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DOMAIN NAME SYSTEM PRIVATIZATION: IS ICANN OUT OF CONTROL?

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

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FIRST SESSION

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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: Represntatives 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." It 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 responsibility 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.

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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 in 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 Chandrasedaran

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.

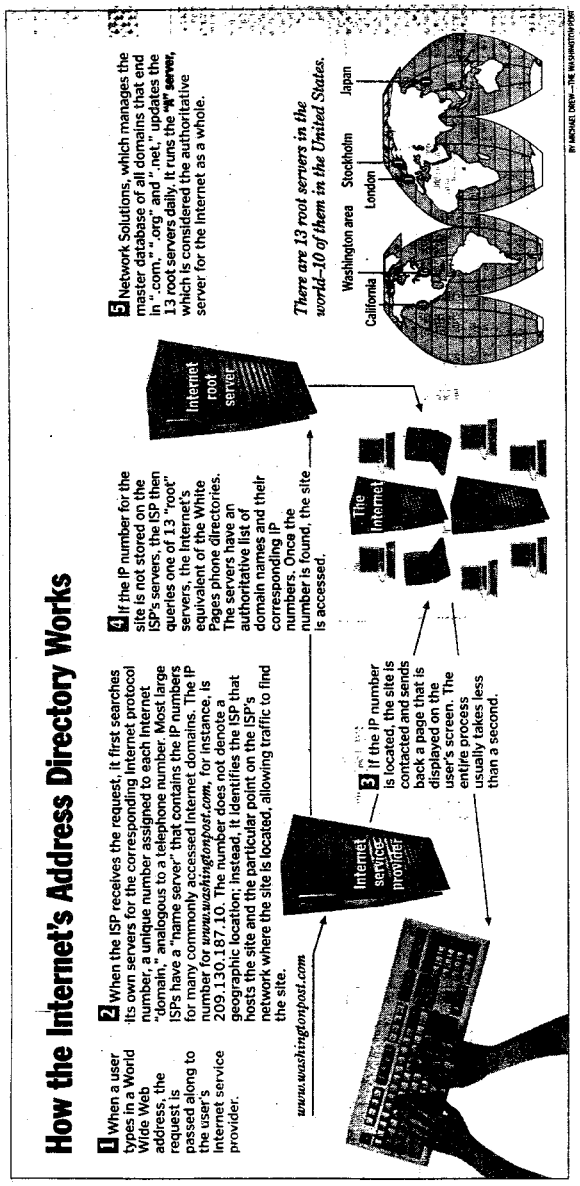
Dyson and Sims blame Network Solutions for much of the opposition to ICANN, which Sims believes, is being used as a whipping boy for Network Solutions' disagreements with the government. "We're an easier target than the government," said Sims, who contends that Network Solutions "has put a lot of work 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."



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, a 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 cliche 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

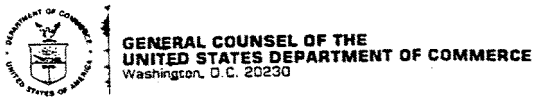
- The provisions of the ICANN Accreditation Agreement, together with the recommendations of the World Intellectual Property Organization (WIPO) when fully implemented, reflect the recommendations of the White Paper related to reducing friction between trademark owners and domain name holders. We commend 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 lead 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.[1] Registrations in .com, .net and .org account for nearly 75% of all third level domain name registrations.[2] 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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[1] 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.

[2] 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 privatize the management of 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").[3] 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.[4] 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

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[3] Tab 1.

[4] The RFC, the Green Paper, and public comments on these documents are posted online at 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.[5] 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.[6] 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[7], 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.[8] 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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[5] These submissions, and public comment on them, are posted at www.ntia.doc.gov.

[6] Tab 2.

[7] Tab 3.

[8] Tab 4.

White Paper. Amendment 11 to the Cooperative Agreement[9] 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.

I. 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.[10]

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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[9] Tab 5.

[10] 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.[11] 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.[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

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[11] Tab 6.

[12] 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.

[13] 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.[14]

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.[15]

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.[16] 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.[17] 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.[18] 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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[14] The Guidelines also provided for the $1 fee, discussed above.

[15] Tab 7.

[16] Tab 8.

[17] Tab 9.

[18] 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.[19]

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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[19] 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.[20]

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.[21]

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.

[20] WHOIS is the database of domain name registrant and registration information.

[21] 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[22]

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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[22] 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."[23]

- 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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[23] 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."[24]

- 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.[25]

- 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.[26] 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 to its own registration page at 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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[24] Tab 12.

[25] Tab 13.

[26] This action prompted a Congressional inquiry. Tab 14.

The Department and NSI have reached temporary resolutions of some of these issues.[27] 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.[28] 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 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 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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[27] 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.

[28] 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 cyberpiracy 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.[29] 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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[29] The WIPO report is available on the Internet at 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.[30] 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 NTIA 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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[30] 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 it 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 contrancts, 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 it 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 [31] 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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[31] 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. Pincus

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 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, nonprofit 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 Amendent 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.

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.

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

that most of the global Internet communities continue to participate in this consensus development process.[1]

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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1 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).

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

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."[2] 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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2 *Developments — The Law of Cyberspace,* 112 Harv. L. Rev. 1574, 1671-72 (1999).

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

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.

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

"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

WA: 1082722v1

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, 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:

Question	Page
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")[1] 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[2], 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.[3] 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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1 Attachment 1.

2 Attachment 2.

3 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[4] have been funded by a annual fee levied by NSI on every registered domain name. NSI charges a minimum of $70 ($35 per year)[5] for

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[4] Prior to the current arrangement, the services were funded by the USG and free to all users wherever located.

[5] To obtain the $70 fee, registrants must supply various technical information that (continued...)

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 a 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 and is attached at Attachment 3.

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[5] (...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[6] that is approved by the

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[6] 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.[7] 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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[6] (...continued)
permitted to charge for accessing the registries that it operates will be significantly lower than the $9 temporary charge that is now permitted.

[7] 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.[8] 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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[8] 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[9] 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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9 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)[10], 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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[10] 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,[11] and ICANN's own bylaws,[12] appropriately and effectively ensures against arbitrary denial of accreditation to NSI or any other registrar.

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[11] Section III.0, Attachment 6.

[12] 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 more 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 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 bylaws. 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 restart 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:]

EXHIBIT I

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.*

505 Huntmar Park Drive - Herndon, Virginia 20170 - Phone: (703) 742-0400

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 phonerecords 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.

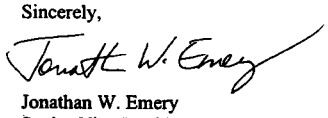
Finally, the NSF's conclusion that data created or maintained by the awardee under a cooperative agreement are the property of the awardee is consistent with the policy and practice of the Federal Government in dealing with such grants. See, e.g., Executive Order No. 12591, 52 Fed. Reg. 13,414 (1987); 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 recompete 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 just 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; rneustein@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 finanical
> 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
>
>
>
>

Joe Sims 03/31/99 11:04

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 thne 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, 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 cashflow 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.[1]

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

[1] 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 uncertainly 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 consistences 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 ecommerce 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 bylaws. 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 ⅔ 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. 1ATR'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.1ATR 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 $25.07 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, prommulgated 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 noncommercial 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 differentregions of the world. However, the regions picked have been among the most expensive in the world to travel to, and to obtain accomodations 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.[1] 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),[2] and the so-called "country code" top-level domains such as .us, .uk and .fr. At the outset, it was thought that .com would 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-

[1] 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.

[2] 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 considered 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 versus 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 converts 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 processees 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 Ataturk. 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 that 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 recompete 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 s 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[1] 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[2]. 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[3], 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

[1] The *Cooperative Agreement* originally executed between the National Science Foundation and NSI

[2] register.com company estimates

[3] 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 deregulation 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[4] and Mike Roberts[5] 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 $1.07 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 $1.07 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

[4] Interim Chairman of ICANN
[5] 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[6] 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.

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[6] 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 polices 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 transitionary 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 unchartered 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 publically 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 transitionary 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.

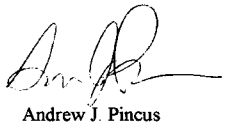
2. *Is adding new domains an advisable means of increasing competition among domain name registrars?*

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.

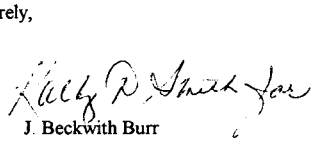
The Department of Commerce believes that adding new gTLDs might increase competition at the registry (as opposed to the registrar) level. The careful addition of new gTLDs will benefit Internet users in a number of other ways as well. As a result, ICANN is charged, under the MOU, with developing policies 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

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JAMES E. DERDERIAN, CHIEF OF STAFF

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.

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 possibe (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

505 Huntmar Park Drive - Herndon, Virginia 20170 - Phone: (703) 742-0400

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

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

The Internet Corporation for Assigned Names and Numbers

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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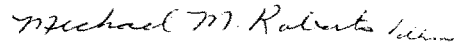
offer his views on the type of candidate that, based on his discussions with numerous people, would likely find broad support in the community, and those views were taken into account, along with similar opinions expressed by numerous others. With regard to my email of September 18, it was never intended 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,

Harris N. Miller
President

Enclosure

Information Technology Association of America

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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 recompete 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
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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 registion containing any of these words?

No.

3. Does the department of Commerce have the authority to recompete 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 recompete 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 slected 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

AMERICANS FOR TAX REFORM

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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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.

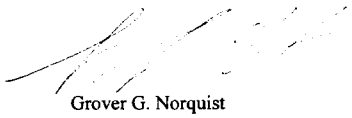
Ultimately, neither I, nor anyone else, knows enough of how this shadowy organization operates to answer this question conclusively. For that matter, this is a question that should have been answered before ICANN came into existence and certainly before they began attempts to craft and force policy its 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.[1] 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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[1] 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.[2]

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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[2] 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.[3] If one accepts the argument, then any NSI policy restricting the words that a domain name can contain must pass First Amendment scrutiny.[4] The First Amendment

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[3] *See* Associated Press, *Woman files suit seeking to register "dirty words" as Internet addresses* (May 7, 1999), <http://www.freedomforum.org/speech/1999/5/7wwwdirtywords.asp>; Dan Goodin, *NSI's ban on "dirty" domains challenged* (May 3, 1999), <http://www.news.com/News/Item/0,4,36003,00.html>.

[4] 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 recompete 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 recompete 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 recompete 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).[5] 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., Zoecon Industries v. American Stockman Tag Co.*, 713 F.2d 1174, 1179 (5th 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.[6]

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.[7]

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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[5] 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.*

[6] 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.

[7] 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 recompete 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.

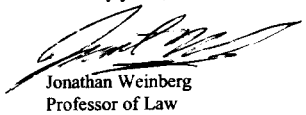
8. If ICANN ultimately does not charge its now-suspended $1 per domain-name fee, how should ICANN fund its operation?

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. 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
Added Preamble and Statement of Purpose	Rejected by ICANN
Removed text that established the purpose of the corporation to be solely for "lessening the burdens of government"	Rejected by ICANN
Mandated that the Interim board create a membership structure, without exception	Has not occurred almost a year later and may never occur or be so gutted as to lose the original intent

Defined "fundamental" assets expected to be received from the US and added constraints upon what the corporation can do with those assets.	Rejected by ICANN
Removed President from the Board of Directors	Rejected by ICANN
Re-cast Supporting Organizations to be essentially permanent advisory committees with very strong role in initiating and defining corporation policies.	Rejected by ICANN
Eliminated Supporting Organizations' ability to appoint Directors to either the Initial or the Final Board	Rejected by ICANN
Clarified that individuals may be members of Supporting Organizations	Initially partially accepted by ICANN, then amended out of their organic documents
Added "On-The-Record," role call voting on matters before the Board	Rejected by ICANN
Added additional public access	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
Broadened rights to Board Reconsideration	Rejected by ICANN
Eliminated special and unique recognition of contracts between the US and NSI and between the US and the University of Southern California	Accepted by ICANN
Added a more robust business planning and cost recovery model	Partially accepted by ICANN, but as th 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>, mmr@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

>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?
>>

>>
>>>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
>>**********

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[1] analysis located at **Error! Bookmark not defined.** [2]. 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.**[3]

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

[1] "The Domain Name Handbook: High Stakes and Strategies in Cyberspace" Copyright © 1998 Ellen Rony and Peter Rony.
[2] Reproduced as Appendix I
[3] 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.[4]" 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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[4] 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*[5] 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 [6] 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

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[5] Jews for Jesus v. Steven C Brodsky *US District Court, District of NJ (1999)*
[6] 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 then 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[7].

[7] *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 the 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 [8], 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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[8] 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[9].

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[10].

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

[9] Attached as Appendix III

[10] 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

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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"[11]

> 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."

[11] 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 recompete 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[12].

Point #2 is especially troublesome to countries that already have a strong tradition of protecting intellectual property rights, regardiess 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 s 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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[12] GAC Communique 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 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 Communique 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

THE BERKMAN CENTER FOR INTERNET & SOCIETY
AT HARVARD LAW SCHOOL

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

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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>:

> 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 recompete the .com, .net, and .org registries? How would such recompetition 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 recompete 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 recompetition 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 recompetition—and the brinksmanship 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 recompetition to take place now—with NSI fully entitled to submit a bid

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.

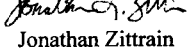
Concern over undue taxation might be alleviated by (1) an explicit cap on the total amount ICANN will, in fact, collect in a given year, limited to cost recovery; should a surplus be collected, ICANN's subsequent fees would be adjusted downward; (2) flat fees rather than per-name taxes. ICANN could simply 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 possibilties 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.

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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 transitionary 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.

oOo

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.

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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, 11th Floor, New York, NY 10018 • Phone (212) 798-9100

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).

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

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.

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

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

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.

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

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

"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*

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

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

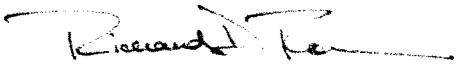
occasions, two of which were partly the result of the inability of NTIA and Network Solutions to reach an agreement. NTIA must be stronger with NSI in negotiating key terms for the post test-bed period as well as ensuring that NSI recognizes ICANN's authority. The transition of the domain name system 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.

ONE HUNDRED FIFTH CONGRESS

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

October 15, 1998

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

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.

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)

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 105th Congress and throughout the 106th 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

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-officecommunications,intra-officeand 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.

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 do 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

ONE HUNDRED FIFTH CONGRESS

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JAMES E. DERDERIAN, 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
14th 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

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.

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

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 105th Congress and throughout the 106th 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-officecommunications,intra-officeand 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.

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 15th 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 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.*

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 3 1, 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 offoreign 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,

John Sopko
Chief Counsel for Special Matters

Enclosures

The Honorable John D. Dingell, Ranking Member