuade the tribunal that the request for an additional award is “justified”.
97. Section 57(3) of the EAA provides that an arbitral tribunal may “make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award”. In the context of Section 57(3) of the EAA, the English courts have held that “the terms of s 57(3)(b) are apt to refer to a head of claim for damages or some other

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<sup>142</sup> David D. Caron and Lee M. Caplan, “Part VI The Award, Ch. Post-Award Proceedings” in *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2013, p. 802 [Caron].

<sup>143</sup> Gary B. Born, “Chapter 24: Correction, Interpretation and Supplementation of International Arbitral Awards” *International Commercial Arbitration*, 3<sup>rd</sup> ed., Kluwer Law International, 2021, p. 3370 [Born].

<sup>144</sup> *Ibid*, p. 3378.

<sup>145</sup> See Bylaws, Section 4.3(x).

<sup>146</sup> Afiliias’ Reply, fn. 4.

remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims".<sup>147</sup>

98. A similar distinction was drawn in respect of the word "issues" as used in Section 68(2)(d) of the EAA, which provides that an award may be challenged for "serious irregularity" in the event of a "failure by the tribunal to deal with all the issues that were put to it", where such failure "has caused or will cause substantial injustice to the applicant". In interpreting the word "issues" as used in that provision, the English courts have observed:

(ii) There is a distinction to be drawn between "issues" on the one hand and "arguments", "points", "lines of reasoning" or "steps" in an argument, although it can be difficult to decide quite where the line demarcating issues from arguments falls. [...]

(iii) While there is no expressed statutory requirement that the Section 68(2)(d) issue must be "essential", "key" or "crucial", a matter will constitute an "issue" where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with [...].

(vi) If the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry [...]; it does not matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.

(vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length [...].

(viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue [...]. A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it [...].

(ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences [...]. The fact that the reasoning is wrong does not as such ground a complaint under Section 68(2)(d) [...].

(x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise [...]. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues [...].<sup>148</sup>

99. It follows from the foregoing that a request for an additional award is not appropriate if it relates to an arbitral tribunal's omission to deal, not with a claim but rather with arguments or grounds in support of a claim.<sup>149</sup>

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<sup>147</sup> *Torch Offshore LLC v. Cable Shipping Inc.*, [2004] EWHC (Comm) 787, para. 27 (Eng.) [emphasis added].

<sup>148</sup> *Symbion Power*, [2017] EWHC (TCC) 348 (Eng.), para. 18, quoting *Sec'y of State for the Home Dep't v. Raytheon Sys. Ltd.*, [2014] EWHC (TCC) 4375 (Eng.), para. 33.

<sup>149</sup> The *Amici* cite an article highlighting the distinction between a "claim" and a "ground for relief put forward in support of a claim", in which the author notes that "[g]rounds [...]" are the reasons forming the basis of a claim". Klaus Reichert, "Prayers for Relief – The Focus for Organization" in *Evolution and Adaptation: The Future of International Arbitration*, Jean Engelmayr Kalicki and Mohamed Abdel Raouf (eds.), Kluwer Law International, 2019, p. 717.

100. Turning to the requirement that the claim subject to the application for an additional award has been “omitted from the award”, Gary B. Born observes in the above-quoted treatise:

The mere fact that an arbitral tribunal has not expressly addressed a particular claim does not automatically require issuance of an additional award: a tribunal may be taken to have impliedly rejected claims as to which it does not grant relief (although the better practice is clearly to address issues explicitly and although the failure to do so may give rise to claims that the award is, in some respects, unreasoned).<sup>150</sup>

101. It is also generally accepted that requests for an additional award are not available to revisit a tribunal’s decision deliberately not to address a particular claim or issue, for example because it considers it unnecessary to do so in light of its decisions on other issues. In the words of the late Professor David D. Caron, when commenting on deliberate omissions to address a claim in the context of Article 39 of the UNCITRAL Rules:<sup>151</sup>

Article 39 obviously has no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a claim or issue in the award. Nevertheless, to avoid any misunderstandings, it is good practice for an arbitral tribunal to document in the award the disposition of each of the parties’ respective claims, no matter how small or inconsequential their bearing is on the outcome of the case.<sup>152</sup>

102. Turning to the second requirement of Article 33 of the ICDR Rules for a party to obtain an additional award, it seems to be common ground between the Parties that it is for the arbitral tribunal, in its discretion, to decide whether a request for an additional award is “justified” within the meaning of Article 33.
103. In its discussion of the legal standard applicable to a request for an additional award under English law and pursuant to Article 33 of the ICDR Rules, the Claimant submits that “any omission to decide a properly submitted claim – whether deliberate, inadvertent, or otherwise – is grounds for an additional award.”<sup>153</sup> In light of the text of Article 33 and the authorities canvassed above, the Panel finds this to be an overly broad expression of the standard to be met by an applicant for an additional award, and must therefore reject it.

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<sup>150</sup> Born, *supra* note 143, p. 3407.

<sup>151</sup> Article 39 of the 2010 UNCITRAL Rules reads as follows:

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.
3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

<sup>152</sup> Caron, *supra* note 142, p. 823. See also Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional Award]*, Kluwer Law International, 2017, p. 356.

<sup>153</sup> Application, para. 8. See also Afiliias’ Reply, para. 11.

### 3. Applicable Standard to a Request for Interpretation of an Award

104. For a request to interpret an award to be “justified”, the moving party must demonstrate “that the award is ambiguous and requires clarification for its effective execution”.<sup>154</sup> It is also well accepted that a request for interpretation cannot be used to invite reconsideration of an award, or to challenge a tribunal’s reasoning:

- The power to issue an interpretation does not “enable the arbitrator to change his mind on any matter which has been decided by the award, and attempts to use the section for this purpose should be firmly resisted.”<sup>155</sup>
- It is well settled that such a request is limited to an interpretation of the award in the form of clarification; and that it cannot extend to a request to modify or annul the award or take the form of an appeal or review of the award.<sup>156</sup>
- A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions.<sup>157</sup>
- Tribunals should reject any request which goes beyond the interpretation of the award; provisions in arbitration rules for the interpretation of awards are not meant to empower the tribunal to change the substance of their ruling.<sup>158</sup>

105. As was succinctly put in the decision of an ICC tribunal:

As to the scope of “interpretation”, which might be regarded as broader than the “correction” feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision.<sup>159</sup>

106. In support of its requests for interpretation, the Claimant contends that Article 33 of the ICDR Rules is “a vehicle for one or both parties to secure clarification of the award where necessary”, including regarding “its exact meaning and scope”; and that this mechanism “is to provide clarification of the award by *resolving any ambiguity and vagueness in its terms*”.<sup>160</sup> Such a formulation of the standard to request interpretation omits mention of the need to safeguard against indirect requests for reconsideration or challenges of the tribunal’s reasoning presented under the guise of a request for

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<sup>154</sup> Born, *supra* note 143, p. 3401.

<sup>155</sup> *Al Hadha Trading Co. v. Tradigrain S.A.*, [2002] Lloyd’s Law Reports 512, para. 66, quoting *Mustill & Boyd on Commercial Arbitration*, 2<sup>nd</sup> ed., Companion Volume 2001, p. 341. See also Born, *supra* note 143, p. 3405 (“In practice, requests for interpretation will ordinarily only be successful if directed to specific portions of the dispositive part of the award.”); and Julian David Mathew Lew, Loukas Mistelis, *et al.*, “Chapter 24 Arbitration Award” in *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 658 [Lew] (“Interpretation of an award is justified only when the ruling, rather than the discussion of facts and arguments, is expressed in vague terms or where there is ambiguity as to how the award should be executed.”)

<sup>156</sup> *Methanex Corp. v. United States*, UNCITRAL, Letter to Parties from Tribunal ¶ 2, 25 September 2002.

<sup>157</sup> Born, *supra* note 143, p. 3405.

<sup>158</sup> Lew, *supra* note 155, p. 659, § 24-97.

<sup>159</sup> *Procedural Order of 6 January 2003 in ICC Case 11451 (Extract)*, in ICC, *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003-2004)*, pp. 19 (2010).

<sup>160</sup> Application, para. 92 [emphasis in the original].

interpretation. As noted below, it is altogether clear that the Claimant is not merely seeking “clarification” of the Final Decision, but rather a reversal of its key findings and conclusions.

107. Having identified the standards applicable, respectively, to a request for an additional award and a request for interpretation, the Panel turns to considering the various requests set out in the Application.

## **B. Afilias’ Request for an Additional Decision**

108. Three (3) claims are said to have been presented by the Claimant but omitted by the Panel in the Final Decision. The Panel addresses each of them in turn.

### **1. The “Rules Breach Claim”**

109. As noted already, the Claimant defines the “Rules Breach Claim” as:

...the [...] specifically pled Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC’s application, and/or (b) not declaring NDC’s bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder [...].<sup>161</sup>

110. The Claimant avers that in omitting to decide Afilias’ claim that ICANN breached its Articles and Bylaws through its *inaction* – and instead referring the claim back to the ICANN Board to “pronounce” on it “in the first instance” – the Panel failed to resolve that specific claim, as required by Article 4.3(g) of the Bylaws, and thus acted *infra petita*.

111. The Claimant argues that it had sought two (2) separate types of relief with respect to the “Rules Breach Claim”: first, “declaratory relief”; and second, “affirmative” or “binding declaratory relief” (also referred to by the Claimant and the Respondent as “injunctive relief”, a terminology which the Panel adopts in this decision to avoid confusion with the first “type” of relief).<sup>162</sup> According to the Claimant, while the Panel denied the request for injunctive relief, the Panel omitted to resolve Afilias’ request for declaratory relief on the so-called Rules Breach Claim. The Claimant submits:

The Panel’s denial of Afilias’ requested injunctive relief did not and could not encompass Afilias’ requested declaratory relief. The Panel thus left Afilias’ principal claim undecided – even though it had been extensively arbitrated by Afilias, ICANN, and the Amici, and submitted to the Panel for resolution.<sup>163</sup>

112. With respect, the Panel finds this reasoning to be mistaken and based on false premises.

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<sup>161</sup> Application, para. 16; see also para. 4(1). Covered Actions is defined at Sec. 4.3(b)(ii) of the Bylaws as “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”

<sup>162</sup> Application, para. 68 (“Afilias sought both declaratory relief and affirmative declaratory relief (what ICANN more accurately called ‘injunctive’ relief) for its Rules Breach Claim in the IRP.”); Afilias’ Reply, para. 34.

<sup>163</sup> Afilias’ Reply, para. 34.

113. The Panel recalls that the Claimant requested the following relief in its Amended Request for IRP:

89. Reserving its rights to amend the relief requested below, inter alia, to reflect document production and further witness evidence, Afilias respectfully requests the IRP Panel to issue a binding Declaration:

- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
- (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
- (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
- (4) specifying the bid price to be paid by Afilias;
- (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC;
- (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
- (7) granting such other relief as the Panel may consider appropriate in the circumstances.<sup>164</sup>

114. In its Post-hearing Brief, the Claimant articulated its request for declaratory relief as follows:

238. As an initial matter, ICANN agrees that "declarations finding that ICANN violated the Articles or Bylaws would be within the Panel's authority." Thus the Panel can indisputably declare that ICANN has breached:

- Sections 1.2(a)(v), 1.2(c) of the Bylaws by failing to reject NDC's application, and/or disqualify its bids, and/or deem it ineligible to execute a registry agreement because NDC violated the following sections of the New gTLD Program Rules: Sections 1 and 10 of Module 6, Section 1.2.7 of Module 1, and Sections 4.3.1(5) and 4.3.1(7) of Module 4 of the AGB, as well as Rules 12, 13, 32 of the Auction Rules;
- Sections 1.2(a)(v) and 2.3 of the Bylaws by the arbitrary, capricious, disparate, and discriminatory manner in which it treated Afilias;
- Article III of ICANN's Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws by failing to act transparently to the maximum extent feasible;
- Article III of ICANN's Articles of Incorporation and Sections 1.2(a) and 1.2(b)(iv) of the Bylaws by failing to act in accordance with its competition mandate;
- Sections 1.2(a), 1.1(a)(i), 1.2(a)(iv), 3.1, 3.6(a)(i)-(ii), 4.3(n)(i), and 4.3(n)(ii) of the Bylaws by adopting Rule 7 of the Interim Supplemental Procedures for IRP;
- Article III of ICANN's Articles of Incorporation and Sections 1.2, 1.2(a), 1.2(c) of the Bylaws by failing to conduct itself in accordance with relevant principles of international law, specifically the obligation of good faith.<sup>165</sup>

115. As for the Claimant's request for injunctive relief, it was set out in the immediately following paragraphs of the Claimant's Post-Hearing Brief:

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<sup>164</sup> Amended Request for IRP, para. 89.

<sup>165</sup> Claimant's PHB, para. 238.

239. In light of the foregoing declarations, the Panel should also grant Afiliás' requested injunctive remedies as well as its request for costs (as set forth in Afiliás' separate submission on costs filed herewith). Such remedies are entirely within the Panel's jurisdiction and are necessary to "[e]nsure that ICANN ... complies with its Articles of Incorporation and Bylaws" and to achieve a "binding, final resolution[]" of this dispute that is "consistent with international arbitration norms" and that is "enforceable in any court with proper jurisdiction."

240. Specifically, as injunctive relief, in addition to granting such other relief as the Panel considers appropriate in the circumstances of this case, the Panel should order and recommend that ICANN:

- Reject NDC's application for the .WEB gTLD;
- Disqualify NDC's bids at the ICANN auction for the .WEB gTLD;
- Deem NDC ineligible to execute a registry agreement for the .WEB gTLD;
- Offer the registry rights to the .WEB gTLD to Afiliás, as the next highest bidder in the ICANN auction;
- Set the bid price to be paid by Afiliás for the .WEB gTLD at USD 71.9 million;
- Pay Afiliás' fees and costs as set out in Afiliás' accompanying costs submission<sup>166</sup>.

116. In paragraph 254 of the Final Decision, the Panel described the Claimant's principal claims in the IRP, which the Panel characterized as the Claimant's "core claims".<sup>167</sup> In the immediately following paragraph, paragraph 255, the Panel described the request for relief associated with the Claimant's core claims. For ease of reference, the Panel reproduces these two (2) paragraphs in full:

254. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules. The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.

255. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.<sup>168</sup>

117. It is immediately apparent that the Claimant is seeking to recast as a distinct claim – the so-called Rules Breach Claim – what the Panel described in the Final Decision as the Claimant's core claims and the request for relief that the Claimant had sought in respect thereof. Properly understood, the Claimant's request for an additional award in relation to the Rules Breach Claim is thus but an

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<sup>166</sup> Claimant's PHB, para. 240.

<sup>167</sup> In support of the statement at paragraph 32 of its Reply that the Rules Breach Claim was its "principal claim", the Claimant refers to the paragraph of the Final Decision that describes the "core claims".

<sup>168</sup> Final Decision, paras. 254-255 [emphasis added].

expression of the Claimant's disagreement with the Panel's determination of its core claims and the denial of the request for relief associated therewith.

118. It can also be seen that the Panel's description of the Claimant's core claims includes the constituent elements of what the Claimant now calls the "Rules Breach Claim". Moreover, as attested to by the words emphasized in the above quote of paragraph 254 of the Final Decision, it was well understood that the Claimant's claims encompassed the alleged *inaction* of the Respondent when Afilias first asserted that the Respondent was required to reject NDC's application for .WEB,<sup>169</sup> declare NDC's bids at the ICANN auction invalid,<sup>170</sup> and/or deem NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules,<sup>171</sup> and offer .WEB to Afilias as the next highest bidder.<sup>172</sup>
119. In the Panel's opinion, it simply cannot be argued that the Final Decision omitted to deal with the "claim" that the Respondent had wrongfully failed to address these assertions, when they were first raised and thereafter later on in the process in June 2018. Insofar as the Respondent's Staff is concerned, the Panel found, at paragraph 413(1):

Declares that the Respondent has violated its [Articles and Bylaws] by (a) its staff (Staff) failing to pronounce on the question of whether the [DAA] complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold";<sup>173</sup>

120. Insofar as the alleged inaction of the Respondent's Board is concerned, the Panel decided:

331. The Respondent urges that it was not a violation of the Respondent's Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC's application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and **it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.**

332. The Panel does find, however, that it was a violation of the commitment to operate "in an open and transparent manner and consistent with procedures to ensure fairness" for the Respondent to have failed to communicate the Board's decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC's application and auction bids for .WEB. Since the Board's decision to defer consideration of these issues contradicted the Respondent's representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.<sup>174</sup>

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<sup>169</sup> Which corresponds to subparagraph a) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

<sup>170</sup> Which corresponds to subparagraph b) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

<sup>171</sup> Which corresponds to subparagraph c) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

<sup>172</sup> Which corresponds to subparagraph d) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

<sup>173</sup> Final Decision, para. 413(1) [emphasis added].

<sup>174</sup> *Ibid*, paras. 331-332 [emphasis added].



121. The Panel having found that the Respondent was not obligated to act upon the Claimant's complaints during the pendency of these proceedings, the Panel thus necessarily also found that the Respondent's failure to act in this respect (*i.e.*, its alleged *inaction*) was *not* a violation of its Articles and Bylaws. That is precisely the declaratory relief that the Claimant contends the Panel omitted to deal with under the rubric of the Rules Breach Claim.
122. As regards the Respondent's impugned inaction in June 2018, the Panel made the following additional findings – in favor of the Claimant – in respect of both the Staff's and Board's conduct:

347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.<sup>175</sup>

123. As regards the Claimant's request for relief in relation to its core claims, or Rules Breach Claim, there can be no question that it was denied, and that the associated claims were therefore fully dealt with. In the section of the Final Decision entitled "Determining the Proper Relief", the Panel quoted Section 4.3(o) of the Bylaws, which defines the authority of IRP panels, and decided that "the Claimant [was] entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision [...]."<sup>176</sup> The Panel then turned to the relief sought by the Claimant in respect of what is being referred to in the Application as the Rules Breach Claim, and explained in the following terms its decision to deny it:

362. As foreshadowed earlier in these reasons, the Panel is firmly of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.

363. The Panel also accepts the Respondent's submission that it would be improper for the Panel to dictate what should be the consequence of NDC's violation of the New gTLD Program Rules, assuming a violation is found.<sup>177</sup>

124. This decision is carried forward in the *Dispositif* as follows:

**Dismisses** the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that that the Respondent be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in subparagraph 410(5).<sup>178</sup>

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<sup>175</sup> Final Decision, para. 347 [emphasis added].

<sup>176</sup> *Ibid*, para. 361.

<sup>177</sup> *Ibid*, paras. 362-363.

<sup>178</sup> *Ibid*, para. 413(7) [emphasis added]

125. It is equally apparent that the so-called declaratory relief that the Claimant is seeking in the Application would directly contradict the Panel's decision that it is for the Respondent to pronounce in the first instance on the substance of the constituent elements of the Rules Breach Claim. In this regard, the Panel must reject the Claimant's argument that "the Panel would not need to alter a single word of the Decision's existing *Dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each."<sup>179</sup> In support of this argument, the Claimant has reproduced in Annex B to the Reply the amendments to the *Dispositif* of the Final Decision that it contends would be required in order for the Panel to grant the relief it is requesting in relation to the Rules Breach Claim. The language that the Claimant requests be added to the *Dispositif* reads as follows:

**Declares** that ICANN violated its Articles and Bylaws by (a) not rejecting NDC's application, (b) not declaring NDC's bids at the ICANN auction invalid, (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder;<sup>180</sup>

126. In the Panel's opinion, it would appear undisputable that the Claimant's proposed additional declaration directly contradicts the Panel's "firm view", as it was put in paragraphs 362 and 363 of the Final Decision, that it is for the Respondent to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules; as well as the finding that it would be improper for the Panel to dictate what should be the consequence of NDC's violation of the New gTLD Program Rules, assuming a violation is found. Having expressed that opinion, made that decision and fully exercised its authority in relation to the Rules Breach Claim in the Final Decision by dismissing the relief sought in relation to the Claimant's core claims, the Panel is *functus officio* and without any authority to issue an additional award regarding that "claim" or any other claim dealt with in the Final Decision.

## 2. The "International Law Claim"

127. The Claimant defines the "International Law Claim" in the Application in the following terms:

Claimant's claim that ICANN breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC despite NDC breaches of the Rules;<sup>181</sup>

and

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<sup>179</sup> Reply, para. 94.

<sup>180</sup> Annex B to the Reply, at proposed additional para. 5.

<sup>181</sup> Application, para. 4.

Afilias claimed from the very outset that ICANN violated its obligation to conduct its activities in conformity with relevant principles of international law by failing to enforce the New gTLD Program Rules and by proceeding to delegate .WEB to NDC.<sup>182</sup>

128. Two (2) preliminary observations are in order. As the first of these formulations makes clear, the contention that the Respondent “*breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law*” illustrates that the Claimant’s arguments based on international law served to support the Claimant’s claim that the Respondent had violated its Articles and Bylaws through the actions and inactions that were being impugned by the Claimant in this IRP. This is so because under its Articles and Bylaws the Respondent is obligated to carry out its activities in conformity with relevant principles of international law and international conventions, as well as applicable local law. This was expressly noted by the Panel in the Applicable Law section of the Final Decision:

28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.<sup>183</sup>

129. The other preliminary observation arises from the second formulation of the Claimant’s “International Law Claim”, and the fact that it is based on the same facts and circumstances as the Rules Breach Claim. Indeed, the contention that the Respondent violated international law “*by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC*” is inseparable from the Claimant’s core claims in the IRP, as described in the Final Decision. As noted already, the Panel is of the view that the core claims, including the so-called Rules Breach Claim, were fully dealt with in the Final Decision.
130. While the Claimant presented various arguments based on principles of international law in support of its core claims, it did not advance a distinct claim based on international law. Indeed, the Claimant had observed that the principles of international law it was relying on provided “independent” but “generally overlapping” safeguards to those arising from the terms of the Articles and Bylaws,<sup>184</sup> and submitted that these international law principles were a “lens” through which the Panel should view the provisions of the Bylaws.<sup>185</sup> The excerpts reproduced in Annex A of the Claimant’s Reply exemplify these observations and submissions rather than establish that the Claimant had articulated and advanced an international law claim separate and distinct from its core claims. In sum, the principles of international law relied upon by the Claimant were presented as providing

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<sup>182</sup> Application, para. 38.

<sup>183</sup> Final Decision, para. 28.

<sup>184</sup> Afilias’ Response to the *Amici*’s Briefs, para. 143.

<sup>185</sup> Claimant’s PHB, fn. 203.

*an additional basis* for the Panel to find in the Claimant's favor in regard to its core claims, or what is now presented as the Rules Breach Claim.

131. As noted in the Panel's discussion of the applicable standard to a request for an additional award, there is a fundamental distinction between, on the one hand, a "claim" and, on the other, grounds or arguments put forward in support of a claim. A request for an additional award is not appropriate if it relates to an arbitral tribunal's omission to deal, not with a claim, but with one or more arguments or grounds put forward in support of a claim.
132. In the present case, the Panel was well aware of the provisions of Section 1.2(a) of the Bylaws, and the Claimant's arguments based on certain principles of international law. The Final Decision explicitly refers to both Section 1.2(a)<sup>186</sup> and the Claimant's arguments based on principles of international law.<sup>187</sup> The Panel found in favor of the Claimant by the application of the Respondent's commitments, under the Bylaws, to make decisions by applying documented policies objectively and fairly (*Dispositif*, para. 2) and to operate in an open and transparent manner and consistent with procedures to ensure fairness (*Dispositif*, para. 3). The fact that the Panel did not explicitly take the further step to articulate how these same findings in relation to the same claim could find support in certain principles of international law does not provide a ground for a request for an additional decision.
133. The Claimant not having presented an international law claim that was separate and distinct from the Claimant's core claims, it cannot be argued in relation to the Claimant's international law arguments that a claim was "presented but omitted from the award", as required by Article 33 of the ICDR Rules. The Panel is of the view that it has fully dealt with and resolved the Claimant's core claims, and must therefore reject the request for an additional decision in respect of what is now described as the "International Law Claim".

### **3. The "Disparate Treatment Claim"**

134. The Claimant defines the "Disparate Treatment Claim" as follows:

Claimant's claim that ICANN breached its Articles and Bylaws by treating Affiliates inequitably and disparately when compared to the manner in which it treated NDC and non-applicant Verisign.<sup>188</sup>

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<sup>186</sup> See, among others, para. 28 of the Final Decision. See also para. 290, where the Panel quotes Article 2, paragraph III of the Respondent's Articles.

<sup>187</sup> See paras. 129, 131, 194-196, 200 and 221 of the Final Decision. The Panel noted in para. 195 of the Final Decision that the requirement under the Bylaws to afford impartial and non-discriminatory treatment was "consistent with the principles of impartiality and non-discrimination under international law."

<sup>188</sup> Application, para. 4. See also para. 85.

135. In respect of the Claimant's allegation of disparate treatment, the Panel stated the following in the Final Decision:

350. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant's core claims, such as turning to Verisign rather than NDC to obtain information about NDC's arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afiliias' letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach. Accordingly, the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims.<sup>189</sup>

136. This paragraph makes clear that the Panel's decision not to make further findings in relation to what the Claimant describes as the Disparate Treatment Claim was deliberate. Equally clear is the fact that the Panel considered the allegation of disparate treatment and provided reasons for its decision in regard thereto: the allegation of disparate treatment supported the Claimant's core claims; the Panel had fully disposed of those claims; and the Panel therefore "[did] not consider it necessary to add to its findings in relation to the Claimant's core claims". As explained previously in this decision, such a conclusion cannot be revisited in the context of a request for an additional award.<sup>190</sup>
137. Having already fully exercised its authority in the Final Decision in relation to the allegation of disparate treatment, the Panel is *functus officio* and without any authority to issue an additional decision regarding what the Claimant describes in the Application as the Disparate Treatment Claim.

#### 4. Conclusion

138. For all of these reasons, the Panel must decline to issue an additional decision in respect of the three (3) "claims" that the Claimant contends had been presented but allegedly omitted by the Panel in the Final Decision. In the Panel's opinion, the first two (2) "claims" set out in the Application are *post hoc* constructs that seek to repackage the claims actually presented to the Panel and recast the manner in which they were advanced. The Panel is of the view that these "claims" were not actually presented as distinct claims, nor were "omitted" within the meaning of Article 33 of the ICDR Rules. As for the allegation of disparate treatment, the Final Decision evidences that it was considered and dealt with to the extent the Panel felt it necessary. Moreover, and in any event, an attestation of the Panel's resolution of *all* claims that had been put before it is

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<sup>189</sup> Final Decision, para. 350.

<sup>190</sup> See, in the context of Article 39 of the UNCITRAL Rules: Caron, *supra* note 142, p. 823. See also Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional Award]*, Kluwer Law International, 2017, p. 356.

provided in the last paragraph of the Final Decision's *Dispositif*, in which the Panel "[d]ismiss[ed] all of the Parties' other claims and requests for relief".

**C. Afilias' Requests for Interpretation of the Final Decision**

139. The five (5) "issues" which the Claimant contends are "vague, ambiguous, confusing, and/or contradictory"<sup>191</sup> and requiring interpretation are the following:

- a) What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints?<sup>192</sup>
- b) Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?<sup>193</sup>
- c) What law (if any) did the Panel apply in this IRP – just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law?<sup>194</sup>
- d) On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel?<sup>195</sup>
- e) What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims?<sup>196</sup>

140. The Panel addresses each of these requests for interpretation in turn.

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<sup>191</sup> Application, para. 94.

<sup>192</sup> *Ibid*, paras. 94 and 95-99.

<sup>193</sup> *Ibid*, paras. 94 and 100-103.

<sup>194</sup> *Ibid*, paras. 94 and 104-107.

<sup>195</sup> *Ibid*, paras. 94 and 108-111.

<sup>196</sup> *Ibid*, paras. 94, 112-114.

## 1. Alleged Ambiguity of the term “Pronounce”

141. Afiliias argues that there is ambiguity as to the scope and meaning of the terms “pronounce” and “pronouncement” as used by the Panel in the Final Decision.<sup>197</sup> Its request for interpretation of these terms includes the request “that the Panel address the following questions regarding the nature of a ‘pronouncement’”:

- a) What constitutes a “pronouncement” and what is the foundation in ICANN’s documents or applicable law for the “pronouncement” requirement, particularly in light of the Bylaws’ definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?
- b) What should have been the form and substance of ICANN’s “pronouncement” on Afiliias’ complaints?
- c) On what sources did the Panel rely to fashion its “pronouncement” remedy?
- d) Before ICANN issues the “pronouncement” recommended by the Panel, must Afiliias and other Internet community members be given an opportunity to be heard by the Board?
- e) Must the Respondent’s “pronouncement” be issued following an opportunity for Afiliias and other Internet community members to receive and comment on all relevant evidence and argument?
- f) What materials, documentary or otherwise, must ICANN consider before it issues the “pronouncement” recommended by the Panel?
- g) Must the “pronouncement” be issued in a written form and made public on ICANN’s website?
- h) Must the “pronouncement” be issued with full and adequate supporting reasoning following Board deliberation?
- i) Must the “pronouncement” be issued with findings of fact and conclusions of law?
- j) Must the “pronouncement” be issued without the participation of Board members with conflicts of interest?<sup>198</sup>

142. The terms “pronounce” or “pronouncement” are used throughout the Final Decision, including in the following two (2) sub-paragraphs of the *Dispositif*.<sup>199</sup>

1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its Bylaws for Internet Corporation for Assigned Names and Numbers, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (Staff) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu DotCo, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the “Confirmation of Understanding” executed by these same parties on 26 July 2016 (**DAA**), complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken “off hold”; and (b) its Board, having deferred consideration of the Claimant’s complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not

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<sup>197</sup> Application, paras. 95-99.

<sup>198</sup> *Ibid*, para. 99.

<sup>199</sup> Final Decision, para. 413 [emphasis added].

pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program;

[...]

5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;

143. The context for the declarations and the recommendation just quoted – and the use therein of the terms “pronounce” and “pronouncement” – is provided in the following extracts of the Final Decision:<sup>200</sup>

299. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.

300. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.

[...]

322. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and “others in the contention set” were worthy of the Respondent's consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent's contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent represented that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism. Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD Program, but also to disseminate the Respondent's position on those questions within the Internet community and allow market participants to act accordingly.

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<sup>200</sup> Final Decision, paras. 299-300, 322, 330-331, 335, 344, 347-347 and 352 [emphasis added, except in para. 330 where the emphasis is in the original].



[...]

330. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC's bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a "pending question, one on which the Board had not pronounced and had decided not to address." [emphasis added] Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

331. The Respondent urges that it was not a violation of the Respondent's Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC's application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.

[...]

335. In the opinion of the Panel, the Respondent's decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett's letter of 16 September 2016, the text in the introduction to the attached Questionnaire, and Mr. Atallah's letter of 30 September 2016. The Panel also finds this conduct to be inconsistent with the Board's decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated by the Respondent in this IRP.

[...]

344. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on whether NDC violated the Guidebook".

[...]

347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.

348. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent's failure to disqualify NDC's application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.

[...]

352. For reasons expressed elsewhere in this Final Decision, the Panel is of the opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook

and Auction Rules and, assuming the Respondent determines that it did, what consequences should follow. [...]

144. In the opinion of the Panel, there is and can be no ambiguity as to the meaning of the words “pronounce” and “pronouncement” in the Final Decision when read in their proper context. These words are used by the Panel interchangeably with the words “decide” (paras. 322 and 352), “resolve” (para. 322) and “determine” (para. 352), thus confirming that they are to be given their usual dictionary meaning, *to wit*: “to give a judgement, or opinion or statement formally, officially or publicly”;<sup>201</sup> “to formally state an official opinion or decision”<sup>202</sup>; “to utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a Court is said to ‘pronounce’ judgment or a sentence”.<sup>203</sup>
145. The Panel notes that Google’s English dictionary provided by Oxford Languages lists among the synonyms of the verb “to pronounce” the verbs: “to declare”, “to rule”, “to adjudicate”, and “to judge”.<sup>204</sup> That the verb “to pronounce” and the noun “pronouncement” were used in the Final Decision in the sense just indicated is also confirmed by the fact that the word “pronounce” is used in paragraph 413(1) of the Final Decision, quoted above, to refer to the decision that the Panel itself was invited to make by the Claimant in this IRP.
146. Finally, the Panel observes that when the word “pronounced” was used by a member of the Panel to seek confirmation from Mr. Disspain, a long-time serving member of the Respondent’s Board, that after the November 2016 Board workshop he knew that the question of whether NDC’s bid was compliant with the New gTLD Program Rules had been raised by Afiliias and was a “*pending question, one on which the Board had not pronounced and had decided not to address*”,<sup>205</sup> Mr. Disspain had no difficulty understanding the question, and neither the Claimant nor the Defendant raised objection that it somehow lacked clarity.

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<sup>201</sup> Oxford Learner’s Dictionaries, s.v. “Pronounce”, <https://www.oxfordlearnersdictionaries.com/us/definition/english/pronounce> (“to give a judgement, opinion or statement formally, officially or publicly”).

<sup>202</sup> MacMillan Dictionary, s.v. “Pronounce”, <https://www.macmillandictionary.com/us/dictionary/american/pronounce> (“to formally state an official opinion or decision”).

<sup>203</sup> The Law Dictionary (on-line version), s.v. “Pronounce”, <https://thelawdictionary.org/pronounce> (“To utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a court is said to ‘pronounce’ judgment or a sentence.”)

<sup>204</sup> Google Dictionary provided by Oxford Languages, s.v. “Pronounce”, [https://www.google.com/search?q=pronounce+meaning&rlz=1C1GCEB\\_enCA924CA924&ei=ZuuwYfvdAbOcptQPn8iNgAo&ved=0ahUKEwj7qJaf3dT0AhUzjokEHR9kA6AQ4dUDCA4&uact=5&og=pronounce+meaning&gs\\_lcp=Cgdnd3Mtd2l6EAMyCAgAEAcQChAeMgglABAHEAoQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB46BAgAEBM6BggAEB4QEzoiCAAQBR AeEBM6CAgAEAcQHhATSgQIQRgASgQIRhgAUMQCWN8EYMcn aAFwAHgAqAFkiAGYApIBazluMZgBAKABAcABAQ&scient=qws-wiz.](https://www.google.com/search?q=pronounce+meaning&rlz=1C1GCEB_enCA924CA924&ei=ZuuwYfvdAbOcptQPn8iNgAo&ved=0ahUKEwj7qJaf3dT0AhUzjokEHR9kA6AQ4dUDCA4&uact=5&og=pronounce+meaning&gs_lcp=Cgdnd3Mtd2l6EAMyCAgAEAcQChAeMgglABAHEAoQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB46BAgAEBM6BggAEB4QEzoiCAAQBR AeEBM6CAgAEAcQHhATSgQIQRgASgQIRhgAUMQCWN8EYMcn aAFwAHgAqAFkiAGYApIBazluMZgBAKABAcABAQ&scient=qws-wiz.)

<sup>205</sup> Merits hearing transcript, 7 August 2020 (Mr. Disspain), pp. 976-977, quoted in Final Decision, para. 330, and quoted above in this decision at para. 143. See also Merits hearing transcript, 7 August 2020 (Mr. Rasco), pp. 898.

147. In their Submission on the Application, the *Amici* refer to a press release dated 9 June 2021 issued by counsel for the Claimant announcing that they had “[...] Secure[d] Another Victory Against ICANN in .Web Arbitration”. This press release concerns the Final Decision and it describes in terms free from ambiguity the Panel’s decision that the Respondent’s Board should consider and pronounce upon the Claimant’s claims:

The ICDR Panel has directed ICANN’s Board to conduct an objective and fair review of Afiliias’ Complaints, consider whether NDC violated ICANN’s rules and what the consequences should be if a determination of illegality is made.<sup>206</sup>

148. For all of the above reasons, the Panel has no hesitation in rejecting outright the contention that the terms “pronounce” or “pronouncement” as used in the Final Decision raise any ambiguity. By way of consequence, the Panel must deny the request for an interpretation of those terms.

149. The Panel also denies as falling manifestly outside the scope of Article 33 the Claimant’s request that the Panel address the ten (10) questions said to regard the “nature of a ‘pronouncement’”. As the Respondent correctly notes, many of those questions seek advisory opinions from the Panel on the procedures and processes that the Board should follow when it comes to consider and resolve the Claimant’s complaints against NDC and the DAA, issues as to which neither party made submissions or sought findings or declarations and which are not addressed in the Final Decision.<sup>207</sup>

## **2. Alleged Ambiguity as to the Purported Requirement of a Pronouncement as a Pre-Condition to Asserting a Claim in an IRP**

150. The Claimant’s second request for interpretation comes in the form of three (3) questions:

Did the Panel determine that the Board must always “pronounce” on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel’s observations that some sort of decision on Afiliias’ complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?<sup>208</sup>

151. This second request for interpretation seeks to build on the Claimant’s assertion that the effect of the Final Decision is that the impugned action or inaction of the Respondent’s Staff must first be submitted to the Board for pronouncement before an IRP may be pursued.<sup>209</sup> On the basis of that assertion, Afiliias requests “that the Panel provide an interpretation that explains whether its

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<sup>206</sup> See *Amici’s* Submission, para. 19, fn. 27.

<sup>207</sup> Response, para. 68.

<sup>208</sup> Application, para. 94.

<sup>209</sup> *Ibid*, paras. 100 and 103.

decision to remand to the Board for “pronouncement” assumes or requires that all future IRP challenges to Staff action or inaction must first be pronounced upon by the Board.”<sup>210</sup>

152. However, not only does the Claimant fail to support its basic assertion by reference to specific language in the Final Decision, the assertion is actually disproved by some of the Panel’s actual findings in the Final Decision. Indeed, and as the Respondent observes, “the Panel found in Afllias’ favor with regard to actions and inactions [of the Staff] for which the ICANN Board never pronounced.”<sup>211</sup> For example, the Panel found that the Staff had acted contrary to the Respondent’s Articles and Bylaws by preparing and issuing the Questionnaire of 16 September 2016 and, in June 2018, by moving toward the delegation of .WEB without the question of whether NDC had violated the New gTLD Program Rules having been determined. These Staff actions or inactions had not previously been submitted to the Board for pronouncement, and the Panel’s findings in relation thereto therefore contradict and disprove the assertion and associated concerns on which this second request for interpretation is premised.
153. This suffices for the Panel to find that the Claimant’s second request for interpretation is based on a false premise and, in any event, that it fails to identify an ambiguity in the Final Decision requiring clarification or interpretation.

### **3. Alleged Ambiguity as to the Law Applied by the Panel**

154. The Claimant’s third request for interpretation of the Final Decision concerns to the law applied by the Panel in this IRP. The Claimant contends that the Final Decision is vague and ambiguous as to the actual law applied by the Panel and requests the Panel:

...to provide an interpretation of its decision on the applicable law that clarifies (a) whether it held that California law is the sole law applicable to ICANN, (b) what specific law, if any, it applied to interpret the obligations contained in ICANN’s Articles and Bylaws, and (c) whether international law is an independent source of obligation in light of the Articles’ and Bylaws’ requirement that ICANN “shall conduct its activities in conformity with relevant principles of international law.”<sup>212</sup>

155. The Application asserts that the Panel “apparently determined that California law should be applied to the Dispute”.<sup>213</sup> After reproaching the Panel for recording in the Final Decision that the Claimant “did not express disagreement with ICANN’s position” concerning the application of California law,<sup>214</sup> the Claimant goes on further to assert that the Panel “does not identify the substantive law

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<sup>210</sup> Application, para. 103.

<sup>211</sup> Response, para. 70.

<sup>212</sup> Application, para. 107.

<sup>213</sup> *Ibid*, para. 104.

<sup>214</sup> *Ibid*, paras. 105-106.

(if any) it deemed applicable” to its rulings (other than those on privilege issues and the substance of the business judgment rule).<sup>215</sup>

156. These assertions completely distort the Final Decision in so far as the applicable law is concerned.
157. Before quoting the relevant section of the Final Decision on the Applicable Law, it bears recalling that this IRP proceeded in two (2) phases, and that while the Final Decision completed Phase II, it was the Final Decision *in the IRP*. As a consequence, some sections of the Introduction to the Final Decision relate to Phase I, some to Phase II, while others relate to the IRP as a whole. This explains why certain paragraphs of the Final Decision reproduce entire paragraphs from the Decision in Phase I, while others, in order to abbreviate the Final Decision, incorporate by reference whole sections of the Phase I Decision.<sup>216</sup>
158. The Panel reproduces below in full the Applicable Law section of the Final Decision:

#### H. Applicable Law

27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.

28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.

29. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.

30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.<sup>217</sup>

159. As indicated in the above quoted paragraphs, the only issues that the Panel stated were resolved applying California law were the issues of privilege that arose in the document production phase of this IRP.<sup>218</sup> As for the statement the Claimant reproaches the Panel for having repeated in the Final Decision, namely that the Claimant “did not express disagreement with ICANN’s position”, paragraph 29 of the Final Decision states explicitly that it was made in answer to a question at the hearing on Phase I and that it concerned the law applicable to the interpretation of the Interim

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<sup>215</sup> Application, paras. 104-106; see also paras. 78-79.

<sup>216</sup> See, for example, para. 35 of the Final Decision which incorporates by reference paras. 33-67 of the Phase I Decision.

<sup>217</sup> Final Decision, paras. 27-30 [emphasis added].

<sup>218</sup> *Ibid*, para. 30. This is further elaborated on in paragraph 59 of the Final Decision. The Panel also declined the Respondent’s invitation to apply California law to determine the meaning of the terms “frivolous” and “abusive” as used in Section 4.3 (r) of the Bylaws (Final Decision, para. 400).

Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, in case of ambiguity. As the Claimant itself notes in the Application, paragraph 29 of the Final Decision reproduced *verbatim* paragraph 27 of the Phase I Decision and concerned issues that had been discussed in Phase I.<sup>219</sup>

160. As regards the other issues in dispute, the first paragraph of the Applicable Law section of the Final Decision states that the “rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures”, while the next paragraph quotes extensively from Section 1.2(a) of the Bylaws, including its reference to relevant principles of international law.
161. In the Panel’s opinion, the Final Decision is explicit as to the rules that the Panel has applied to arrive at its various findings and conclusions and, consistent with paragraph 28 of the Final Decision, these rules are, in the main, those set out in the Bylaws and the Interim Procedures. As regards the Respondent’s time limitations defence, the Panel identified the relevant rule of the Interim Procedures in the section of the Final Decision entitled “Applicable Time Limitation Rule”.<sup>220</sup> In so far as the merits of the Claimant’s claims are concerned, “the key standards against which the Respondent has determined that its conduct should be assessed” are set out in the section of the Final Decision entitled “Relevant Provisions of the Articles and Bylaws”,<sup>221</sup> many of which are quoted in full.
162. In the Panel’s opinion, in regard to the law applied by the Panel in this IRP, the Application fails to identify any ambiguity requiring clarification or interpretation. The Claimant’s third request for interpretation must therefore be denied.

#### **4. Alleged Ambiguity as to the Basis for the Determination Concerning ICANN’s Knowledge, Expertise and Experience**

163. The Claimant’s fourth request for interpretation of the Final Decision is directed to an alleged ambiguity as to the basis for the Panel’s determination concerning ICANN’s knowledge, expertise and experience. However, instead of pointing to language that, by reason of its alleged ambiguity, might require clarification or interpretation,<sup>222</sup> the Claimant criticizes that determination and seeks an explanation as to the basis on which it was made:

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<sup>219</sup> Application, para. 79.

<sup>220</sup> Final Decision, paras. 259-268.

<sup>221</sup> *Ibid*, paras. 289-296.

<sup>222</sup> In regard to the Respondent’s knowledge, expertise and experience with the gTDL Program Rules, the Panel noted that the Guidebook and Auction Rules “originate from the Respondent and it is the Respondent that is entrusted with responsibility for the implementation of the gTDL Program in accordance with the gTLD Program Rules [...]” (Final Decision, para. 299). The Respondent does not cite this observation in its discussion of its fourth request for interpretation, nor does it refer to the

Afilias requests the Panel to provide an interpretation that clarifies the basis on which it determined that ICANN has the “knowledge, expertise, and experience” that uniquely qualifies it, as opposed to the Panel, to “pronounce” on Afilias’ complaints regarding ICANN’s obligations with respect to NDC’s violations of the New gTLD Program Rules.<sup>223</sup>

164. This is not a proper request for interpretation. As noted earlier in this decision, a request for interpretation may not be used to challenge the tribunal’s reasoning or dispositions, to seek revision, reformulation or additional explanations of a given decision, or “to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question.”<sup>224</sup>
165. This suffices to dispose of the Claimant’s fourth request for interpretation, which must be denied as being unauthorized under Article 33 of the ICDR Rules.

## **5. Alleged Ambiguity as to the Standard and Burden of Proof Applied by the Panel**

166. Finally, the Claimant argues that there is an ambiguity in the Final Decision as to the standard and burden of proof applied by the Panel. In the Claimant’s submission, the ambiguity stems from paragraphs 32 and 33 of the Final Decision, which the Panel cites below along with paragraph 31, which introduces the section of the Final Decision entitled “Burden and Standard of Proof”:

### **I. Burden and Standard of Proof**

31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.

32. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, “more likely than not”. That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, “[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.”

33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.<sup>225</sup>

167. In relation to this last request for interpretation, the Claimant begins by asserting, based on the above-quoted language of paragraph 32, that “the Panel state[d] that it applied a heightened standard of proof to some issues before it, in light of allegations of dishonesty or fraud”.

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evidence of Ms. Christine Willett and Ms. Samantha Eisner, two (2) members of the Respondent’s Staff, or that of Ms. J. Beckwith Burr and Mr. Christopher Disspain, two (2) Board members, all of whom filed witness statements and testified at the evidentiary hearing (see Final Decision, paras. 68 and 70).

<sup>223</sup> Application, para. 111 [emphasis added].

<sup>224</sup> Stuart Isaacs, “Chapter 22: Life after Death: The Arbitral Tribunal’s Role Following its Final Award” in Neil Kaplan & Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration*, Kluwer Law International, 2018, p. 367.

<sup>225</sup> Final Decision, paras. 31-33.

The Claimant goes on to state that the Panel failed to identify at any point in the Decision the issues to which it applied these principles such that “the standard of proof applicable to the issues ultimately resolved in the *Dispositif* is left indeterminable.”<sup>226</sup> Based on that reasoning, the Claimant requests that:

... the Panel provide this interpretation regarding the following issues:

a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afiliás' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?

b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?

c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?

d) Whether the failure to disclose the “decision” from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?

e) Whether the failure to “pronounce” on Afiliás' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?

f) Whether proceeding toward delegation of .WEB to NDC without a “pronouncement” violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?

g) Whether the disparate treatment of Afiliás violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?

h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?<sup>227</sup>

168. The Panel finds no basis in paragraph 32 or elsewhere in the Final Decision for the Claimant's assertion that the Panel “applied a *heightened standard* of proof to some of the issues before it, in light of allegations of dishonesty or fraud”, and the Claimant does not cite any. To the contrary, paragraph 32 identifies *one* standard of proof – the balance of probabilities – and adds that allegations of dishonesty or fraud will attract close scrutiny to ensure “*that the standard is met*”.<sup>228</sup> The Panel goes on to state that “these principles were applied by the Panel in considering *the issues in dispute in Phase II of this IRP*”,<sup>229</sup> without differentiating among these issues.

169. Nowhere in the Final Decision is there any suggestion that the Panel applied a different standard of proof than the standard identified in paragraph 32, or that it was felt appropriate to apply to any

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<sup>226</sup> Final Decision, paras. 112-113.

<sup>227</sup> Afiliás' Article 33 Application, para. 114.

<sup>228</sup> Final Decision, para. 32 [emphasis added].

<sup>229</sup> *Ibid*, para. 33 [emphasis added].



of the issues determined by the Panel close scrutiny to ensure that the standard was met. Indeed, the only explicit reference to the standard of proof in the Final Decision (other than in paragraph 32) provides confirmation that the standard applied was that identified in that paragraph.

[...] Having considered the witness and documentary evidence on [the Respondent's pre-auction investigation], which is preponderant, the Panel finds [...].<sup>230</sup>

170. As discussed in the Decision on Phase I, the Claimant had made allegations of misconduct on the part of the Respondent and members of its Staff in relation to the adoption of Rule 7 of the Interim Procedures. The Respondent's good faith in the enactment of Rule 4 was also impugned by the Claimant in its submissions concerning the time limitation defence. However, and for reasons set out in the Final Decision, the Panel did not make any finding in relation to the Rule 7 Claim<sup>231</sup> or the Claimant's allegations concerning the adoption of Rule 4.<sup>232</sup>
171. In sum, and contrary to the Claimant's assertions, the Panel did not apply a "heightened standard of proof to some of the issues". Accordingly, and quite aside from the Claimant's failure to identify any ambiguity requiring interpretation or clarification, there is no basis for the Claimant's request that the Panel identify the issues as to which it applied a heightened standard of proof, nor for its request that the Panel address the eight (8) questions listed as part of its fifth request for interpretation.
172. For these reasons, the Claimant's fifth request for interpretation is denied.

## **6. Conclusion**

173. For the reasons explained in this section, the Panel declines to provide an interpretation of the Final Decision regarding the five (5) issues identified in the Application. In the Panel's opinion, none of those five (5) requests meets the requirements for interpretation of an award set out in Article 33 of the ICDR Rules.

### **D. Costs**

174. The Respondent claims its costs and legal fees incurred as a result of the Application, as well as the Panel's fees in resolving the Application. According to the Respondent, the Application is both "frivolous" and "abusive" as these terms were defined by the Panel in the Final Decision.

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<sup>230</sup> Final Decision, para. 298. Inexplicably, the Claimant includes a request for interpretation regarding the standard applied to that issue in the list of questions cited in the text at para. 167 (see para. b).

<sup>231</sup> Final Decision, paras. 7, 355-357 and 413(9).

<sup>232</sup> *Ibid*, paras. 282-284.

175. The Claimant accepts that the Panel has the power to allocate the costs of the Application as between the Parties, and agrees with the Respondent that the “frivolous or abusive” standard set out in Section 4.3(r) of the Bylaws applies.<sup>233</sup> However, the Claimant urges that the Application is neither frivolous, nor abusive.
176. Article 33 (4) of the ICDR Rules, already cited, provides that the parties are responsible for all costs associated with any request for interpretation, correction, or an additional award, and that the Tribunal “may allocate such costs.”
177. Section 4.3(r) of the Bylaws reads as follows:
- (r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.<sup>234</sup>
178. In the Final Decision, the Panel defined frivolous as used in Section 4.3(r) as “of little weight or importance”, “having no sound basis (as in fact or law)”, “lacking in seriousness” or “clearly insufficient on its face”.<sup>235</sup> As for the term “abusive”, the Panel defined it as “characterized by wrong or improper use or action”.<sup>236</sup>
179. The Panel has dismissed the Application in its entirety. In the opinion of the Panel, under the guise of seeking an additional decision, the Application is seeking reconsideration of core elements of the Final Decision. Likewise, under the guise of seeking interpretation, the Application is requesting additional declarations and advisory opinions on a number of questions, some of which had not been discussed in the proceedings leading to the Final Decision.
180. In such circumstances, the Panel cannot escape the conclusion that the Application is “frivolous” in the sense of it “having no sound basis (as in fact or law)”. This finding suffices to entitle the Respondent to the cost shifting decision it is seeking and obviates the necessity of determining whether the Application is also “abusive”.
181. The Respondent avers that it has incurred US \$236,884.39 in legal fees opposing Afiliás’ Article 33 Application and submits that this sum is reasonable. The Respondent points out that the Application consisted of 68 pages of text with over 200 footnotes; cited 17 new authorities comprising more

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<sup>233</sup> Afiliás’ Reply, para. 131.

<sup>234</sup> Bylaws, Section 4.3(r) [emphasis added].

<sup>235</sup> Final Decision, para. 401.

<sup>236</sup> *Ibid.*

than 170 pages; and sought far-reaching relief, all of which required the Respondent to take the Application seriously and respond accordingly. A schedule of fees incurred in responding to the Application was attached as Appendix B to the Response. In regard to the amount claimed by the Respondent for its legal fees, the Panel notes that while the Claimant has denied that the Application is frivolous or abusive, it did not challenge the reasonableness of the amount of fees claimed by the Respondent.

182. The Panel finds that the amount of fees incurred by the Respondent to respond to the Application, as detailed in Appendix B to the Response, is reasonable. Considering the Panel's above finding in paragraph 180, the Panel considers that the Respondent, which is clearly "the prevailing party" in respect of the Application, should be reimbursed its legal fees under Section 4.3(r) of the Bylaws, and the Panel so orders.
183. The ICDR has informed the Panel that the fees and expenses of the Panelists in relation to the Application total US \$140,335.30, and that there are no administrative fees of the ICDR in relation to the Application. The ICDR has further advised that the entire advance on non-party costs in relation to the Application has been paid by the Respondent.
184. Considering the outcome of the IRP as a whole, including the findings of breach of the Articles and Bylaws by the Respondent as set out in the Final Decision, the Panel denies the Respondent's claim that the Claimant also be made to bear the fees of the Panel members in relation to the Application, which, as part of the administrative costs of the IRP, shall be borne by the Respondent in accordance with the default rule set out in Section 4.3 (r) of the Bylaws.

## V. **DISPOSITIF**

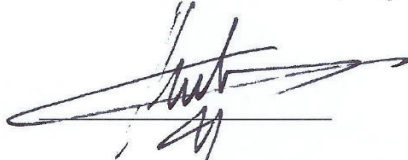
185. For the reasons set out in this decision, the Panel hereby unanimously:

1. **Denies** in its entirety Afiliat Domains No. 3 Limited's Rule 33 Application for an Additional Decision and for Interpretation, dated 21 June 2021 (**Application**);
2. **Grants** the Respondent's request that the Panel shift liability for the legal fees incurred by the Respondent in connection with the Application, **fixes** at US \$236,884.39 the amount of the legal fees to be reimbursed to the Respondent by the Claimant on account of those legal fees, and **orders** the Claimant to pay this amount to the Respondent within thirty (30) days of the date of notification of this decision, after which 30-day period this amount shall bear interest at the rate of 10% *per annum*;
3. **Fixes** the costs of the Application, consisting of the fees and expenses of the Panel members, at US \$140,335.30;
4. **Denies** the Respondent's request that the Claimant bear the fees of the Panel members in connection with the Application, and **declares** that the costs of

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England



Catherine Kessedjian

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Richard Chernick

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Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

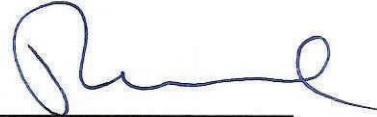
the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

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Catherine Kessedjian



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Richard Chernick

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Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

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Catherine Kessedjian

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Richard Chernick



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Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

**RM 202**

## Industrial Risk Insurers v. Man GHH

141 F.3d 1434 (11th Cir. 1998)  
Decided May 22, 1998

Nos. 94-2982, 94-2530

1435 Decided May 22, 1998 \*1435

Appeals from the United States District Court for the Middle District of Florida.

D.C. Docket No. 85-1770-CIV-T-17.

Robert S. Hoofman, Thomas B. DeWolf, DeWolf, ward, O'Donnell Hoofman, P.A., Orlando, FL, for Industrial Risk Insurers, Barnard Burk Group, Inc., Barnard and Burk Engineers and Constructors, Inc., American Home Assurance Co.

Steven L. Brannock, Frederick J. Grady, Stacy D. Blank, Mark E. Grantham, Holland Knight, Tampa, FL, for M.A.N. Gutehoffnungshütte, GmbH, and Appellants.

Before TJOFLAT and EDMONDSON, Circuit Judges, and NANGLE-, Senior District Judge.

– Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

1437\*1437

TJOFLAT, Circuit Judge:

Industrial Risk Insurers, Barnard and Burk Group, Inc., Barnard and Burk Engineers and Constructors, Inc., ISI, Inc., and American Home Assurance Company<sup>1</sup> appeal from the district court's denial of their motion to vacate an international commercial arbitration award. On cross-appeal, respondent M.A.N. Gutehoffnungshütte GmbH ("MAN GHH")

challenges the district court's denial of pre-judgment interest. In a separate appeal, MAN GHH challenges the district court's imposition of sanctions under [Federal Rule of Civil Procedure 11](#). We affirm the district court's denial of the motion to vacate the award. We vacate the district court's denial of pre-judgment interest, however, and remand for reconsideration of that issue. We also reverse the district court's imposition of [Rule 11](#) sanctions.

<sup>1</sup> The only interest of American Home Assurance in this appeal is that it is among the parties against whom costs were imposed by the arbitral panel. As stated *infra* part I.C, we affirm that costs award. We omit any further reference to American Home Assurance for clarity's sake.

### I.

This complex commercial litigation began over a decade ago, in 1985.<sup>2</sup> Nitram, Inc., a Florida nitric acid manufacturer, contracted with Barnard and Burk Group, Inc., a Texas corporation, for the provision and installation of a tail gas expander in Nitram's Tampa, Florida nitric acid manufacturing plant.<sup>3</sup> \*1438 Barnard and Burk Group then engaged Barnard and Burk Engineers and Constructors, Inc., a Louisiana corporation, to perform the design engineering work for the installation, and engaged ISI, a Louisiana corporation, to perform the construction work.<sup>4</sup> (We refer hereinafter to the Barnard and Burk Group, Barnard and Burk Engineers and Constructors, and ISI, collectively, as "Barnard and Burk"). Barnard and Burk Group in turn



contracted to purchase the tail gas expander from M.A.N. Maschinenfabrik Augsburg-Nürnberg AG, a German turbine manufacturer. MAN GHH, the Appellee/Cross-Appellant in this appeal, is a spin-off corporation of, and the successor-in-interest to, M.A.N. Maschinenfabrik Augsburg-Nürnberg AG.

<sup>2</sup> We recite only those facts and prior proceedings necessary to an understanding of the issues raised on appeal.

<sup>3</sup> A tail gas expander is essentially a turbine which generates electricity from waste gasses given off in the nitric acid manufacturing process.

<sup>4</sup> Barnard and Burk Engineers and Constructors, Inc., and ISI, Inc., are both wholly-owned subsidiaries of Barnard and Burk Group.

MAN GHH was responsible for designing, manufacturing, and delivering a functional tail gas expander and for providing technical guidance regarding its installation; Barnard and Burk was responsible for the piping required to put the expander into service.

The tail gas expander was installed in the Tampa plant in late 1984 and early 1985. On January 16, 1985, during start-up procedures, moving and stationary components of the expander came in contact with each other. This caused a "wreck" of the machine, deforming its rotor, scarring its stator casing and destroying seals. Parts of the expander were returned to Germany for repair and the piping was modified. On March 23, 1985, during a second attempt to start the turbine, the expander suffered a second wreck. See *Nitram, Inc. v. Industrial Risk Insurers et al.*, 848 F. Supp. 162, 164 (M.D. Fla. 1994). The machine was rebuilt again and after further piping modifications, it ran successfully; the two wrecks, however, had resulted in months of down time and millions of dollars in damages.

Nitram had purchased business risk insurance from Industrial Risk Insurers ("IRI"), a Hartford, Connecticut, consortium of insurance companies that provides business risk insurance to certain large manufacturing, processing, and industrial concerns.<sup>5</sup> IRI refused to pay Nitram for the losses caused by the first wreck under Nitram's business risk policy with IRI, arguing that the wrecks were caused by Barnard and Burk's poor design and defective piping, and that the losses due to the wrecks therefore were not covered by the policy. IRI acknowledged that the policy did cover some of the losses due to the March wreck and made payment for those losses under the policy. In October of 1985, Nitram sued both IRI and Barnard and Burk in Florida state court, arguing *inter alia* that one of them had to pay for the remaining losses: if Barnard and Burk was at fault for the wrecks, Nitram argued, then Barnard and Burk was liable; if Barnard and Burk was not at fault, then the loss due the wrecks was covered by Nitram's policy with IRI. IRI, as Nitram's subrogee, cross-claimed against Barnard and Burk for the amount of the partial payment IRI had made to Nitram under its policy. Defendants IRI and Barnard and Burk then removed the case to the district court on grounds of diversity, and Barnard and Burk counterclaimed against Nitram, alleging various breaches of contract by Nitram.

<sup>5</sup> Several other companies were parties to the litigation in the district court in various capacities, but were not parties to the arbitral proceeding that gives rise to this appeal, and are consequently not parties to this appeal. We omit reference to them for clarity's sake.

Barnard and Burk proceeded to file a third-party claim against MAN GHH, asserting that MAN GHH's faulty expander, and not Barnard and Burk's design or piping, caused the two wrecks, and that MAN GHH was therefore required to indemnify Barnard and Burk for various costs and for lost business. Nitram then settled with IRI, and

its claims against IRI were dismissed. As a result, IRI was subrogated to Nitram's claims against Barnard and Burk.

In April of 1987, MAN GHH moved to compel arbitration of Barnard and Burk's third-party claim against it, pursuant to an arbitration provision in its contract with Barnard and Burk for the design, manufacture, and purchase of the expander. That <sup>1439</sup>provision, <sup>\*1439</sup> as amended, provided for binding arbitration in Tampa under the rules of the American Arbitration Association and under Florida law. The district court ordered arbitration pursuant to this provision in July of 1987.

In December of 1987, Nitram amended its complaint to state claims directly against MAN GHH. Nitram brought tort and breach-of-warranty claims alleging that the expander was defectively designed and manufactured by MAN GHH, and demanding indemnification in case Nitram was held liable to Barnard and Burk. IRI, as Nitram's subrogee, added a cross-claim against MAN GHH for good measure. In August of 1988, MAN GHH moved for, and the district court ordered, arbitration of these claims as well.

Barnard and Burk then settled with Nitram, and with IRI, leaving the arbitrators to determine:

1. Barnard and Burk's third-party complaint against MAN GHH;
2. Nitram's complaint against MAN GHH; and
3. IRI's cross-claim against MAN GHH as Nitram's subrogee.

All of these claims turned on whether the two wrecks were caused by MAN GHH's expander or by Barnard and Burk's design and piping. The arbitration panel heard testimony in January and March of 1993.

Also in March of 1993, while the arbitration proceedings were pending, Barnard and Burk moved for [Rule 11](#) sanctions against MAN GHH, arguing that MAN GHH had improperly attempted to relitigate the issue of the arbitral venue, which

had already been decided by the district court. The district court agreed and imposed sanctions upon MAN GHH's counsel in July of 1993. See Nitram, Inc. v. Industrial Risk Insurers, [149 F.R.D. 662](#) (M.D. Fla. 1993).

In May of 1993, the arbitrators returned an award in favor of MAN GHH, concluding that Barnard and Burk's design and piping, not MAN GHH's tail gas expander, had caused the two wrecks. The panel also awarded MAN GHH costs and conversion rate compensation.

Barnard and Burk then moved the district court to vacate the arbitration awards, on grounds that the principal arbitral award was "arbitrary and capricious" and that the arbitration panel improperly and prejudicially admitted certain testimony and evidence, and that the costs award and conversion rate compensation award should be vacated along with the principal award. The district court denied the motion and confirmed the panel's awards. See Nitram, [848 F. Supp. 162](#). Barnard and Burk now appeals the denial of that motion, asking four questions:

1. Whether the arbitrators' failure to conduct the arbitration in strict conformity with the agreement of the parties required the district court to vacate the principal arbitral award;
2. Whether the award should be vacated because of the panel's admission of 1) a technical report that was proffered at a relatively late date in the proceedings, and 2) the testimony of an expert who had been previously retained by IRI and who provided opinions against Barnard and Burk's interests;
3. Whether the district court abused its discretion in determining that the arbitration awards were not "arbitrary and capricious;" and

4. Whether the conversion rate and costs awards should be vacated along with the principal award.

On cross-appeal, MAN GHH challenges the district court's refusal to award to MAN GHH prejudgment interest from the date of the last arbitral award through the date of the district court's judgment confirming the arbitral award. MAN GHH also brings a separate appeal challenging the district court's imposition of [Rule 11](#) sanctions.

## I.

As a threshold matter, we must determine the source of our jurisdiction. We must inquire sua sponte into the source of our jurisdiction whenever it might be in question. See *Miscott Corp. v. Zaremba Walden Co.*, [848 F.2d 1190, 1192](#) (11th Cir. 1988). The district court proceeded in the belief that its jurisdiction was grounded in diversity, and that its treatment of the arbitral

<sup>1440\*1440</sup> proceedings was therefore controlled by Chapter 1 of the Federal Arbitration Act ("FAA"), [9 U.S.C. § 1-16](#) (1994), which covers domestic arbitral proceedings. We conclude that the district court was in error, and hold that the case is controlled by Chapter 2 of the FAA, [9 U.S.C. § 201-208](#), which covers international arbitral proceedings.

The instant case presents an issue of first impression in this court: Do the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and thus the provisions of Chapter 2 of the FAA, govern an arbitral award granted to a foreign corporation by an arbitral panel sitting in the United States and applying American federal or state law? We hold that they do.

The New York Convention was drafted in 1958 under the auspices of the United Nations. See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3. The United States acceded to the

treaty in 1970, and Chapter 2 of the FAA was passed that same year. The purpose of the New York Convention, and of the United States' accession to the convention, is to "encourage the recognition and enforcement of international arbitral awards," *Bergesen v. Joseph Muller Corp.*, [710 F.2d 928, 932](#) (2d Cir. 1983), to "relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation." *Ultracashmere House, Ltd. v. Meyer*, [664 F.2d 1176, 1179](#) (11th Cir. 1981). See also generally *Leonard V. Quigley*, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," 70 *Yale L.J.* 1049 (1961) (recounting the deliberations of the New York Convention and describing accession's benefits for the U.S.). The Convention, and American enforcement of it through the FAA, "provide businesses with a widely used system through which to obtain domestic enforcement of international commercial arbitration awards resolving contract and other transactional disputes, subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy." G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization," 44 *Duke L.J.* 829, 888 (1995).

The New York Convention is incorporated into federal law by the FAA, which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, [513 U.S. 265, 269-73, 115 S.Ct. 834, 837-39, 130 L.Ed.2d 753](#) (1995). Chapter 2 of the Act, [9 U.S.C. § 201-208](#), mandates the enforcement of the New York Convention in United States courts. See [9 U.S.C. § 201](#). Chapter 2 generally establishes a strong presumption in favor of arbitration of international commercial disputes, see *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, [473 U.S. 614](#),

638-40, 105 S.Ct. 3346, 3359-61, 87 L.Ed.2d 444 (1985), and creates original federal subject-matter jurisdiction over any action arising under the Convention. See 9 U.S.C. § 203; H.R. Rep. No. 91-1181, at 2 (1970), reprinted in 1970 U.S.C.C.A.N. 3601, 3602 ("Section 203 gives original jurisdiction over any action or proceeding falling under the Convention to the district courts of the United States regardless of the amount in controversy."). As an exercise of the Congress' treaty power and as federal law, "[t]he Convention must be enforced according to its terms over all prior inconsistent rules of law." *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l. Oil Co. (Pemex)*, 767 F.2d 1140, 1145 (5th Cir. 1985).

The Convention by its terms applies to only two sorts of arbitral awards: 1) awards made in a country other than that in which enforcement of the award is sought, and 2) awards "not considered as domestic awards in" the country where enforcement of the award is sought. It is apparent that the arbitral award at issue in the instant case does not fall within the first category. We hold, however, that it does fall within the second category. Section 202 of the FAA provides that all arbitral awards arising out of commercial relationships fall under the Convention, except for those awards that "aris[e] out of . . . a  
1441 [commercial] relationship \*1441 which is entirely between citizens of the United States . . . ." 9 U.S.C. § 202.<sup>6</sup> We read this provision to define all arbitral awards not "entirely between citizens of the United States" as "non-domestic" for purposes of Article I of the Convention. We join the First, Second, Seventh, and Ninth Circuits in holding that arbitration agreements and awards "not considered as domestic" in the United States are those agreements and awards which are subject to the Convention not because [they were] made abroad, but because [they were] made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing

jurisdiction. We prefer this broad construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.

<sup>6</sup> The entire section reads:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202.

*Bergesen*, 710 F.2d at 932 (emphasis added) (internal citation omitted); see also *Yusuf Ahmed Alghanim Sons, W.L.L. v. Toys "R" US, Inc.*, 126 F.3d 15, 18-19 (2d Cir. 1997); *Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995) (stating that the New York Convention and § 202 "mandate that any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls within the Convention"); *Ministry of*

Defense of the Islamic Republic of Iran v. Gould Inc., 887 F.2d 1357, 1362 (9th Cir. 1989) (holding that New York Convention applies when arbitral "award (1) . . . arise[s] out of a legal relationship (2) which is commercial in nature and (3) which is not entirely domestic in scope", and that the award at issue was "obviously not domestic in nature because Iran [was] one of the parties to the agreement"); Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982) (stating that Chapter 2 mandates enforcement of a written commercial arbitral agreement when one of the parties to the agreement is not an American citizen). Specifically for purposes of the case sub judice, we hold that an arbitral award made in the United States, under American law, falls within the purview of the New York Convention — and is thus governed by Chapter 2 of the FAA — when one of the parties to the arbitration is domiciled or has its principal place of business outside of the United States.

MAN GHH is a German corporation. The arbitral award granted to it by the Tampa panel is therefore non-domestic within the meaning of § 202 of the FAA and article 1 of the New York Convention.<sup>7</sup> We therefore hold federal subject-matter jurisdiction over this appeal.

<sup>7</sup> The appellants argue that the award at issue does not fall under the Convention because MAN GHH's American subsidiary was also a party to the arbitration. The presence of the subsidiary does not, however, take the award out of the purview of the Convention, so long as the foreign parent was a party to the proceeding.

## II.

Having established the source of our jurisdiction, we move to address the appeal on the merits. The Tampa panel's arbitral award must be confirmed unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York

<sup>8</sup> \*1442 See Imperial Ethiopian Gov't

v. Baruch-Foster Corp., 535 F.2d 334, 335-36 (5th Cir. 1976);<sup>9</sup> see also National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 813 (D. Del. 1990). The appellants bear the burden of proving that any of these seven defenses is applicable. See Imperial Ethiopian Gov't, 535 F.2d at 336.

<sup>8</sup> Article V reads:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, opened for signature June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 3, reprinted in 9 U.S.C.A. § 201 note (West supp. 1997). The New York Convention's enumeration of defenses against enforcement is exclusive. See part II.C, *infra*.

<sup>9</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Only two of the seven enumerated defenses might apply to the instant case. The first is that found in Article V(1)(d), which provides that a court may refuse to confirm an international arbitral award if "the arbitral procedure was not in accordance with the agreement of the parties." The second is that found in Article V(2)(b), which provides that a court may refuse to enforce an arbitral award if "the recognition or enforcement of the award would be contrary to the public policy of" the country where enforcement is sought.

The appellants argue that the procedures of the Tampa panel were not in accordance with the parties' arbitration agreement,<sup>10</sup> and that the award therefore should not have been confirmed. They argue that the panel should not have considered the contents of a technical report on the wrecks provided by the German technical institute Rheinisch-Westfälischer Technischer Überwachung Verein (the "TÜV report"), because that report was provided to the appellants at a relatively late date, very shortly before the proceedings began. In considering that report, the appellants argue, the arbitration panel violated the rules of the American Arbitration Association, which were the agreed-upon rules of procedure for

the arbitration. The appellants also assert that the panel should not have heard the testimony of 1443 Donald Hansen, a piping expert who had \*1443 previously been retained by Respondent IRI to inspect the tail gas expander onsite at the Tampa plant after the first wreck and who was directly involved in the redesign of the expander before the second wreck. Allowing this testimony, the appellants argue, violated "the well-established public policy protecting . . . fundamental principles of fairness and professional conduct." The appellants also assert a defense that is not enumerated by the New York Convention: that the arbitral award should be vacated on the ground that it is "arbitrary and capricious."

<sup>10</sup> The appellants make this assertion in support of their argument that the arbitration proceedings did not conform to the requirements of Chapter 1 the FAA. The nonconformity of arbitral procedures to the agreement of the parties "is a defense under both the [FAA] and the New York Convention. The wording is slightly different but there is no reason to think the meaning different." *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir. 1997) (internal citation omitted). We therefore treat the appellants' argument that the nonconformity of the arbitral procedures to the agreement of the parties violated Chapter 1 of the FAA as an argument that that nonconformity was a violation of the New York Convention and Chapter 2. Likewise, we treat the appellants' argument that the admission of Hansen's testimony was a violation of public policy warranting vacatur of the award under Chapter 1 as an argument for vacatur under Chapter 2.

We review de novo the district court's determinations that the procedures observed by the arbitrators were in accordance with the agreement of the parties, that the admission of Hansen's testimony was not violative of public policy, and that the award was not "arbitrary and capricious." See *First Options of Chicago, Inc. v. Kaplan*, 514

U.S. 938, 947-49, 115 S.Ct. 1920, 1926, 131 L.Ed.2d 985 (1995) (requiring de novo review of questions of law involved in a district court's refusal to vacate an arbitral award). We hold that the admission of the TÜV report was in accordance with the AAA rules and therefore with the agreement of the parties. We also hold that the admission of Hansen's testimony was not a violation of public policy of the sort required to sustain a defense under the New York Convention. We further hold that no defense against enforcement of an international arbitral award under Chapter 2 of the FAA is available on the ground that the award is "arbitrary and capricious," or on any other grounds not specified by the Convention.

## A.

Rule 3 of the AAA's Supplementary Procedures for International Commercial Arbitration provides that

[a]t the request of any party, the AAA will make arrangements for the exchange of documentary evidence or lists of witnesses between the parties. In international cases, it is important that parties be able to anticipate what will transpire at the hearing. By cooperating in an exchange of relevant information, the parties can avoid unnecessary delays.

The TÜV report was provided to the appellants on Jan. 8, 1993 — the Friday before the Monday when the arbitration proceedings began — and was not admitted into evidence by the arbitrators until March 26, 1993. The appellants objected to its admission at that time and were allowed to cross-examine Hansen about the institute's report and about his conclusions based on it. The appellants also rebutted Hansen's testimony with testimony from experts of their own.

MAN GHH did produce the TÜV report very shortly before the commencement of the arbitration proceedings. But arbitration proceedings "need not follow all the 'niceties' of

the federal courts; [they] need provide only a fundamentally fair hearing."<sup>11</sup> *Grovner v. Georgia-Pacific*, 625 F.2d 1289, 1290 (5th Cir. Unit B 1980).<sup>12</sup> "An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal \*1444 rules of procedure or evidence." *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992), overruled on other grounds, *Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985. Arbitration rules, such as those of the AAA, are intentionally written loosely, in order to allow arbitrators to resolve disputes without the many procedural requirements of litigation.

<sup>11</sup> The appellants rely on this language from *Grovner* as an independent ground for their argument that the arbitral award should not be enforced: they argue that, because the TÜV report was admitted into the arbitral proceedings on such short notice, and because Hansen's testimony was admitted, the proceedings were fundamentally unfair, and the awards arising from that proceeding should be vacated. As a threshold matter, we note that this argument assumes that a defense against enforcement of an international arbitral award is available on the ground that the arbitral proceeding is "fundamentally unfair." This is an open question. See *infra* part I.C (discussing exclusivity of the New York Convention's enumeration of defenses against enforcement). We need not decide this question, however, because it is apparent that the admission of Hansen's testimony and the relatively late provision of the TÜV report did not render the proceedings fundamentally unfair. The appellants had ample opportunity to rebut the report and Hansen's testimony, and in fact did so with expert witnesses of their own. Any undue prejudice caused by the admission of Hansen's testimony and of the TÜV report was therefore cured

sufficiently to ensure that the proceedings were not rendered fundamentally unfair by the admission of these materials.

<sup>12</sup> In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982), this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

The AAA's Rule 3 is a prime example. It does not require parties to provide all documents by any certain deadline; rather, it notes the importance of predictability in the proceedings and of the efficient exchange of relevant information, and provides only that "the AAA will make arrangements for the exchange of documentary evidence." There is thus no notice requirement in Rule 3 that MAN GHH could have violated; instead, arbitrators are left wide discretion to require the exchange of evidence, and to admit or exclude evidence, how and when they see fit. This is the rule to which the parties agreed, and we therefore cannot say that the relatively late provision of the TÜV report, and its admission by the panel, constituted a failure of the panel to adhere to the parties' agreement.<sup>13</sup>

<sup>13</sup> Respondents also argue that the admission of the TÜV report at a relatively late date violated the panel's own prehearing order. That order provided that [e]ach side shall submit its expert witnesses' reports, witness depositions, or excerpts, to be relied upon, and expert witness summaries/affidavits, which shall include the experts' backgrounds and history, in quadruplicate, to the Association, for transmittal to the Arbitrators, by June 12, 1992.

The admission of such documents after June 12, 1992, in contravention of the panel's order, might or might not violate the agreement of the parties. We need not reach that question, however, because the TÜV report was an exhibit, not an "expert witness' report, witness deposition . . . excerpt . . . expert witness summar[y,] [or] affidavit." Its production was therefore not



required by the prehearing order, and that order was not violated by its late production.

## B.

The appellants also argue that the award should be vacated on the ground that the arbitration panel improperly heard testimony from Hansen, a piping expert who was retained by appellant IRI to inspect the tail gas expander casing onsite at the Tampa plant after the first wreck and who was directly involved in the redesign of the expander casing before the second wreck. The arbitration panel called Hansen to testify *sua sponte*, after the appellants objected to MAN GHH's attempt to call him.

The appellants assert that "[f]ederal and Florida cases uniformly prohibit 'side-switching,'" that is, testimony against a party's interest by an expert witness formerly retained by that party.<sup>14</sup> Such testimony, they argue, violates "the well-established public policy protecting . . . fundamental principles of fairness and professional conduct." The appellants cite no rule of procedure or of evidence, and not a single case, establishing the purported "rule against side-switching." Rather, the appellants cite cases prohibiting attorneys from, or disqualifying attorneys for, contacting counterparties' experts in violation of: 1) [Fed.R.Civ.P. 26](#),<sup>15</sup> see *Durflinger v. Artiles*, 727 F.2d 888 (10th Cir. 1984); 2) attorney-client privilege, see *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992); or 3) the confidentiality of work product or litigation strategy, see *MMR/Wallace Power Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712 (D. Conn. 1991); *Geralnes B.V. v. City of Greenwood Village*, 609 F. Supp. 191 (D. Colo. 1985). The effect of these rules, taken together, is that parties will rarely be able to avail themselves of the services of the other side's expert witnesses — but that is merely the effect of these rules and not a

rule unto itself. In the absence of any precedent, we decline to recognize any blanket rule or policy against "side-switching."

<sup>14</sup> As an initial matter, we doubt whether Hansen was in fact an "expert witness" for IRI, and not merely a professional consultant who in this case happened to be a fact witness. Hansen never had an exclusivity or confidentiality agreement with IRI and was never asked to serve as an expert witness in the litigation in district court. These facts alone suffice to distinguish the instant case from the Middle District of Florida's holding in *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992), upon which the appellants rely. Most important, however, Hansen directly observed the redesign and reconstruction of the expander after the first wreck, and consulted with the parties during that process; in this regard his status in the arbitration proceeding was much the same as that of a consulting physician in a medical malpractice case. Nevertheless, we assume *arguendo* that Hansen's consulting work for IRI qualifies him as IRI's "expert witness" for purposes of this discussion.

<sup>15</sup> [Rule 26\(b\)\(4\)\(B\)](#) provides:

A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in [Rule 35\(b\)](#) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Moreover, none of the concerns in the cases cited by respondents are implicated by the arbitration panel's admission of Hansen's testimony. Rule 26 does not independently apply to arbitration proceedings, and attorney-client privilege is not a concern because there is no allegation that Hansen divulged any information properly protected by the privilege. Concerns about the confidentiality of work product and litigation strategy are not implicated because Hansen was called by the panel, not by MAN GHH, and because his testimony before the panel neither relied upon any confidential work product of IRI's attorneys nor included any information about the respondents' litigation strategy.

Finally, even if such concerns were implicated by the admission of Hansen's testimony, we could not consider vacatur of the district court's order confirming the award unless that admission fell within one of the New York Convention's seven grounds for refusal to enforce an award. See *M C Corp. v. Erwin Behr GmbH Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996) ("[T]he Convention lists the exclusive grounds justifying refusal to recognize an [international] arbitral award."). Even if the purported "rule against side-switching" did exist, for instance, it would not control arbitration proceedings unless the parties agreed to be controlled by it. See *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991) (noting that power and authority of arbitrator at arbitration proceeding is dependent upon the provisions of the arbitration agreement under which he was appointed). Nor have the appellants established that the admission of Hansen's testimony was a violation of public policy of the sort required to sustain a defense under article V(b)(2) of the New York Convention. We have held that domestic arbitral awards are unenforceable on grounds that they are violative of public policy only when the award violates some "explicit public policy" that is "well-defined and dominant . . . [and is] ascertained `by reference to the laws and legal precedents and not

from general consideration of supposed public interests.'" *Drummond Coal Co. v. United Mine Workers*, District 20, 748 F.2d 1495, 1499 (11th Cir. 1984) (quoting *W.R. Grace Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum Plastic Workers*, 461 U.S. 757, 766, 103 S.Ct. 217 2183, 2183, 76 L.Ed.2d 298 (1983)). We believe that rule applies with equal force in the context of international arbitral awards. See *Parsons Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974) (holding that "the Convention's public policy defense should be construed narrowly"). The appellants cite no laws or precedents in support of their invocation of "the well-established public policy protecting . . . fundamental principles of fairness and professional conduct." We therefore hold that the appellants have not established a violation of public policy sufficiently to sustain a defense under article V(b)(2) of the New York Convention.

### C.

Finally, the appellants also argue that the arbitral award should be vacated on the ground that it is "arbitrary and capricious." See, e.g., *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), cert. denied, 507 U.S. 915, 113 S.Ct. 1269, 122 L.Ed.2d 665 (1993). We reject this argument as well. Under the law of this circuit, domestic arbitral awards may be vacated for six different reasons; four are enumerated by the FAA and two are non-statutory defenses against enforcement, derived by the courts from the statutory list. See *Raiford v. <sup>1446</sup>Merrill Lynch, <sup>\*1446</sup>Pierce, Fenner Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990). The two non-statutory defenses against enforcement of a domestic award are 1) that the award is "arbitrary and capricious"<sup>16</sup> and 2) that enforcement of the award would be contrary to public policy. See *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1458 (11th Cir. 1997).

16 A domestic arbitral award may be vacated as "arbitrary and capricious" if it "exhibits a wholesale departure from the law [or] if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993).

As discussed supra, the seven defenses against enforcement of an international arbitral award that are enumerated in the New York Convention include a public policy defense. The Convention does not, however, include a defense against enforcement of an award on the ground that the award is "arbitrary and capricious." The omission is decisive. Section 207 of Chapter 2 of the FAA explicitly requires that a federal court "shall confirm [an international arbitral] award unless it finds one of the grounds for refusal or deferral of . . . enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207 (1997 supp.). The Convention itself provides that "enforcement of [an] award may be refused, at the request of the party against whom it is invoked, only if that party furnishes . . . proof that" one of the enumerated defenses is applicable. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 2520, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (reprinted in 9 U.S.C.A. § 201 note (West supp. 1997)) (emphasis added). In short, the Convention's enumeration of defenses is exclusive. See *Yusuf Ahmed Alghanim Sons*, 126 F.3d at 20 (holding that "the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award"); *M C Corp. v. Erwin Behr*, 87 F.3d 844, 851 (6th Cir. 1996) (same). We therefore hold that no defense against enforcement of an international arbitral award under Chapter 2 of the FAA is available on the ground that the award is "arbitrary and capricious," or on any other grounds not specified by the Convention. The appellants' attempt to invoke such a defense thus fails.

We therefore decline to vacate the arbitral award granted to MAN GHH by the Tampa panel. Because we affirm the award, we also decline to vacate the derivative awards of costs and conversion rate compensation.

## II.

On cross-appeal, MAN GHH complains of the district court's refusal to award to MAN GHH post-arbitral-award, prejudgment interest. MAN GHH moved the court to enter judgment on the arbitral award and to grant prejudgment interest from the date the last arbitral award was made through the date of the Court's entry of the amended final judgment. The court entered judgment on the award but declined to award such interest. The court held that its jurisdiction was grounded in diversity, and that state law therefore would control the award of prejudgment interest. The court then concluded that Florida law does not authorize the granting of post-arbitral-award, prejudgment interest. Because we hold that the district court held federal question jurisdiction over the case pursuant to Chapter 2 of the FAA, see part I, supra, and that federal law allows awards of post-arbitral-award, prejudgment interest, we remand for a determination whether, in the court's discretion, the circumstances of the instant case warrant such an award.

Unlike most other countries, the United States has no federal statute governing awards of prejudgment interest on international arbitral awards. See John Y. Gotanda, "Awarding Interest in International Arbitration," 90 Am. J. Int'l L. 40, 45 (1996). Instead, awards of prejudgment interest are equitable remedies, to be awarded or not awarded in the district court's sound discretion. See *Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1536 (11th Cir. 1987); *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984). Under the law of this circuit, "[p]re-judgment interest is not a <sup>1447</sup>penalty, but <sup>\*1447</sup> compensation to the plaintiff for the use of funds that were rightfully his," see *Insurance Co. of N. Am. v. M/V Ocean Lynx*, 901

F.2d 934, 942 (11th Cir. 1990), and absent any reason to the contrary, it should normally be awarded when damages have been liquidated by an international arbitral award. See *Waterside Ocean Navigation*, 737 F.2d at 153-54 ("Absent persuasive reasons to the contrary, we do not see why pre-judgment interest should not be available in actions brought under the [New York] Convention."); see also *Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co.*, 866 F.2d 11, 14 (1st Cir. 1989) (holding that, under either federal or Rhode Island law, post-award, prejudgment interest should be awarded on domestic arbitral award); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986) (holding that confirmed domestic arbitral award bears interest from date of award, not from date of judgment confirming award).<sup>17</sup>

<sup>17</sup> We note that international arbitrators often award post-arbitral-award interest. See, e.g., *Bergesen v. Joseph Muller Corp.*, 548 F. Supp. 650, 651 (S.D. N.Y. 1982); *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1069 (N.D. Ga. 1980).

In the absence of a controlling statute, federal courts' choice of a rate at which to determine the amount of prejudgment interest to be awarded is also a matter for their discretion. That choice is usually guided by principles of reasonableness and fairness, by relevant state law, and by the relevant fifty-two week United States Treasury bond rate, which is the rate that federal courts must use in awarding post-judgment interest. See 28 U.S.C. § 1961; *Gotanda*, supra, at 45 and n. 63 (citing cases).

Because the district court below held federal subject-matter jurisdiction under 9 U.S.C. § 203, the decision whether to grant prejudgment interest was a matter for the court's discretion and was not controlled by state law. The district court declined to award post-arbitral-award, prejudgment interest on the grounds that it held only diversity jurisdiction, that state law therefore controlled,

and that Florida law prohibited such an award under the circumstances. Because we hold that federal law controls both the entitlement to and the rate of post-arbitral-award, prejudgment interest, we find that the district court failed to exercise its discretion.<sup>18</sup> We therefore remand for a determination whether, under the circumstances, MAN GHH is entitled to post-arbitral-award, prejudgment interest.

<sup>18</sup> We also note that, while the district court may choose to be guided by Florida law in determining whether to grant post-award, prejudgment interest, it appears to have misread *Pharmacy Management Servs., Inc. v. Perchon*, 622 So.2d 75 (Fla. 2d Dist.Ct.App. 1993). That case held that a court may not grant pre-award interest on a final arbitral award that states that it is in full settlement of all claims. *Perchon* did not hold that a court may not grant post-award, pre-judgment interest on such an award.

### III.

In a separate appeal, MAN GHH's counsel challenge the district court's imposition of Rule 11 1448sanctions.<sup>19</sup> The decision \*1448 whether to impose Rule 11 sanctions is left to the district court's sound discretion. See *Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1254 (11th Cir. 1996). An abuse of discretion occurs when the court makes a clear error of law or fact in determining whether to impose sanctions. See *Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990).

<sup>19</sup> Rule 11 provides in relevant part:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances —

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

[Fed.R.Civ.P. 11.](#)

Sanctions may be imposed under [Rule 11](#) for filings that are presented to the court "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." [Fed.R.Civ.P. 11\(b\)\(1\)](#); see also [Pelletier v. Zwiefel](#), [921 F.2d 1465](#), [1514](#) (11th Cir. 1991). "Improper purpose may be shown by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings . . . . [Rule 11](#) is intended to reduce frivolous claims and to deter costly meritless maneuvers, thereby eliminating delay, and reducing the cost of litigation." [Pierce v. Commercial Warehouse](#), [142 F.R.D. 687](#), [690-91](#) (M.D. Fla. 1992). In order for sanctions to be appropriate, however, the filing for which sanctions are imposed must be frivolous, that is, it must enjoy no factual and legal support in the record. See [Davis v. Carl](#), [906 F.2d 533](#), [538](#) (11th Cir. 1990) ("[Rule 11](#) is intended to deter claims with no factual or legal basis at all; creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment." (emphasis in original)). In order for sanctions to be imposed for excessive relitigation of an issue already decided by the court, the disputed issue must have been clearly decided by the court's earlier orders, and counsel's relitigation of the issue must clearly offer no meritorious new arguments. See, e.g., [Mariani v. Doctors Assoc's, Inc.](#), [983 F.2d 5](#), [8](#) (1st Cir. 1993) (imposing sanctions for "virtually verbatim" reargumentation

of an issue — dismissal of the action — clearly already decided by the court) (emphasis in original).

The facts underlying the instant sanctions order are as follows. MAN GHH provided the expander and various services to Barnard and Burk pursuant to one contract for the design, manufacture, and sale of the expander ("the design contract") and one service contract; MAN GHH also provided spare parts and services to Nitram under two separate service contracts.<sup>20</sup> The transactions between MAN GHH, Nitram, and Barnard and Burk that were the subject of the arbitral proceeding thus arose out of four separate contracts. In the district court, MAN GHH first moved for arbitration of the third-party claims asserted against it by Barnard and Burk, and later, after Nitram and IRI had filed tort and breach-of-warranty claims against MAN GHH, moved for arbitration of those claims as well.<sup>21</sup> At the time that MAN GHH moved for arbitration of Nitram's and IRI's claims against it, only one contract — the design contract — had been entered into the record below. Nitram and IRI were not parties to this contract and argued that they therefore ought not to be ordered to submit their claims to the arbitrators. MAN GHH contended — and the district court concluded — that all of the claims involved in the case at that time were so closely related that they all should be submitted to the Tampa panel. The district court referred to the arbitration clause in the design contract and ordered arbitration, in Tampa, of Nitram's and IRI's claims against MAN GHH, along with those

1449 of Barnard and \*1449 Burk.<sup>22</sup>

<sup>20</sup> Specifically, MAN GHH 1) provided the expander to Barnard and Burk Group under the design contract; 2) provided engineering services to Barnard and Burk Engineers and Constructors under a second contract; 3) provided engineering services to Nitram under a third contract; and 3) provided a spare rotor to Nitram under a

fourth contract. We refer to these latter three contracts as "the service contracts" for brevity's sake.

<sup>21</sup> As the district court noted, Nitram's and IRI's claims against MAN GHH were arbitrable even though they were cast as tort and breach-of-warranty claims, rather than contract claims. See *Genesco, Inc. v. T. Kakiuchi Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987) (holding that, in determining whether particular claim falls within scope of arbitration agreement, court focuses on factual allegations in complaint rather than legal causes of action asserted, and if allegations underlying claims "touch matters" covered by parties' arbitration agreement, then claims must be arbitrated, whatever legal labels are attached to them).

<sup>22</sup> In 1990, while the arbitral proceedings were still pending, the district judge who had presided over the case, the Hon. George C. Carr, passed away. All subsequent district court proceedings referred to in this opinion were presided over by the Hon. Elizabeth A. Kovachevich.

Before the Tampa arbitration began, MAN GHH returned to the district court and moved for 1) a preliminary injunction limiting the scope of the Tampa arbitration and, in the alternative, 2) an order compelling arbitration, in Europe, of some claims that Nitram and Barnard and Burk intended to raise in the Tampa arbitral proceeding.<sup>23</sup> MAN GHH argued that Barnard and Burk and Nitram were raising new contract claims before the Tampa panel, claims arising from the three service contracts not referred to by the district court in its earlier orders compelling arbitration. These new claims, MAN GHH argued, were due to be arbitrated in Paris and Zurich pursuant to arbitration clauses in the service contracts. Barnard and Burk and Nitram contended that they had made clear to the court that claims under those contracts might well arise during the arbitral proceedings, and that the court, in anticipation,

included those potential claims in its orders compelling arbitration in Tampa. The district court agreed, and held that its earlier orders compelling arbitration had considered the venue of claims arising under the three service contracts and had mandated that arbitration of those claims proceed in Tampa.<sup>24</sup> The court therefore denied the preliminary injunction.

<sup>23</sup> This motion was legally proper; the district court had the power to enjoin the arbitration of the newly-asserted contract claims. See *Kelly v. Merrill Lynch, Pierce, Fenner Smith, Inc.*, 985 F.2d 1067, 1068-69 (11th Cir. 1993) (holding that federal courts have power to enjoin arbitration of state common law claims in cases in federal court); see also *Societe Generale de Surveillance, S.A. v. Raytheon European Management and Sys. Co.*, 643 F.2d 863, 868 (1st Cir. 1981) ("To allow a federal court to enjoin an arbitration proceeding which is not called for by the contract interferes with neither the letter nor the spirit of this law. Rather, to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present.") (emphasis in original).

<sup>24</sup> The district court's order denying the preliminary injunction merely stated that a preliminary injunction would be "inappropriate" under the facts of the case; it also incorporated by reference, however, the opposition to the motion for preliminary injunction filed by Nitram, IRI, and Barnard and Burk. That opposition argued that the earlier order compelling arbitration of Nitram's and IRI's claims against MAN GHH included the claims arising under the three service contracts. In its later order imposing sanctions, the district court specifically verified its intention to incorporate that particular argument into the court's denial of the motion for preliminary injunction. We note in this context that the judge who reviewed

the earlier orders compelling arbitration and, we believe, misread them, was not the same judge who entered those orders. See *supra* note 22.

Barnard and Burk then moved for sanctions pursuant to [Rule 11](#), arguing that MAN GHH's motion for preliminary injunction constituted an improper attempt to relitigate an issue — the venue of the arbitral proceeding — already decided by the court. The court agreed, and awarded sanctions. See *Nitram, Inc. v. Industrial Risk Insurers*, 149 F.R.D. 662 (M.D. Fla. 1993). Enforcement of the sanctions order was stayed pending this appeal.

MAN GHH's counsel now argue that the district court clearly erred in holding that there was no support in the record for MAN GHH's assertion that the claims asserted by Nitram and Barnard and Burk under the three service contracts were not covered by the district court's earlier orders compelling arbitration, and that those claims were due to be arbitrated in Europe. Thus, counsel argue, the district court abused its discretion, and the sanctions order should be vacated. We agree.

The initial suit brought by Nitram against IRI and Barnard and Burk was a suit in contract, based on the contract between Nitram and Barnard and Burk for the installation of the expander. Barnard and Burk's third-party complaint against MAN GHH sought indemnification on the basis of the design contract between MAN GHH and Barnard and Burk. Furthermore, the court's order compelling arbitration of Barnard and Burk's third-party claims against MAN GHH was wholly pursuant to the design contract; the order compelling arbitration of those <sup>1450</sup> claims mentioned and cited only the arbitration clause contained in the design contract. Indeed, the three service contracts had never even been entered into the record at the time that the court entered its orders compelling arbitration. When the court later ordered arbitration of Nitram's and IRI's tort and breach-of-warranty claims against MAN GHH, it did so on the ground that those claims were

intertwined with and grounded in the design contract between MAN GHH and Barnard and Burk, and on the ground that Nitram and IRI were third-party beneficiaries of that contract. In short, the district court's orders compelling arbitration committed to arbitration only the arbitrable claims that were before the court at the time: Barnard and Burk's third-party claims against MAN GHH and the tort and breach-of-warranty claims brought by Nitram and IRI against MAN GHH.

The court could not have done more. There had been no contract claims brought on the three service contracts; there were thus no arbitration clauses before the court mandating arbitration of any such claims, and the court therefore had no jurisdiction to compel arbitration of those claims. Chapter 2 of the FAA, like Chapter 1, "does not require parties to arbitrate when they have not agreed to do so, . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989) (citations omitted). "It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* Like other contracts, an agreement to arbitrate disputes may not be enforced by the courts until the agreement has been brought before the court by a proper pleading. See *Prima Paint Corp. v. Flood Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 1806 n. 12, 18 L.Ed.2d 1270 (1967) (stating that the FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so"). In the instant case, the parties had placed contract claims arising from the three service contracts under the purview of the arbitration clauses in those contracts<sup>25</sup> — not under the arbitration clause in the design contract — and no contract claims arising from the service

contracts had been pled to the district court. The court therefore could not have ordered arbitration of those claims.<sup>26</sup>

<sup>25</sup> Specifically, claims arising under MAN GHH's contract with Barnard and Burk Engineers and Constructors (see *supra* note 20) were due to be arbitrated in Zurich, and claims arising under MAN GHH's spare rotor contract with Nitram were due to be arbitrated in Paris. MAN GHH's contract with Nitram for engineering services contained no arbitration clause, and the district court therefore very likely could not properly have compelled arbitration of claims arising thereunder at all. Consequently, it certainly may not be said that claims arising under these contracts were clearly due to be arbitrated in Tampa.

<sup>26</sup> As noted *supra*, we conclude that the court's orders compelling arbitration did not purport to commit to arbitration any contract claims arising out of the three service contracts.

Therefore, when the arbitrators agreed to hear claims arising out of the three collateral service contracts, they did so outside of their charge by the district court.<sup>27</sup> Consequently, MAN GHH's counsel's motion for a preliminary injunction limiting the scope of the Tampa arbitration and for an order moving arbitration of these claims to Europe clearly enjoyed support in the record. The district court's determination that the motion did not enjoy any such support was therefore clearly erroneous, and its imposition of sanctions was an abuse of discretion. Accordingly, we reverse the order imposing [Rule 11](#) sanctions upon MAN GHH's counsel.

<sup>27</sup> It also seems that they did so outside of the agreement of the parties to the arbitration, since MAN GHH did not agree to have those claims arbitrated in Tampa. As noted *supra*, however, MAN GHH prevailed on those claims at arbitration and therefore did not make this argument to the district court,



and does not make this argument on appeal. The appellants do not attempt to make this argument either. We therefore deem the argument waived.

## CONCLUSION

For the foregoing reasons, we AFFIRM the <sup>1451</sup>district court's denial of the motion to <sup>\*1451</sup> vacate the arbitral award, but VACATE the district court's

denial of prejudgment interest and REMAND the case for resolution of that issue. We also REVERSE the district court's imposition of [Rule 11](#) sanctions against MAN GHH's counsel. SO ORDERED.

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