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IS ICANN'S NEW GENERATION OF INTERNET DOMAIN NAME SELECTION PROCESS THWARTING COMPETITION?

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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IS ICANN'S NEW GENERATION OF INTERNET DOMAIN NAME SELECTION PROCESS THWARTING COMPETITION?

THURSDAY, FEBRUARY 8, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2123, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Stearns, Gillmor, Cox, Shimkus, Pickering, Davis, Ehrlich, Tauzin (ex officio), Markey, Gordon, DeGette, Harman, Brown, and Dingell (ex officio).

Staff present: Will Norwind, majority counsel; Yong Choe, legislative clerk; Andrew Levin, minority counsel; and Brendan Kelsay, minority professional staff.

Mr. UPTON. The hearing will come to order. Today we are holding the first hearing in the 107th Congress of the Subcommittee on Telecommunications, where we will be discussing the Internet. I want to welcome all the members of the subcommittee, particularly Ed Markey, the ranking member, and our vice chair Mr. Stearns, good friends both.

Today's hearing focuses on whether ICANN's new generation of Internet domain name selection process is thwarting competition. Our constituents may not know the term ICANN, top-level domain name, or root server, but they are definitely familiar with .com, .net, and .org. And every time they e-mail us, .gov, our constituents use these top-level domain names every single day, enabling them with a simple click of the mouse to communicate almost instantaneously all over the world.

If ICANN gets its way, our constituents may also—should become familiar with seven new top-level domain names, like .biz, .info, .pro, .name, .museum, .aero, and .coop. These are seven new names selected last November by ICANN for potentially launching as early as later this year. However, 37 other applicants were not selected by ICANN. Moreover, we know that others could not even afford the $50,000 application fee or chose not to apply because, on principle, they question ICANN's authority to, in their minds, play God with respect to approving new names. Hence there is a great deal of controversy surrounding ICANN's selection process which

has prompted us to have this timely hearing called by myself and Chairman Tauzin in a January letter to ICANN.

At this point I would ask unanimous consent to put that letter into the record.

[The letter follows:]

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
January 12, 2001

Mr. MICHAEL M. ROBERTS
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers
4674 Admiralty Way, Ste. 330
Marina del Rey, CA 90292

DEAR MR. ROBERTS: The Committee on Energy and Commerce is continuing its oversight of the Internet Corporation for Assigned Names and Numbers (ICANN). As you may recall, the Subcommittee on Oversight and Investigations of the Committee on Commerce held a hearing on July 22, 1999, to examine the issue of domain name system privatization.

In connection with our continuing review, we have been monitoring the process by which ICANN arrived at its decision in November to approve seven suffixes: .aero, .coop, .info, .museum, .name, .pro, and .biz. There have been a number of reports that ICANN's process to create a new generation of Internet domain name suffixes may be thwarting competition in the registration and assignment of Internet domain names. As the Committee of jurisdiction over this issue, the Committee wants to ensure that this process is open and fair, and most important, successfully sparks competition. To that end, we are gathering facts in preparation for a Subcommittee on Telecommunications hearing in February to examine the process by which ICANN selects Internet domain name suffixes. Accordingly, we request that you contact Chairman Tauzin's telecommunications counsel, Jessica Wallace, to arrange a time to jointly brief committee staff at your earliest convenience.

Sincerely,

W.J. "BILLY" TAUZIN
Chairman, Committee on Energy and Commerce

FRED UPTON
Member of Congress

Mr. UPTON. The House Energy and Commerce Committee has jurisdiction over ICANN, and this hearing is the latest in a series of activities in which this subcommittee is engaged on this topic. Back in July 1999, I chaired an Oversight and Investigations Subcommittee hearing entitled, Is ICANN Out of Control? At the heart of that hearing were broad fundamental questions about the Commerce Department's decision to vest responsibility for the management of the domain name system in a private nonprofit corporation as the Federal Government moved to privatize this critical function.

Much has transpired since July 1999, but important policy questions still linger about ICANN. Some continue to question its very legitimacy and the propriety of the Commerce Department's delegation of responsibility to it. Others support the Commerce Department's efforts to privatize management of the DNS, but remain vigilant as this relatively fledgling concept evolves to ensure that it operates openly and fairly.

While I anticipate more hearings on ICANN later this year on a variety of other important substantive issues, this hearing will focus specifically on ICANN's selection process for new top-level domain names and whether it is, in fact, thwarting competition. On the one hand some view ICANN's approval of only a limited number of names as thwarting competition. On the other hand, others argue ICANN was prudent in selecting a number of—limited num-

ber of new names so that they can be test-driven to best hedge against harming the technical integrity of the Internet.

It appears these principles need to be balanced. Today we will get a feel for how well or poorly ICANN is balancing these principles by examining its selection process. In my mind, legitimate questions have been raised by several of our witnesses about the fairness of the application and selection process, questions which must, in fact, be answered by ICANN.

As such, today we will hear from ICANN, two businesses whose applications were selected, two businesses whose applications were not selected, one small business which did not apply at all, and two public interest advocates. Today's witnesses will greatly assist our subcommittee in answering the question of whether ICANN is thwarting competition.

In addition, I have to say that as a parent of two young kids, I want to explore ICANN's rationale for not approving two particular top-level domain names, .kids and .xxx as a means of protecting our kids from the awful, awful filth which is sometimes widespread on the Internet. We should strongly encourage the use of technology to protect our kids, and special top-level domain names may be just exactly the dose of medicine that is needed. That is why many parents lie awake at night thinking about the ways we need to respond.

These issues are too important to not have proper oversight. If ICANN can't, who can?

[The prepared statement of Hon. Fred Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON, CHAIRMAN, SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

Good morning. Today we are holding the first hearing in the 107th Congress of the Subcommittee on Telecommunications and the Internet. I want to welcome all of the members of the Subcommittee and tip my hat to our ranking member, Ed Markey, and our vice chair Cliff Stearns.

Today's hearing focuses on whether ICANN's new generation of Internet domain name selection process is thwarting competition?

Our constituents may not know the terms: ICANN, Top Level Domain name, or root server, but they are *definitely* familiar with: "dot com", "dot net", "dot org", and—every time they e-mail us—"dot gov". Our constituents use these Top Level Domain names every day, enabling them—with a simple click of the mouse—to communicate almost instantaneously all over the world.

If ICANN gets its way, our constituents may become familiar with seven *new* Top Level Domain names, like: "dot biz", "dot info", "dot pro", "dot name", "dot museum", "dot aero", and "dot co-op". These are the seven new names selected last November by ICANN for potential launching as early as later this year. However, thirty-seven other applicants were *not* selected by ICANN. Moreover, we know that others could not even afford the $50,000 application fee or chose not to apply because, on principle, they question ICANN's authority to, in their minds, "play god" with respect to approving new names. Hence, there is a great deal of controversy surrounding ICANN's selection process—which has prompted this timely hearing, called for by myself and Chairman Tauzin in a January letter to ICANN.

I ask unanimous consent to put the Tauzin/Upton letter in the record.

The House Energy and Commerce Committee has jurisdiction over ICANN, and this hearing is the latest in a series of activities in which this Committee has engaged on this subject. In fact, in July 1999, I chaired an Oversight and Investigations Subcommittee hearing entitled: Is ICANN out of control? At the heart of that hearing were broad, fundamental questions about the Commerce Department's decision to vest responsibility for the management of the domain name system in a private non-rofit corporation, as the federal government moved to privatize this critical function.

Much has transpired since July 1999, but important policy questions linger about ICANN. Some continue to question its very legitimacy and the propriety of the Com-

merce Department's delegation of responsibility to it. Others support the Commerce Department's efforts to privatize management of the DNS, but remain vigilant as this relatively fledging concept evolves to ensure that it operates openly and fairly.

While I anticipate more hearings on ICANN this year on a variety of other important, substantive issues, *this* hearing will focus specifically on ICANN's selection process for new Top Level Domain names and whether it is thwarting competition. On the one hand, some view ICANN's approval of only a limited number of new names as thwarting competition. On the other hand, others argue that ICANN was prudent to select a limited number of new names so that they can be "test driven" to best hedge against harming the technical integrity of the Internet. It appears as if these are principles which need to be balanced.

Today, we will get a feel for how well, or poorly, ICANN is balancing these principles by examining its selection process. In my mind, legitimate questions have been raised by several of our witnesses about the fairness of the application and selection process—questions which *must* be answered by ICANN. As such, today we will hear from: ICANN, two businesses whose applications were selected, two businesses whose applications were *not* selected, one small business which did not apply at all, and two public interest advocates. Today's witnesses will greatly assist our Subcommittee in answering the question of whether ICANN is thwarting competition.

In addition, as a parent of two young children, I want to explore ICANN's rationale for not approving two particular Top Level Domain names: "dot kids" and "dot xxx", as a means to protect kids from the awful smut which is so widespread on the Internet. We should strongly encourage the use of technology to protect our kids, and special Top Level Domain names may be just the ticket. This is what so many parents lie awake at night thinking about, and we need to respond.

I look forward to hearing from the witnesses, and I thank them for their participation today.

Mr. UPTON. I yield to my ranking member Mr. Markey, the gentleman from Massachusetts.

Mr. MARKEY. Thank you, Mr. Chairman, and welcome to the Subcommittee on Telecommunications, Trade, and Consumer Protection——

Mr. UPTON. Welcome back. Thank you.

Mr. MARKEY. [continuing] in your new role as the chairman of this prestigious panel. I think it is going to be a very exciting 2 years. This is my 25th year on the Subcommittee on Telecommunications, Trade, and Consumer Protection, and I think that the issues today are more exciting than we have ever had in the past as all of these technologies offer new public policy challenges to the Congress as they do to the private sector. So this is a very distinguished panel which you have brought with us here today.

ICANN was specifically created to undertake certain administrative and technical management aspects of the domain name system and Internet address space. ICANN exists because the U.S. Department of Commerce and many corporate and civic entities believe that these functions should not be done by the government, but, instead, by a private sector entity.

In its early stages of the Internet's development, things were much easier. Vin Cerf could contact Jon Postel, who in turn contacted a select group of Internet pioneers and elder statesmen, and they were largely able to determine amongst themselves what was best for the Net's development. Yet given the rapid commercialization of the Internet and the ardent desire of various public, private and civic voices to have their say on how the Internet develops from here forward, it is obvious that we must proceed with a different process.

As we do so, it is important to keep in mind ICANN is not simply an international standards-setting body. Recent decisions creating

new top-level domains demonstrates that ICANN is establishing Internet policy in its selections, not merely advising the global community of appropriate technical standards. This development in itself is neither good nor bad. It is perhaps somewhat inevitable. It only becomes problematic when ICANN starts to make policy judgments without an adequate policy process.

There is no question in my mind that the current process is highly flawed. ICANN has made much of the fact that all applications and comments were posted on a Web site. That is very useful, but it is no substitute for a comprehensive policy process, especially for something as important to Internet competition and diversity as selecting new top-level domains.

New top-level domains are quasipublic assets. Some of the people making these decisions were elected; some were not. There was a significant $50,000 fee assessed against applicants, although not all that money was actually spent analyzing the applications themselves. Not all technically qualified and financially qualified applications were selected. The winners, therefore, were chosen for other, more subjective reasons, although it is not apparent what criteria were used for these subjective judgments.

To hear some of the participants explain it, both winners and losers, events at the Vatican are shrouded in less mystery than how ICANN chooses top-level domains.

Let me be clear, however, that this does not mean that any of the new seven top-level domains selected are bad choices or should not have been chosen. ICANN would have done well to prohibit in this first round of applications any applications from the incumbent, Verisign, but at the end of the day, the new seven domain names chosen will increase competition and diversity somewhat.

My concern is with those that were not selected and with the smaller, less powerful voices who feel they have no access to this process.

We have a number of important questions to explore today. For those applicants that were not selected, what is the appeals process? To whom are the ICANN board members accountable, to the Internet community, to the Department of Commerce? Is the Department of Commerce performing adequate oversight? Is it simply an eyewitness to history? How can we make the subjective criteria for ICANN's policymaking more clear? Does ICANN have adequate resources to perform these policy functions? And how do we address ICANN's long-term funding needs?

The future of Internet governance and Internet policymaking raise vitally important issues. I want to commend Chairman Upton for calling this hearing and, again, thank the witnesses for their participation this morning. I yield back the balance of my time.

[The prepared statement of Hon. Edward J. Markey follows:]

PREPARED STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Good Morning. I want to commend Chairman Upton for calling this hearing today on the Internet Domain Name System and issues related to Internet governance. I also want to thank all of our witnesses for coming to share their views with us on these important topics.

Mr. Chairman, the Internet Corporation for Assigned Names and Numbers—or ICANN—was established to perform certain limited, but highly vital functions. It was created specifically to undertake certain administrative and technical manage-

ment aspects of the Domain Name System and the Internet address space. ICANN exists because the U.S. Department of Commerce, and many corporate and civic entities, believed that these functions should not be done by the government but instead by a private sector entity.

In its early stages of the Internet's development, things were much easier. Vint Cerf could contact Jon Postel, who in turn contacted a select group of Internet pioneers and elder statesmen and they were largely able to determine among themselves what was best for the Net's development. Yet given the rapid commercialization of the Internet and the ardent desire of various public, private, and civic voices to have their say on how the Internet develops from here forward, it is obvious that we must proceed with a different process.

As we do so, it is important to keep in mind that ICANN is not simply an international standards setting body. Recent decisions creating new Top Level Domains demonstrate that ICANN is establishing Internet policy in its selections, not merely advising the global community of appropriate technical standards. This development in itself is neither good nor bad. It is perhaps, somewhat inevitable. It only becomes problematic when ICANN starts to make policy judgements without an adequate policy process.

There's no question in my mind that the current process is highly flawed. ICANN has made much of the fact that all applications and comments were posted on a website. That's very useful, but it is no substitute for a comprehensive policy process—especially for something as important to Internet competition and diversity as selecting new Top Level Domains.

New Top Level Domains are a quasi-public asset. Some of the people making these decisions were elected, some were not. There was a significant $50,000 fee assessed applicants although not all of that money was actually spent analyzing the applications themselves. Not all technically qualified and financially qualified applications were selected. The "winners" therefore, were chosen for other, more subjective reasons—although its not apparent what criteria were used for these subjective judgements.

To hear some of the participants explain it, (both winners and losers,) events at the Vatican are shrouded in less mystery than how ICANN chooses new Top Level Domains.

Let me be clear however, that this does not mean that any of the seven new Top Level Domains selected are bad choices or should not have been chosen. ICANN would have done well to prohibit in this first round of applications any application from the incumbent, Verisign, but at the end of the day the new seven domain names chosen will increase competition and diversity somewhat.

My concern is with those that were not selected and with the smaller, less powerful voices who feel they have no access to this process. We have a number of important questions to explore today. For those applicants that were not selected, what is the appeals process? To whom are the ICANN board members accountable—to the Internet community?—to the Department of Commerce? Is the Department of Commerce performing adequate oversight or is it simply an eyewitness to history? How can we make the subjective criteria for ICANN's policymaking more clear? Does ICANN have adequate resources to perform these policy functions? How do we address ICANN's long term funding needs?

This future of Internet governance and Internet policymaking raise vitally important issues. I want to commend Chairman Upton for calling this hearing and again, thank the witnesses for their participation this morning.

Mr. STEARNS [presiding]. I would also like to have a short opening statement to congratulate the new Chairman on his selection to this prestigious committee and his kindness in offering me the vice chairmanship, and I look forward to working with him shoulder to shoulder on the issues.

This, of course, marks the first hearing of this subcommittee, and it is examining the Internet Corporation for Assigned Names and Numbers, ICANN, selection process of new Internet domain names.

The Internet is not the unsettled Wild West it once used to be. Users have tamed this frontier, and both the Internet and the World Wide Web have become a stable facet for many Americans. Furthermore, estimates indicate the number of e-commerce Web sites to double in the next 2 years, up from 687,000 just 2 years ago.

Of course, to ensure this continual prosperity oversight of how the Internet infrastructure is managed should be a key responsibility for us on this subcommittee. So I look forward to getting a report card from today's witnesses on ICANN, accountability and transparency throughout the process, and to learn more about what ICANN is doing to ensure competition and the integrity and stability of the Internet.

And Mr. Dingell, the ranking member of the full committee, is recognized.

Mr. DINGELL. Mr. Chairman, I thank you. Mr. Chairman, I want to congratulate you on the accession to the responsibility of the chairman of this subcommittee, and I look forward to working with you on these matters.

I also want to commend you for today's hearings. We are engaged in inquiring into a matter which a lot of people regard as being arcane, but that does not mean that it is irrelevant. To the contrary, the integrity of the process used by ICANN recently when it selected a handful of new top domain names is arguably one of the most critical issues affecting the Internet today. Domain names are the key to Internet commerce, and we must determine whether ICANN has a process which is fair and proper, and whether the outcome will lead to a more effective competition in the management of the global domain name system.

We must also inquire as to whether the process has resulted in achieving a measure of public confidence by its fairness or, by grotesque unfairness, has achieved not just distrust, but active distaste.

The questions, important as they are, are only going to address, however, narrow issues pertaining to domain name assignments. The larger question we must ask is whether this administrative process is emblematic of a larger problem with the overall system of Internet governance. This system set up by ICANN was initiated by the U.S. Department of Commerce and continues to be subject to the authority of that agency. As such, it falls squarely within this committee's oversight responsibilities.

I hope and expect that we will be holding hearings to evaluate whether the mission of that agency is being soundly defined, properly executed, and whether, in fact, it is being fair. The signs I would observe are that it has not been behaving fairly, and that its behavior has left a lot of unanswered questions.

I hope that we will hear from witnesses today who will be able to describe what is going on there. I gather many of them believe the system is broken. I have strong evidence to believe they are correct.

Some suggest that ICANN has morphed from a nongovernmental, technical standards-setting organization to a full-fledged policymaking body. If that is true, there is cause for serious concern. ICANN was not given authority to assume that function, and it appears to be accountable to no one, except perhaps God Almighty, for its actions.

Most important, if ICANN is making Internet policy decisions, then the people must know that they who are affected will have access to a reliable and transparent system to seek redress for harm.

There is no question we are treading on uncharted territory. Bumps in the road are, of course, unavoidable, but while it may be desirable to keep the Internet unregulated both from a diplomatic and economic standpoint, we must not allow U.S. interests to be put at risk by blindly adhering to a hands-off approach, and we must see to it that the agency which we are constituting to act on behalf of the U.S. Government in these matters functions fairly, well, efficiently and in a fashion which is going to be in the broad overall public interest.

I particularly commend you, therefore, for initiating this hearing. I believe that our oversight efforts have to be extremely diligent, and we have to be prepared to act quickly should it become necessary to do so. I would observe that we should follow this set of hearings vigorously and energetically to require the necessary answers from ICANN and from the Department of Commerce. I believe there is much to be justified here, and I believe that the task of justifying these things is going to be difficult, and I look forward to assisting those agencies that are responsible here in achieving a correct and a proper result. It may be painful for them. Thank you, Mr. Chairman.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, thank you for recognizing me. First, I want to congratulate and welcome you to the Subcommittee on Telecommunications and the Internet. I know you will do a wonderful job in charting the course of this Subcommittee, and in helping us navigate through the many complex issues associated with telecommunications. You are to be commended not only for your enthusiasm in scheduling the very first hearing of the 107th Congress, but also for your courage in tackling what may be the most arcane issue we have faced in years. I've familiarized myself with today's testimony, Mr. Chairman, and even reciprocal compensation is starting to look like a simple fix.

Arcane, however, does not mean irrelevant. To the contrary, the integrity of the process used by ICANN recently when it selected a handful of new top-level domain names is arguably one of the most critical issues affecting the Internet today. Domain names are the key to Internet commerce, and we must determine whether the ICANN process was fair and proper, and whether the outcome will lead to more effective competition in the management of the global domain name system.

These questions, however important they may be, still only address the narrow issue pertaining to domain name assignments. The larger question we must ask is whether this administrative process—if found to be deficient—is emblematic of a larger problem with the overall system of Internet governance. This system of governance set up by ICANN—was initiated by the U.S. Department of Commerce, and continues to be subject to the authority of that agency. As such, it falls squarely within the jurisdiction of this Committee's oversight responsibilities, and I hope and expect that we will hold ongoing hearings to evaluate whether ICANN's mission is both soundly defined and properly executed.

We will hear from some witnesses today who believe the system is broken. Some suggest that ICANN has morphed from a non-governmental technical standards-setting organization to a full-fledged *policymaking* body. If that is true, I believe it is cause for serious concern. ICANN was not given authority to assume that function, and it appears to be accountable to no specific body for its actions. Most important, if ICANN is making Internet policy decisions, then those people directly affected must have access to a reliable and transparent system to seek redress from harm.

There is no question that we are treading on uncharted territory and bumps in the road are unavoidable. But while it may be desirable to keep the Internet unregulated, both from a diplomatic and economic standpoint, we must not allow U.S. interests to be put at risk by blindly adhering to a hands-off approach. I believe we should be diligent in our oversight efforts, and quick to act should it become necessary to do so.

Thank you again, Mr. Chairman, for holding this important hearing, and I also want to extend my appreciation to each of the distinguished witnesses for appearing today.

Mr. UPTON. Thank you, Mr. Dingell.

I would make a motion at this point that all Members—the House is not in session with recorded votes today, so a number of Members I know have gone back to their districts, but I would make a motion by unanimous consent that all members of the subcommittee have an opportunity to put their—insert their full statement into the record.

And with that I recognize Mr. Shimkus from Illinois.

Mr. SHIMKUS. Mr. Chairman, I don't have an opening statement.

Mr. UPTON. Mr. Brown.

Mr. BROWN. Thank you, Mr. Chairman, brief opening statement.

I am pleased to join the Subcommittee on Telecommunications and the Internet with you, Mr. Chairman, with Ranking Member Markey, and look forward to working with both of you on issues that are so important to the new economy.

The subject of domain names is of interest to all of us. Recently I met with the vice president of Cuyahoga Community College in Cleveland, who stressed his frustration with his school's Internet domain. Cuyahoga Community College in Cleveland, Ohio, otherwise known as Tri-C, is the first and largest community college in Ohio. It is the fourth largest institution of higher education in the State.

Despite the fact Tri-C is a large, well-established higher education institution, it has been locked out of obtaining the domain .edu. Only 4-year, degree-granting colleges and universities generally are allowed the .edu domain. Two-year colleges are not allowed that address even though they educate as many, if not more, students than 4-year students. www.tri-c.cc.oh.us is not an especially memorable address for its faculty and others.

The Department of Commerce, in partnership with ICANN, oversees the .edu domain. While they have expressed interest in finding a solution, action has not been taken in an expedient manner. It is important for the Department and ICANN to move expeditiously so community colleges and their students can have easier access and equal access to important campus resources and the Internet.

Mr. Chairman, I thank you.

Mr. UPTON. Mr. Davis.

Mr. DAVIS. I ask unanimous consent my statement go in the record in deference to our witnesses so we can hear from them.

[The prepared statement of Hon. Tom Davis follows:]

PREPARED STATEMENT OF HON. TOM DAVIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, I am pleased to be beginning my membership on the Subcommittee with a very timely oversight hearing on ICANN's selection of new generic DNS suffixes. Thank you to all of the witnesses for taking time from their work to be here today. I am particularly pleased to see Dr. Cerf whom I have had the pleasure of meeting previously, and Ms. Leah Gallegos who hails from my home state of Virginia.

As the Internet continues to grow, not only in terms of electronic commerce but also with respect to global communication in general, the number of people, businesses, and nations with a stakeholder interest in the fair and competitive expansion of its perimeters is growing. At the same time, there is a legitimate expectation that the Internet will be a predictable environment that reflects the competitive

marketplace. With that growth, it becomes even more important that there is confidence the ICANN is managing Internet functions in a manner that promotes competition, uses an open and transparent process that maintains the Corporation's neutrality, and does no harm to the future growth of the Internet.

I have heard from a number of persons in Virginia who have expressed their dismay at both the format and the process by which ICANN selected the suffixes and the successful registry applicants in November of last year. I look forward to hearing our witnesses's testimonies and having the opportunity to determine whether or not Congress needs to take action that will assist ICANN and the Department of Commerce in improving the process for promoting competition in the selection of next generation Internet Domain Names.

Mr. UPTON. Thank you, Mr. Davis.

Mr. Gordon.

Mr. GORDON. I am ready to hear the panel.

Mr. UPTON. Ms. Harman.

Ms. HARMAN. As the rookie on this committee who represents what is now called the digital coast of California, I just want to say how happy I am to be here and to be on the this subcommittee and to make one observation, which is that I believe we have in general a digital economy and an analogue government, and the challenge is to create a digital government to match the digital economy. We have to do this right, and we have to observe fairness, but it would be a shame if we imposed analogue procedures on this issue. And so I hope that we will be very creative and very digital in this subcommittee as we move forward.

I yield back, Mr. Chairman.

Mr. UPTON. Thank you.

Ms. DeGette.

Ms. DEGETTE. Mr. Chairman, I will echo my colleague from California's pleasure at being on this committee. You may not be aware, but just in the past few years, the Denver metropolitan area has become one of the fastest growing telecommunications hubs in the country, and, as a matter of fact, is now in the top five. So even though it is onerous, I know, I would love to invite the chairman and the ranking member to come out there and see our industry at some point and to perhaps have some field hearings there. It is exciting what is going on, and I am excited to be on the telecom committee.

Even though I am new to this committee, I am not new to the issue. When I was in the State legislature in Colorado, we passed one of the landmark laws that preceded the 1969 act, so I am delighted to get back with these issues and to hear from the witnesses today, and I yield back my time as well.

[The prepared statement of Hon. Diana DeGette follows:]

PREPARED STATEMENT OF HON. DIANA DEGETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Good morning Mr. Chairman. A warm welcome to our witnesses.

I am thrilled to be here today as a new member of this subcommittee. I am pleased as well, that my colleague Mr. Stupak has joined me as a fellow refugee from the now defunct Finance and HazMat subcommittee.

As some of you may know, the Denver metropolitan area, which I represent, has one of the fastest growing telecommunications industries in the country right now.

In fact, overall, I believe we are in the top five telcom hubs in the nation at this time. The growth of this dynamic industry has unbelievable growth in the Denver area over the past decade, and as one who is very interested in these issues, it has been exciting to watch the progress.

Given this fact, I would like to take the opportunity to invite my Chairman and Ranking Member to come pay us a visit. I would be happy to host some field hearings in the near future on some of the pressing telecom issues that we will be dealing with in the 107th.

While I was not yet in Congress when the Telecommunications Act of 1996 passed, I did work on this issue in the Colorado State House. In fact Colorado passed a landmark telecom reform act in 1995, which I was very involved in, and I look forward to continuing that work here at the federal level.

I am pleased to attend my first subcommittee first hearing on such an interesting issue, that of new domain names and how the whole process of selecting them has unfolded.

This issue couldn't be more timely, not only because of the where ICANN is in the process of selecting new suffixes, but because the Internet is still growing at an unbelievable rate and pressure continues to build on its capabilities.

If you look at the rate at which registered domain names have grown over the past few years, it is clear that there is a huge demand to expand the number of domain names available for registrations by individuals, organizations and businesses.

As the Internet has grown, the method of allocating and designating domain names has been fairly controversial. The issues that have caused to many headaches include transitioning to a single domain names system (DNS) registrars to many registrars, trademark disputes, the appropriate federal role and of course, the issues that brings us here today, the process of creating new domain names.

Certainly, it is the responsibility of this committee to make sure that the process is as open and fair as possible. It is also our responsibility to make sure that ICANN is taking every step necessary to guarantee that the overall efficacy of the Internet is not disrupted.

I will forward to hearing the testimony of our witnesses.

Mr. UPTON. Thank you very much.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. W.J. "BILLY" TAUZIN, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

I would like to thank Chairman Upton for holding this important and timely hearing on the Internet Corporation for Assigned Names and Numbers (ICANN). As the Committee of jurisdiction over ICANN, it is imperative that we continue our oversight responsibilities in this area. The issues ICANN is grappling with will have a fundamental impact on the future vibrancy of the Internet. While I recognize that there are a number of important and interesting issues involving ICANN governance issues, funding, issues, root server competition issues, multilingual issues, dispute resolution issues, countrycode TLD issues, and significant trademark implications—this hearing is intended to focus on the discrete but critical issue of the process by which ICANN recently approved seven suffixes: dot areo, dot co-op, dot info, dot museum, dot name, dot pro, and dot biz.

That said, it is my intention to, with Chairman Upton, actively monitor those issues I just mentioned. In that regard, I sincerely hope that ICANN—and its outside representatives—will respect this Committee's rules in the future and submit its testimony within 48 hours of a hearing. This rule really is for your benefit as much as it is for ours. Providing Members and their staff with sufficient time to review your written testimony enables us to better understand your position, encourages Members to be more engaged and generally makes for a more fruitful hearing experience.

For being in existence for a little over two years—ICANN has been charged with a number of important tasks, one of which is to establish a process for the introduction of new top level domain (TLDs) names in a way that will not destabilize the Internet. On November 16th ICANN announced its selection of the seven new suffixes—doubling the number of global TLDs. There are many arguments both for and against new TLDs. Those in favor of a limitless number (or at least significantly more than seven) maintain that new TLDs are technically easy to create, will help relieve the scarcity in existing name spaces that make it difficult for companies to find catchy new website addresses, and are consistent with increasing consumer choice and a diversity of options. However, there are those who urge restraint and caution in the introduction of TLDs pointing to greater possibilities for consumer confusion, the risk of increased trademark infringement, cybersquatting and cvberpiracy. I am eager to hear from ICANN about how it arrived at the number seven.

Equally important, many are questioning the very process by which the suffixes were selected. I am eager to hear ICANN's view of the process, the views of selected and set aside applicants, and the views of Professor Froomkin and the Center for Democracy and Technology. I encourage all panelists to offer, in addition to specific criticism—or praise depending on their point of view—their insights as to how to improve the process as we move forward to future rounds of suffix selections.

On August 3rd ICANN posted an extensive process overview to assist those considering applying to operate a new TLD. The application materials were subsequently posted on August 15th. October 2nd was the deadline for submitting applications and ICANN announced it decision on November 16th. Some validly argue that the six week application review process seemed unacceptably short—making it extremely difficult for each application to enjoy a thorough review. Some are complaining that the criteria was vague and not followed: they were not provided an opportunity to correct errors in the staff recommendation on their applications: they were not provided with any meaningful opportunity for face-to-face consultations and that in fact, they were only provided with three minutes to make a "last ditch" pitch to the Board. With each applicant paying a non-refundable $50,000 filing fee, should the process have provided more?

Notwithstanding these complaints others were happy with the process and maintain that the time has come to introduce new domain names onto the Internet, and urge that there not be any further delay.

Our role should be to ensure that the process by which ICANN, a private, non-profit entity with global responsibilities, selected domain names was open and fair to all applicants. Were the procedures clearly articulated and consistently followed? To the extent we find shortcomings in this new process, and I already have, I hope we can provide some guidance that will serve as a roadmap in the future given that this is not expected to be the last round of domain name selections. With this hearing, our review will not end, we will continue to review this process.

I look forward to hearing from this distinguished panel of witnesses. Thank you.

PREPARED STATEMENT OF HON. ELIOT ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you Mr. Chairman.

Let me also welcome you to your new position. Like all of my Democratic colleagues I look forward to working with you and the other Republican members on these issues to ensure consumer protection and free and open competition.

I also want to welcome back Mr. Markey to the Ranking Position—I have always admired your strong leadership and vocal support for America's consumers.

Today's hearing will hopefully be illuminating to all of us here. Many questions have been raised about the process that ICANN employed to approve the first round of new Top Level Domains (TLDs). This hearing will give us an opportunity to learn about this process.

I, for one, am interested in ensuring that the process was open, fair, and clear to all the participants and those *who may have wanted to participate.* This is one of my concerns—the $50,000 filing fee does seem at first glance to be rather high.

This hearing being called is very timely as well because the Commerce Department has not yet approved the new TLDs.

I do appreciate the difficulty ICANN had in organizing this process. There is just no precedent for doing this. And so even if there were fits and starts, so long as the process was open and clear to all involved, then I am hopeful that we can work with ICANN to improve and streamline this process for future determinations of TLDs.

Mr. UPTON. Our witnesses today are Dr. Vincent Cerf, Chairman of the Board for the Internet Corporation for Assigned Names and Numbers, ICANN; Mr. Lou Kerner, CEO of .TV; Ms. Elana Broitman, director of policy and public affairs, register.com; Mr. David Short, legal director of the International Air Transport Association; Mr. Ken Hansen, director of corporate development of NeuStar, Inc.; Ms. Leah Gallegos, president of AtlanticRoot Network, Inc.; Professor Michael Froomkin, professor of law, University of Miami School of Law; and Mr. Alan Davidson, associate director of the Center for Democracy and Technology.

Welcome all of you to our first hearing of the year. Your statements are made part of the record in their entirety. We would like to limit your presentation to no more than 5 minutes. We have a relatively new timer here which will tell you exactly how much time you have left, and I am going to be fairly fast with the gavel.

Following that 5 minutes, members on the dais will be able to ask questions for 5 minutes, and we will proceed that way.

Dr. Cerf, welcome.

STATEMENTS OF VINTON G. CERF, CHAIRMAN OF THE BOARD, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; LOU KERNER, CHIEF EXECUTIVE OFFICER, .TV; ELANA BROITMAN, DIRECTOR, POLICY AND PUBLIC AFFAIRS, REGISTER.COM; DAVID E. SHORT, LEGAL DIRECTOR, INTERNATIONAL AIR TRANSPORT ASSOCIATION; KENNETH M. HANSEN, DIRECTOR, CORPORATE DEVELOPMENT, NEUSTAR, INC.; LEAH GALLEGOS, PRESIDENT, ATLANTICROOT NETWORK, INC.; A. MICHAEL FROOMKIN, PROFESSOR OF LAW, UNIVERSITY OF MIAMI SCHOOL OF LAW; AND ALAN B. DAVIDSON, ASSOCIATE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

Mr. CERF. Thank you very much, Mr. Chairman, Ranking Member Markey, ladies and gentlemen of the committee. I appreciate the opportunity to describe what I believe is an important accomplishment of what is a young and still maturing entity, the Internet Corporation for Assigned Names and Numbers.

The introduction of new competition for global domain names at the registry or wholesale level of the domain name system is happening for the first time in 15 years. This is the third and the last of the significant initial goals set forth in the U.S. Government white paper that called for the creation of ICANN. ICANN has succeeded in opening the registrar or the retail portion of the domain name market to new competition, accrediting more than 180 competitive registrars of which about half are now operating, and seeing average registrar prices drop by more than a factor of two in the first year of this competition.

ICANN's uniform dispute resolution procedure has successfully provided a quick, cheap and globally available way to resolve many domain name disputes.

This last major initial goal, the introduction of new global top-level domains, is the most complex of these three efforts. The seven original global TLDs were created in 1985, and for at least most of the past decade there has been considerable debate about whether adding new TLDs is a good idea. The range of opinion is from zero to millions, literally, and, as a result, a number of past efforts have not reached a conclusion for lack of consensus. It has only been with the creation of ICANN and the use of the consensus development mechanisms it contains that we have finally been able to come to a sufficient consensus to allow us to move forward with enough TLD additions to the domain name system.

On the other hand, all the advice that we have received from the technical and the policy bodies of ICANN have told us to move prudently and carefully to minimize any risk of destabilizing the domain name system. Many of us believe that we can add new TLDs

without creating instability or other adverse effects, but the fact is it has never been done in the context of the Internet as its exists today, and thus, while our objective is to encourage new competition here, just as we already have in the registrar segment of the market, we want to do so without endangering the utility of what has become a critical global medium for communication and commerce.

The consensus development process within ICANN has been extensive. This issue was first referred to ICANN's Domain Name Support Organization, an open advisory body, that recommended the introduction of a limited number of new TLDs as a proof of concept, with additional TLDs to be added only if it was clear that it could be done without destabilizing or otherwise impairing the utility of the Internet. A similar recommendation was conveyed by ICANN's technical support organization. The board accepted these recommendations and asked for proposals for new TLDs to be included in this first limited proof-of-concept phase.

Because ICANN is a consensus development body, everything about this process was transparent. All the proposals were posted on ICANN's Web site for public comment. Both the proposals and roughly 4,000 public comments were reviewed by ICANN's staff and independent consultants retained for that specific purpose. The results of that evaluation, a 326-page analysis, were also posted for public comment, and another thousand comments were received. The board then held a public forum lasting 12 hours, where the applicants and the general public provided final input and then the next day selected a diverse group of seven proposals to carry out this initial proof of concept experiment in a public meeting that lasted about 6 hours. Since that time, negotiation of appropriate commercial agreements have been under way, and I hope we will see those final agreements soon.

Because, as was clear from the beginning of the process, ICANN was only going to select a limited number of proposals for this initial proof of concept phase, a significant fraction of the 44 applications that went through the process were inevitably going to be disappointed at not being selected in this first proof of concept round. And they were disappointed. But the real news here is that finally, with the formation of ICANN and the development of this consensus, this long debate is actually producing new TLDs. If all those selected become operational, we will have immediately doubled the number of global TLDs available. This will immediately increase competition and consumer choice.

I have a longer statement, Mr. Chairman.

Mr. UPTON. I know, I read it last night.

Mr. CERF. You are very kind to have done so, sir.

I have a longer statement, with attachments, and I would ask these be entered into the record. I will be happy to answer any questions you may have, and I thank you for allowing me and ICANN to participate in this important proceeding.

[The prepared statement of Vinton G. Cerf follows:]

PREPARED STATEMENT OF VINTON G. CERF, CHAIRMAN OF THE BOARD, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

My name is Vinton G. Cerf, and outside of my regular employment at WorldCom,[1] I am the volunteer Chairman of the Internet Corporation for Assigned Names and Numbers (ICANN). I appreciate the opportunity to appear before this Committee to describe the efforts of ICANN to introduce additional competition into the Internet name space, while at the same time prudently protecting against possible disruption of this extremely important global resource for communications and commerce.

The basic message I would like to leave with you today is that ICANN is functioning well, especially for such a young organization with such a difficult job. In fact, it has made substantial progress toward the specific goals it was created to meet, including the introduction of competition at both the wholesale and retail levels of the registration of names in the Domain Name System (DNS). The recent action to introduce seven new Top Level Domains (TLDs) into the DNS will double the number of global TLDs and at the same time will not, we believe, create serious risks of destabilizing the Internet—something I know none of us wants to see. The fact that ICANN, in just over a year, has been able to generate global consensus on this issue—which has been fiercely debated for most of the last decade—is a testament to ICANN's potential to effectively administer the limited but important aspects of the DNS that are its only responsibility.[2]

A. WHAT IS ICANN?

It is probably useful to first provide a little background about ICANN, which is a unique entity that may not be familiar to everyone. ICANN is a non-profit private-sector organization with a 19-member international volunteer Board of Directors drawn from a set of specialized technical and policy advisory groups, and through open, worldwide online elections. ICANN was formed in 1998 through a consensus-development process in the global Internet community, in response to a suggestion by the United States Government that the private sector create such a body. It was formed to undertake certain administrative and technical management aspects of the Domain Name System (DNS) and the Internet address space. Domain names serve as the visible face of the name and address mechanism of the Internet—in short, the way computers know where to send or receive information.

ICANN performs functions that, prior to ICANN's creation by the private sector, were performed by contractors to the US Government (National Science Foundation and DARPA). ICANN is a young, and still maturing organization; it turns out that achieving global consensus is not so easy. But it has made great—and many would say surprising—progress toward the objective shared by the vast majority of responsible voices in the international Internet community: the creation of a stable, efficient and effective administrative management body for specific technical and related policy aspects of the DNS and the Internet address space that is consensus-based, internationally representative, and non-governmental.

B. WHAT ARE THE GUIDING PRINCIPLES OF ICANN?

There is nothing quite like ICANN anywhere in the world, and of course it will be some time before we are certain that this unique approach to consensus development can effectively carry out the limited but quite important tasks assigned to it. I am cautiously optimistic, but we are still at an early stage of evolution, and there is much work to do. The organizational work has been complicated by the fact that we have also been asked to simultaneously begin to accomplish the specific operational goals set out by the US Government in the White Paper.[3] The situation is analogous to building a restaurant and starting to serve customers while the kitchen is still under construction; it is possible, but may occasionally produce cold food.

The White Paper set forth four principles that it described as critical to the success of an entity such as ICANN: stability; competition; private, bottom-up coordination; and representation.

1. Stability is perhaps the easiest to understand. The US Government was seeking to extract itself from what it had concluded was no longer a proper role for the US Government—the funding of private contractors to manage important technical aspects of the global Internet name and number address system—but only in a way that did not threaten the stability of the Internet. As the White Paper said, and

[1] My curriculum vitae is attached.

[2] I have attached to this testimony a time line that describes the chronology of the debate over new Top Level Domains.

[3] The White Paper was a policy statement published by the Department of Commerce on June 10, 1998. See *Management of Internet Names and Addresses,* 63 *Fed. Reg.* 31741 (1998)

as seems obvious, "the stability of the Internet should be the first priority of any DNS management system." If the DNS does not work, then for all practical purposes for most people, the Internet does not work. That is an unacceptable outcome, and thus everything that ICANN does is guided by, and tested against, this primary directive.

2. Competition was also an important goal set forth in the White Paper, which stated that "[w]here possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction." Competition in the DNS structure as it stands today is theoretically possible at both the registry (or wholesale) level, and the registrar (or retail) level. Increasing competition at the retail level involves only adding additional sellers of names to be recorded in existing registries; as a result, it generates relatively minor stability concerns. For this reason, adding new competition at the retail level was the first substantive goal that ICANN quickly accomplished after its formation. On the other hand, adding new registry (or wholesale) competition—which is the subject of this hearing—requires the introduction of additional Top Level Domains into the namespace, and thus does raise potential stability issues of various kinds. As a result, and given its prime directive to protect stability, ICANN has moved forward in this area in a prudent and cautious way, consistent with recommendations from many constituencies interested in the Internet, which I will describe in more detail later in this testimony.

3. A third principle was **private sector, bottom-up consensus development,** and the entirety of ICANN's processes are controlled by this principle. ICANN is a private-sector body, and its participants draw from the full range of private-sector organizations, from business entities to non-profit organizations to foundations to private individuals. Its policies are the result of the complex, sometimes cumbersome interaction of all these actors, in an open, transparent and sometimes slow progression from individuals and particular entities through the ICANN working groups and Supporting Organizations to ICANN's Board, which by its own bylaws has the role of recognizing consensus already developed below, not imposing it from above. Like democracy, it is far from a perfect system, but it is an attempt, and the best way we have yet been able to devise, to generate global consensus without the coercive power of governments.

4. Finally, the fourth core principle on which ICANN rests is **representation.** A body such as ICANN can only plausibly claim to operate as a consensus development organization for the Internet community if it is truly representative of that community. The White Paper called for ICANN to "reflect the functional and geographic diversity of the Internet and its users," and to "ensure international participation in decision making." To satisfy these objectives, all of ICANN's structures are required to be geographically diverse, and the structures have been designed to, in the aggregate, to provide opportunities for input from all manner of Internet stakeholders. This is an extremely complicated task, and we are not yet finished with the construction phase; indeed, we have just initiated a Study Committee chaired by the former Prime Minister of Sweden, Carl Bildt, to oversee a new effort to find a consensus solution for obtaining input from and providing accountability to the general user community, which might not otherwise be involved in or even knowledgeable about ICANN and its activities. Other organizational tasks necessary to ensure that ICANN is fully representative of the entirety of the Internet community are also ongoing. This is hard work, and there is more to do to get it done right.

C. WHAT HAS ICANN ACCOMPLISHED SO FAR?

Obviously, ICANN is still a work in progress. Nevertheless, it has, in my view, already made remarkable progress in its young life. ICANN was created in November of 1998, and did not really become fully operational until a year later (November of 1999) with the signing of a series of agreements with Network Solutions Inc., then the sole operator of the largest and most significant registries—.com, .net, and .org. So ICANN really has only about 14 months of operating history. Still, even in that short span of time, some significant things have happened.

1. The Introduction of Retail Competition. As one of its very first actions, ICANN created an accreditation system for competitive registrars and, pursuant to its NSI agreements, gave those new competitors access to the NSI-operated registries. When ICANN was formed, there was only a single registrar (NSI) and everyone had to pay the single price for the single domain name product that sole registrar offered: $70 for a two-year registration. There are now over 180 accredited registrars, with more than half of those actively operating, and you can now register a domain name in the .com, .net, and .org registries for a wide range of prices and

terms—some will charge zero for the name if you buy other services, while others will sell you a ten-year registration for significantly less than the $350 it would have cost pre-ICANN (even if it had been available, which it was not). While there are no precise statistics, in part because the market is so diverse, a good estimate of the average retail price today of a one-year domain name registration in the NSI registries is probably $10-15—or less than half the retail price just 18 months ago.

At the time of ICANN's creation, NSI had 100% of the registration market for the .com, .net and .org TLDs. Today, we estimate that NSI is registering less than 40% of new registrations in those TLDs—a market share drop of more than half in that same 18-month period. There are still issues that must be dealt with in this area; some registrars have not lived up to their contractual commitments, and ICANN needs to ensure that they do. And indeed, there may be too many registrars; 94% of all registrations come from the 10 largest registrars, with the other 80 or 90 active registrars sharing the other 6%. Name registration is quickly becoming a commodity business, and a commodity business, with commodity margins, will probably not support 100 vigorous competitors. We are already starting to see some companies wishing to leave the business, and we need to make as sure as we can that those departures do not impair the ability of consumers and businesses to rely on names they have registered, and that departures or even failures do not generate unreliability or other forms of instability in the namespace itself. So while there are still issues to be dealt with, I think it is widely recognized that ICANN has been very successful in changing the retail name registration market from a monopoly market to a highly competitive market.

2. Creation of a Cost-Effective, Efficient Dispute Resolution System. A second significant accomplishment has been the creation of the Uniform Dispute Resolution Policy, a way to quickly and cheaply arbitrate certain domain name disputes. While domain names themselves cannot be trademarked, it is certainly possible for domain names to be confusingly similar to a trademarked name, or in other ways to be inappropriately used by someone for illegitimate means. Since trademark and other intellectual property rules differ from country to country, enforcing those rights is complex and expensive.

One of the policies that was generated from the ICANN bottom-up process early on was the need for a simple procedure to resolve the clearest and most egregious violations on a global basis. The result, after considerable work in a variety of ICANN forums, is the UDRP, which one commentator recently noted is "widely viewed as a model of dispute resolution for the 21st Century." The UDRP is limited to certain very specific claims, is intended to require only about $1,500 in costs and 45 days to invoke, and is required to be included in all name registration contracts by all ICANN-accredited registrars, thus providing the basis for global uniformity in the resolution of this particular class of domain name disputes. Even though the UDRP is non-binding (either party may take the dispute to court after an unfavorable UDRP decision), it appears that has happened in only a few dozen out of over 2,000 decisions to date.

The UDRP is, I would submit, another very positive accomplishment of ICANN during its short existence to date. As of this writing, parties interested in further refinement of the UDRP are already studying its design for possible revisions.

D. THE INTRODUCTION OF NEW GLOBAL TOP LEVEL DOMAINS.

That brings me to the subject of today's hearings, which is really the third major accomplishment of ICANN in its short existence: the creation of additional competition at the registry (or wholesale) level of the namespace. To understand how much of an accomplishment this was, and how difficult it has been to get to this point, we need to start with some history, after which I will walk through the general standard utilized, the criteria that were applied, the application process, the evaluation process, and the selection process. I will then bring the story up to date with a description of what has happened since the selections were made.

Background. The Internet as we know it today was not created with all of its present uses clearly in mind. In fact, I can safely say (having been very much involved in the very earliest days of the Internet) that no one had any idea how it would develop in the hands of the general public, nor even that it would ever reach public hands. Certainly there was little appreciation of the increasingly critical role it would play in everyday life.

In those days, we were designing a communications system intended for military application and used for experimental purposes by the research and academic community, and not a system for commerce. Internet addresses are numeric values, usually represented by four numbers separated by "." (dots). This is sometimes called "dotted notation" as in 192.136.34.07. In the earliest days, computers ("hosts")

were known by simple names such as "UCLA" or "USC-ISI". As the system grew, especially after 1985 as the National Science Foundation began growing its NSFNET, it became clear that a system of hierarchical naming and addressing conventions would be needed.

At that time, seven so-called "Top Level Domains" were created: .com for commercial, .net for networks, .org for non-commercial organizations, .gov for government users, .mil for the military, .edu for educational institutions, and .int for international organizations. All domain names since that time (with an important exception I will mention momentarily) have been subdivisions of those original seven TLDs. Thus, wcom.com, to pick an example, is part of the .com top level domain, and all messages sent to Vinton.G.Cerf@wcom.com are routed pursuant to the information contained ultimately in the .com registry's distributed database. In particular, that database resolves "wcom.com" into a 32 bit address, such as 192.136.34.07 [note, this is not the actual Internet address associated with the wcom.com domain name].

The exception mentioned earlier is the set of so-called "country code" (or "cc") TLDs. The original seven TLDs were once called "generic" TLDs and are now known as "global" TLDs, meaning that there are theoretically no geographic boundaries that constrain entries in those databases.[4] In the early days of the Internet, one of the most important values to the scientists seeking to incubate and grow this new thing was the spreading of connectivity to as many parts of the world as possible. To help in that, individual countries (and some other geographic areas) were delegated their own TLDs, such as .au for Australia, or .jp for Japan, or .fr for France. Operation of the registries for these ccTLDs was delegated to a wide variety of people or entities, with the primary consideration being a willingness to agree to operate them for the benefit of the citizens of that geography. These original delegates were frequently academics, sometimes government agencies, and sometimes local entrepreneurs; the common thread was that they promised to use these TLDs to provide access to this new thing called the Internet for local constituents. In this way, the Internet, which started as a research experiment in American universities, slowly became truly global. It is worth noting that the Internet research project was international in its scope almost immediately. It started in 1973, and by early 1975, University College London and the Norwegian Defense Research Establishment were involved. Later, sites in Italy and Germany became a part of the Internet research effort.

The original seven gTLDs were created in the mid- to late-1980s; no new global TLD has been added to the namespace since then. There are now some 245 ccTLDs, but as described, these were intended to be for localized use, not as alternatives for global TLDs. So as the Internet grew during the 1990s, demand for domain names grew as well, but as a practical matter the only global (*i.e.,* non-national) TLDs in which businesses or individuals could freely register a domain name were .com, .net and .org—all administered by Network Solutions, Inc. under a contract with the National Science Foundation.

There is a long history about how this came about, which I don't have time to tell, but suffice it to say that as demand exploded, NSI could not effectively operate the registry within the financial framework of its agreement with the National Science Foundation and sought to remedy this by obtaining permission to charge users for registration of names in the .com, .net and .org databases. Over time, there came to be dissatisfaction with the service offered by NSI. In addition (also for reasons too complicated to relate here), NSI was constrained by its contract with NSF to charge exactly $70 for a two-year registration with an annual $35 charge after the second year—no exceptions, no changes. As the number of name registrations climbed into the millions, many felt that the charge far exceeded the cost of accepting the registration and maintaining the database.

This unhappiness of a significant portion of the Internet community was one of the driving forces behind a grass-roots attempt to institutionalize the function of the original ICANN, the Information Sciences Institute at the University of Southern California, a government contractor that performed a set of functions known as the Internet Assigned Numbers Authority (IANA). After almost three years of contentious debate, the grass-roots effort failed to gel and the US Government (after extensive public consultation) then called on the private sector to come forward with a new kind of organization. The private sector responded by creating ICANN, as a way to, among other things, encourage the addition of competition at both the retail and wholesale levels of the namespace.

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[4]Of course, in fact entries in .gov, .mil, and for the most part .edu relate only to the United States, but the other global TLDs are open to entries from all over the world.

Standards for Introduction of New TLDs. As described above, ICANN was able to introduce retail competition relatively quickly after its creation, and this has produced the expected benefits—lower prices, more consumer choice, and innovation. But the introduction of wholesale competition, because it involves actually expanding the structure of the namespace, presented and continues to present more risks. While most Internet engineers believe that some number of additional TLDs could be added without serious risks of instability, there is considerable uncertainty about how many could be added without adverse side effects, and very few engineers have been willing to absolutely guarantee that there was zero risk of instability. Given the increasingly critical role the Internet now plays in everyday commercial and personal life, the almost uniform consensus in the community was to be cautious and prudent in this process.

For example, the White Paper asserted that "expansion of gTLDs [should] proceed at a deliberate and controlled pace to allow for evaluation of the impact of the new gTLDs and well-reasoned evaluation of the domain space." In addition to concerns about the technical stability of the Internet, many were concerned about potential costs that rapid expansion of the TLD space might impose on business and consumers. The World Intellectual Property Organization, which conducted a study of intellectual property issues in connection with the DNS at the request of the United States Government, concluded that new gTLDs could be introduced if done "in a slow and controlled manner that takes into account the efficacy of the proposed measures in reducing existing problems." The Protocol Supporting Organization of ICANN (made up of the Internet Engineering Task Force and other Internet engineering and protocol development bodies) said it saw no technical problems with the introduction of a "relatively small" number of new TLDs.

In fact, every entity or organization without an economic stake in the answer that has examined this question has recommended the same thing: a "small" or "limited" or "prudent" number of new TLDs should be tried first, as a sort of proof of concept or experiment. Once this "limited" number of new TLDs was introduced—and the suggested numbers roughly ranged from 1 to 10—and assuming there were no adverse side effects, then additional TLDs could be introduced if there was consumer demand for them.

The ICANN Structure and Procedures. Because ICANN is a consensus development body that relies on bottom-up policy development, the issues of whether and how to introduce new gTLDs were first taken up by the Domain Name Supporting Organization (DNSO), the ICANN constituent body responsible for name policy issues. The DNSO organized a Working Group, which recommended that a small number (6-10) of TLDs be initially introduced, and that the effects of that introduction be evaluated before proceeding further. That recommendation was forwarded to the Names Council, the executive body of the DNSO, which reviewed the Working Group recommendation and public comments on it, and recommended to the ICANN Board that it establish a "policy for the introduction of new gTLDs in a measured and responsible way." The Names Council suggested that "a limited number of new top-level domains be introduced initially and that the future introduction of additional top-level domains be done only after careful evaluation of the initial introduction."

Consistent with the ICANN bylaws, the ICANN Board accepts the recommendations of Supporting Organizations if the recommendations meet certain minimal standards designed to ensure that they truly represent consensus recommendations. Thus, the Names Council recommendation was published for public comments, and following the receipt of numerous public comments, the ICANN staff in June 2000 issued a Discussion Draft seeking public comments on a series of questions intended to lead to the adoption of principles and procedures to be followed in a "measured and responsible introduction" of a limited number of new TLDs.[5] Following several thousand additional public comments, and considerable discussion at a public meeting in Yokohama in July 2000, the ICANN Board adopted a series of resolutions instructing its staff to begin the process of accepting applications for a "proof of concept" for the introduction of new TLDs.[6]

In early August, ICANN posted a detailed discussion of the new TLD process it proposed to follow,[7] and in mid-August a detailed set of Criteria for Assessing TLD

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[5] See generally *ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, at* http://www.icann.org/yokohama/new-tld-topic.htm.

[6] *See Resolutions of the ICANN Board on New TLDs, at* http://www.icann.org/tlds/new-tld-resolutions-16jul00.htm

[7] *See New TLD Application Process Overview, at* http://www.icann.org/tlds/application-process-03aug00.htm

Proposals.[8] These nine criteria have been constant throughout this process, and so they bear repeating here:

1. The need to maintain the Internet's stability.

This speaks for itself. ICANN's overriding obligation is to protect the stability of the Internet, and all other objectives are secondary. Thus, any proposal that could be shown to threaten this stability (other than any risk inherent in any new TLD introduction) was obviously unacceptable.

2. The extent to which selection of the proposal would lead to an effective "proof of concept" concerning the introduction of top-level domains in the future.

This too is largely self-explanatory. The effort here was not to find the "best" application, however that might be measured, but to ask the community to offer up a set of options from which ICANN could select a limited number that, taken in the aggregate, would satisfy the evaluation objectives of this proof of concept. This is exactly the same approach that ICANN had previously taken in the introduction of competitive registrars, and which had worked so well there. The addition of multiple registrars to the NSI registries required the creation of new interface software, since before this time only one registrar had been able to direct new entries in those registries. Thus, there was some experimental effort required to make sure that the software was ready for use by a larger number of simultaneous registrars. ICANN first created a "test-bed," asked for expressions of interest from the community, and accredited only five new registrars for a period of a few months, while they and NSI worked out the bugs in the interface software. As soon as the test-bed was completed, ICANN accredited large numbers of registrars, now exceeding 180.

Here, the concept is similar: from options offered up from the community, create a limited number of new TLDs to ensure that the DNS can accept, both technically and practically, these additions without impairing stability in any way. Once that is proven, additional TLDs can be created as appropriate.

3. The enhancement of competition for registration services.

Obviously, this is the principal reason for adding new TLDs, so one criterion for determining which applications to accept initially is how effective they are likely to be in creating new competition for the NSI registries. Of course, competition takes many forms; here, one form would be analogous to .com—a global, unrestricted registry focusing on business. To compete in this way requires not only desire, but the capacity to effectively compete with a competitor with high brand awareness (.com has almost become a generic term), a very significant marketing budget, and a large installed base of registered names which will produce some level of renewals more or less automatically. To compete successfully on a global basis under these circumstances requires a significant capital investment, very significant technical expertise (running a database of several million names that gets hundreds of simultaneous queries every second is a complicated matter), and a substantial marketing budget to build the kind of brand equity that will be necessary to compete effectively with, for example, .com.

Another way to introduce competition into the wholesale part of the market is to offer a different kind of product—not a global unrestricted domain, but various kinds of limited or restricted registries that might appeal to specific different sectors of the market. To use a television analogy, narrowcasting instead of broadcasting. Here, capital and marketing expenses may be lower, but other kinds of service characteristics may be more important.

ICANN's purpose with this criteria was to invite a broad range of competitive options, from which it could select a menu that, taken as a whole, would offer a number of different competitive alternatives to consumers of domain name services.

4. The enhancement of the utility of the DNS.

In addition to competition, one must reasonably consider the practical effects of the introduction of new TLDs. The names registered in the DNS are intended to be used by people, and sound engineering requires that human factors be taken into account.

5. The extent to which the proposal would meet previously unmet types of needs.

If it is assumed that the DNS should meet a diversity of needs, it would be a positive value if a proposed TLD appeared to meet any previously unmet needs of the Internet community.

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[8] *See Criteria for Assessing TLD Proposals, at* http://www.icann.org/tlds/tld-criteria-15aug00.htm

6. The extent to which the proposal would enhance the diversity of the DNS and of registration services generally.

Here, what was sought was diversity of all kinds, in the hopes of creating the broadest possible—and thus most instructive—experiment within the limitations recommended (i.e., a small number of new top level domains). So, the published criteria encouraged the submission of proposals for different kinds of TLDs (open or closed, non-commercial or commercial, personal or business-oriented, etc.) The criteria also sought diverse business models and proposals from different geographic regions, for the same reasons.

7. The evaluation of delegation of policy-formulation functions for special-purpose TLDs to appropriate organizations.

For those proposals that envisioned restricted or special-purpose TLDs, this criterion recognized that development of policies for the TLD would best be done by a "sponsoring organization" that could demonstrate that it would include participation of the segments of the communities that would be most affected by the TLD. Thus, with this class of application, the representativeness of the sponsoring organization was a very important criterion in the evaluation process.

8. Appropriate protections of rights of others in connection with the operation of the TLD.

Any new TLD is likely to have an initial "land rush" when it first starts operations as people seek the most desirable names. In addition, every new TLD offers the potential opportunity for cybersquatting and other inappropriate name registration practices. This criterion sought information about how the applicant proposed to deal with these issues, and also how it proposed to provide appropriate mechanisms to resolve domain name disputes.

9. The completeness of the proposals submitted and the extent to which they demonstrate realistic business, financial, technical, and operational plans and sound analysis of market needs.

Finally, this criterion simply emphasized that, since the effort was a "proof of concept," the soundness and completeness of the application and the business plan would be important elements of the selection process. This was not intended to be an experiment in how well the DNS or the Internet could survive the business failure of a new TLD operator. Nor was it intended to be clairvoyant with regard to the outcome of any particular proposal. Thus, to the extent possible, those applications that appeared to have the soundest business plans, based on the most realistic estimates of likely outcomes.

The Application Process. The application process required the filing of a detailed proposal speaking to all the criteria outlined above. It recommended that applicants retain professional assistance from technical, financial and management advisers, and lawyers. And perhaps most controversially, it required a non-refundable application fee of $50,000. A brief explanation of this particular requirement may be useful.

ICANN is a self-funding organization. It has no capital, and no shareholders from which to raise capital. It must recover its costs from the various constituent units that benefit from ICANN's processes and procedures—today, those costs are borne by address registries, name registries, and registrars. Its annual expenditures to date have been in the $4-5 million range, covering employee salaries and expenses (there are now 14 employees), and a wide range of other expenditures associated with operating in a global setting.

Thus, there was no ready source of funds to pay for the process of introducing new TLDs, and the ICANN Board determined that this, like all other ICANN activities, should be a self-funded effort, with the costs of the process borne by those seeking the new TLDs. At that point, ICANN estimated the potential costs of this process, including the retention of technical and financial advisers, legal advice, the logistics of the process, and the potential cost of litigation pursued by those unhappy with the results. While obviously all these elements were highly uncertain, based on its best judgment of how many applications were likely to come in and what the likely costs would be, and incidentally only after receiving public comments, ICANN established a $50,000 fee. As it turns out, there were more applications than expected, and thus the absolute costs of processing and reviewing them were higher than expected; about half the application revenues have already been used to cover costs of the process to date, with considerable work left to do and still with the potential for litigation at the end of the process. To date, it appears that the fact of more applications and higher costs of review and evaluation than expected have

cancelled each other out, and so it appears that the fees adopted were about right in creating the funds necessary to carry out this process.

I know there have been complaints by some that they were foreclosed from this process because they simply could not afford the $50,000 application fee, and I am sympathetic to these concerns. But there are three practical responses that, in my view, make it clear that this is not a fair criticism of the process. First, the process had to be self-funding; there simply was no other option, since ICANN has no general source of funds. Based on costs to date and those projected, it certainly does not seem that the fee was set too high. While there are still application fee receipts that remain unspent, the process is not over, and it has already consumed half of the fees collected.

Second, and as importantly, it is highly unlikely that any individual or entity that could not afford the application fee would have the resources to be able to operate a successful and scalable TLD registry. The capital and operating costs of even a small registry are thought to be considerable, and especially if the goal is to operate a registry that charged low or no fees for name registrations (many of the persons and entities advancing this particular complaint are non-profit or public interest bodies), those fees would not likely cover the costs of operation, much less the necessary start-up and capital costs. Of course, it is possible that, if an organization that would otherwise have difficulty managing the costs of operating a TLD registry were in fact awarded a new TLD, it might be able to raise the funds through subsequent contributions or grants or the like, but this leads us directly to the third point.

This effort was not a contest to find the most qualified, or the most worthy, or the most attractive for any reason of the various applicants. ICANN is not and should not be in the business of making value judgments. What ICANN is about is protecting the stability of the Internet and, to the extent consistent with that goal, increasing competition and competitive options for consumers of domain name services. Thus, what ICANN was doing here was an experiment, a proof of concept, an attempt to find a limited number of appropriate applicants to test what happens when new TLDs of various kinds are added to the namespace today—a namespace that is vastly different in size and in application than that which existed more than 15 years ago when the first seven global TLDs and the ccTLDs were created.

Because this was a proof of concept, the emphasis was on diverse business models, technical capacity, and diversity of geography and focus—and not on some weighing of the relative merits, however measured, of the applicants. Indeed, a serious attempt was made to avoid otherwise normal business risks, such as limits on capital or other resources, so that forseeably likely business failures did not interfere with the data collection and evaluation process of this experiment. Thus, it would have been impossible to accept any application which relied on the mere hope of obtaining funding if an application was accepted, and indeed, several of the applicants not selected in the evaluation process were thought to be deficient just on that point.

Under these circumstances, it was not appropriate to encourage applications by those with limited resources, since those limitations would almost certainly result in their not being selected. Thus, setting the fee to recover expected costs, without regard to the effect it had on applications, seemed then (and seems today) the logical approach. Once this experiment is over, and assuming it demonstrates that adding new TLDs in a measured way does not threaten the stability of the DNS or the Internet, I would hope that processes could be developed to both expedite and significantly reduce the cost of new TLD applications or, at a minimum, to deal with special cases of TLDs with very limited scope, scale and cost.

The Evaluation Procedure. Forty-seven applications were submitted by the deadline established; three of those were withdrawn for various reasons, and the remaining 44 were then published on ICANN's website, open to public comments, and subjected to an extensive evaluation, applying the criteria set forth in the various materials previously published by ICANN. More than 4,000 public comments were received. The applications and the public comments were carefully reviewed by technical, financial and legal experts, and the result of that evaluation—a 326-page staff report summarizing the public comments and the staff evaluation—was itself posted on the ICANN website for public comment and review .by the Board of Directors of ICANN.[9] Another 1,000 public comments were received on the staff report. The Board was provided with regular status reports, interim results of the staff evaluations, and of course had access to the public comments as they were filed.

There has been some criticism of the fact that the full staff evaluation was not available to the public—and thus to the applicants—until November, only days before the actual Board meeting. Obviously, it would have been much better to

[9] *See Report on New TLD Applications, at* http://www.icann.org/tlds/report

produce this earlier, and we tried to do so. But in fact the timing of the release of the staff report was largely the product of the bottom-up process that ICANN follows to generate consensus. An important ingredient in the staff evaluations was the substance of the voluminous—over 5000—public comments produced in the month after the applications were posted. ICANN's job is to identify consensus, and thus input from the community is a critical part of any Board decision. Getting that community input, considering it, and completing the technical and financial evaluations was a massive job.

It would have been preferable to have issued the staff report earlier. But on the other hand, in the six days between the posting of the report and the Board meeting, ICANN received more than 1,000 additional public comments on the staff report, many from the applicants responding to the evaluation of their particular application. The ultimate question is whether the Board got sufficient timely information on which to base its selection decisions, bearing in mind the objective of the exercise. I believe it did.

At its Annual Meeting in Los Angeles in November 2000, the ICANN Board devoted most of the standard public forum day immediately preceding the Board meeting to the new TLD issue, with presentations by the staff of their findings, public comments, and short presentations from the applicants. Another point of criticism by some has been the short time—three minutes—allowed during this public forum for presentations by each of the applicants, but oral presentations were never intended to be the sole or primary source of information for the Board. Voluminous applications (with many hundreds of pages) had been filed by each applicant; many of them had received and answered clarifying questions from the staff; and many of them had provided additional material by filing material on the ICANN public comment page (every one of the 5,000+ comments was read by ICANN staff). The Board had access to the applications and to the staff evaluations well ahead of the public Board meeting at which the applications were reviewed. The opportunity to make a presentation at the public forum was simply the final step in an extensive process, available so that any last-minute questions could be asked or points made.

Since there were 44 applicants, nearly all of whom wished to speak, and since the time available (given the other parts of the community who also wished to be heard) was limited to about two hours, three minutes was simply all the time available. Most used it wisely, pointing out the particular strengths of their applications.

Some disappointed applicants have also complained that ICANN staff refused to talk with them, or let them respond to concerns raised by their applications. This is not accurate; what ICANN staff refused to do is have private conversations with the applicants, and this derives from the very nature of ICANN as an entity. ICANN is a consensus development body, not a regulatory agency; its decisions are intended to reflect consensus in the Internet community, not simply the policy preferences of those who happen to sit on its Board at any given moment. For this process to work, the vast bulk of ICANN's work must be transparent to the public, and so with very rare exceptions (such as matters dealing with personnel issues), everything ICANN does it does in public. (In fact, one of the three applications that were withdrawn resulted from the applicants' unwillingness to allow significant material in their application to be posted on ICANN's website.) If the public was going to have a real opportunity to comment on the applications, the applications themselves needed to be public, and any substantive discussion of them had to be public as well.

In an effort to help this process, and still get questions answered, ICANN staff frequently took email or other private questions, reformulated them to make them more generically useful, and then posted them on the website as FAQs. In addition, staff encouraged applicants to post any information they wished on the public comment pages, where it would be read by ICANN staff, the ICANN Board and also by any interested observer. What staff would not do, and what was evidently very frustrating to many of the applicants that had not previously had any experience with the open structure and operations of ICANN, was to have private substantive discussions with the applicants.

It is easy to understand this frustration, especially for those disappointed applicants who had not previously participated in the ICANN process and, as a result, did not understand what ICANN is and how it operates and thus were surprised at the transparency of the entire process. Still, it is hard to see how any other process could have been followed consistent with ICANN's consensus development process. Without access to the entirety of the information about each applicant and each application that was available to the Board, the Board would not have had the benefit of public comments on some (often significant) factors, and it would have been hard to justify its selections as deriving from a consensus development process.

The Selection Process. To understand the selection process, we must go back to first principles. The goal here was not to have a contest and pick winners; it was not to decide who "deserved" to have a new TLD; it was not even to attempt to predict the kind or type of TLDs that might get public acceptance. The goal, articulated plainly from the beginning of the process more than a year ago, was to identify from suggestions by the community a limited number of diverse TLDs that could be introduced into the namespace in a prudent and controlled manner so that the world could test whether the addition of new global TLDs was feasible without destabilizing the DNS or producing other bad consequences.

This was not a race, with the swiftest automatically the winner. It was a process that was intended to enable an experiment, a proof of concept, in which private entities were invited to participate if they chose to do so—and those who did choose to participate did so voluntarily, knowing that the odds of being selected were not high, that the criteria for being included in this experiment were in some measure subjective, and that the goal was the production of experimental information that could be evaluated. Of course, when many more applications were received than anyone had suggested should be prudently introduced at this stage, some evaluation was necessary to attempt to identify those suggestions that might best fit the experimental parameters that had been laid down. But this was never a process in which the absolute or relative merit of the particular application was determinative.

Many applications with likely merit were necessarily not going to be selected, if the goal was a small number (remember, the entire range of responsible suggestions for introducing new TLDs was from one to 10 new ones). And since one objective was diversity—of business model, of geography, of type of registry—it was highly likely that some qualified applications would not be selected—both because prudence required the addition of only a small number of TLDs, and because our proof of concept required data from a diverse set of new TLDs. This was especially true of those applications seeking open, global TLDs; while two were selected, about half of the 44 applications sought such a charter. But it was also true of others; .geo received a very positive evaluation from the staff, but the Board felt that, at this proof of concept stage, there were in fact potential risks to the operation of the DNS that could not be fully evaluated without consultation with the technical support organization(s) associated with ICANN.

Thus, the Board considered every one of the 44 remaining applications at its meeting on November 16, 2000, measuring them against their collective judgment about how well they would serve to carry out the test that was being considered. In a meeting that lasted more than six hours, the Board methodically reviewed, and either set aside or retained for further evaluation, application after application, until it was left with approximately 10 applications that seemed to have broad consensus support. After further, more focused discussion, that number was pared to the seven that were ultimately selected, and which had almost unanimous Board support: .biz, .info, .pro, .aero, .coop, .museum, and .name.[10] In the aggregate, the Board concluded that this group provided enough diversity of business models and other relevant considerations so as to form an acceptable test bed or proof of concept.

The various TLDs have very different intended purposes, and that is the strength of the group in the aggregate. Two—.biz and .info—were advanced as essentially alternatives to .com—global, business-oriented registries aimed at capturing millions of registered names around the world. In order to compete with .com—which has a recognized brand, a large installed base that produces a regular stream of renewals, and a very substantial marketing budget—these particular applicants assumed they would need a significant investment in both capital equipment and marketing. The Board felt that these applicants seemed most capable of bringing the necessary resources to bear to test whether anyone can effectively compete with .com after the latter's significant head start.

Two other TLDs—.pro and .name—were aimed at individuals rather than businesses, but in very different ways. .pro was aimed at licensed professionals, while .name was aimed at any individual. The other three—.aero (aerospace industry), .coop (for cooperatives), and .museum (for museums)—were all restricted TLDs, aimed at an industry or a business method or a type of entity, and added to the diversity of this experimental collection of TLDs.

ICANN's objectives—and by that we mean to say the objectives of the general Internet community, which ICANN tries to represent—were to introduce a small number of various kinds of new TLDs into the namespace in a prudent fashion, see what happened, and then, if appropriate, based on those results, move forward with additional new TLDs. It is certainly conceivable that some different subset of the

[10] See http://www.icann.org/minutes/prelim-report-16nov00.htm#00.89

applications it had before it would have met that objective as well as those chosen, but the real question is whether the choices were reasonable, and likely to produce the necessary information on which future introductions could be based. It is also possible, as some of those not selected have complained, that those selected will have a head start (to the extent that matters) over future TLD applicants, but this would be an inevitable consequence of any selection of less than all applicants. Those who were not selected, no matter who they are, were predictably going to be unhappy, and those who were selected were predictably going to be glad, but neither was an ICANN goal. ICANN's goal, and its responsibility, was to find a limited collection of diverse new TLDs that could be prudently added to the namespace while minimizing any risk of instability. While time will tell, at this point we believe we faithfully carried out that responsibility.

The Post-Selection Process. Since November, we have been in the process of drafting and negotiating agreements with the selected applicants. Since these agreements will hopefully be templates for future agreements, we are taking great care to make sure that the structure and terms are replicable in different environments. Since these agreements will contain the promises and commitments under which the applicants will have to live for some time, the applicants are being very careful. The result is slow progress, but progress. We are hopeful that we will be able to complete the first draft agreements within a few weeks. The Board will then be asked to assess whether the agreements reflect the proposals that were selected and, if so, to approve the agreements. Shortly thereafter, this great experiment will begin. We are all looking forward to that time.

Of course, it cannot be stressed enough that no one knows for sure what the effects of this experiment will be. Since there have been no new global TLDs introduced for more than a decade, the Internet is a vastly different space than it was the last time this happened. Of course, there have been a number of country code TLDs introduced over that period, and since some of those have recently begun to function in a way quite analogous to a global TLD, it may be that we will be able to conclude that the DNS can readily absorb more new global TLDs. But there has never been an introduction of as many as seven new global TLDs simultaneously, with the possibility of a land rush that is inherent in that fact. There has never been a highly visible introduction of multiple new TLDs in the context of an Internet that has become a principal global medium for commerce and communication. We do not know whether the introduction of a number of new TLDs—especially combined with the relatively new phenomenon of the use of ccTLDs in a fashion never intended (after all, .tv stands for Tuvalu, not television, no matter what its marketers say)—will create consumer confusion, or will impair the functioning of various kinds of software that has been written to assume that .com is the most likely domain for any address.

In short, it is not absolutely clear what effects these introductions will have on the stability of the DNS or how to introduce new TLDs in a way that minimizes harmful side-effects, and that is precisely why we are conducting this experiment. The results will guide our future actions.

E. CONCLUSION

One of ICANN's primary missions is to preserve the integrity and stability of the Internet through prudent oversight and management of the DNS by bottom-up, global, representative consensus development. Like location in real estate, the three most important goals of ICANN are stability, stability and stability. Once there is consensus that stability is not threatened, ICANN is then charged with seeking to increase competition and diversity, both very important but secondary goals. A competitive Internet that does not function is not useful. An Internet in which anyone can obtain the domain name of their choice, but where the DNS does not function when someone seeks to find a particular website, is also not useful.

In its short life, ICANN has some real accomplishments—made more impressive by the inherent difficulty of developing global consensus on anything, but especially on issues as complex and contentious as those facing ICANN. It has achieved these accomplishments by hewing to its first and guiding principle—to maintain a stable, functional DNS—and within those limits by seeking to increase competitive options and efficient dispute resolution. This same principle has guided the careful, prudent way in which ICANN has approached the introduction of new global TLDs, really for the first time in the history of the Internet as we know it today.

ICANN's processes are and have been transparent. The goals and procedures were derived from public comments, clearly laid out at the beginning of the process, and all decisions were made in full public view. Given the importance of care and prudence in the process, and the potentially devastating results of a misstep, ICANN

has and will continue to err on the side of caution. This may mean slower progress than some would like, but it will also reduce and hopefully eliminate the potential for the catastrophic effects on business and personal use of the Internet that malfunction or other instability of the DNS would produce.

Mr. UPTON. All right. Thank you very much.

Mr. Kerner.

STATEMENT OF LOU KERNER

Mr. KERNER. Good morning, Mr. Chairman and members of the committee. I am Lou Kerner, CEO of The .TV Corporation. Thank you for the opportunity to appear today and to share our concerns about the process by which ICANN proposes a new set of top-level domain names to the Internet.

.TV is the registry for Web addresses ending in .tv. In 1999, we entered into a partnership with the sovereign nation of Tuvalu to commercialize its country code top-level domain, .tv, and in just 9 months we have registered over 250,000 domain names, establishing .tv as the fasting growing TLD in Internet history. We have invested millions of dollars to build a globally diverse technical infrastructure that is reliable, scalable, and secure.

We come here as supporters of ICANN, but with serious concerns about its TLD selection process and its impact on the Internet community. The white paper which led to the creation of ICANN in 1998 envisioned an organization which would operate under a, "sound and transparent decisionmaking process and be fair, open and procompetitive." Mr. Chairman, these worthy ideals were not evident in the TLD selection process implemented by ICANN, which can be described as unfair, closed, and anticompetitive.

On August 15, 2000, ICANN solicited applications to operates new TLDs. Applicants were required to submit in great detail their technical, financial and business plan for the proposed TLD and to pay an unrefundable $50,000 fee. After paying the fee and spending hundreds of manhours preparing our applications, we were thrust into a selection process that was highly flawed. Our many concerns with the process are covered in greater detail in our written submission, but let me briefly outline three areas of glaring deficiency for the committee.

First, there was very vague selection criteria. ICANN's criteria for assessing proposals were vague at best and were not weighted in any manner to give applicants a clear idea of the relative importance of each of the criteria. For example, the criteria included the enhancement of competition for registration services. Our consortium thus proposed a registry fee of $3.50 a name, substantially lower than the average of the winning applicant's, which was $9.68, and even the lowest fee among the winners of $5 is still almost 50 percent above our proposed registry fee. However, pricing never seemed to be addressed by ICANN in the selection process.

Our second major area of concern is a lack of due diligence in the process. ICANN had intended that the evaluation process, "not involve only reviewing what has been submitted, but also consulting with technical, financial, business and legal experts and gathering additional information that may be pertinent to the application." However, ICANN received 47 applications by its October 2 filing deadline, which overwhelmed its resources. It became apparent

that the 6-week period allocated to the review process was completely unrealistic.

ICANN fell behind its timetable, forcing it to abbreviate the review process. Most notably ICANN abandoned plans to conduct interviews with applicants. Due process was sacrificed for expediency in order to meet ICANN's self-imposed deadline of November 16.

In response to criticism from applicants concerning the lack of opportunity to respond to the staff report, ICANN announced on November 14 that each applicant would be permitted to make a 3-minute presentation to the board on the following day. As decisions by the board appeared to have largely already been made, this was a disingenuous gesture; thus, we used our time to express our dissatisfaction with the process, and our message met with thunderous applause from the ICANN community members in attendance.

Our final major concern is that the board decisions were based upon factually inaccurate staff reports. After conducting little financial, technical or operational due diligence, ICANN on November 10 released its staff report which, though replete with errors about our proposal, profoundly influenced the decision of the ICANN board. The report was posted just 1 day before the start of the ICANN meetings at which the new TLDs were selected, effectively eliminating the opportunity for public comment originally proscribed by ICANN.

The report seriously misstated the technical capabilities of our consortium, which collectively offered a broad geographical reach, diverse Internet and technological expertise and the financial resources necessary. Our written response to the staff report, posted on ICANN's Web site per ICANN protocol, was not even read by the board. The erroneous findings of the staff report essentially limited our applications and many others from serious consideration by the board.

Given the current situation, Congress must intervene to ensure a fair and equitable method for approving new TLDs. Mr. Chairman, the approval of new top-level domains is an important manner warranting congressional review, and the Department of Commerce should not implement ICANN's recommendation until such a review takes place. We are concerned that Commerce intends to simply rubber-stamp ICANN's implementation request, which we believe is inappropriate given the fundamental flaws in the selection process.

We are not advocating U.S. Government control of the Internet. However, while Commerce maintains oversight authority of ICANN, the U.S. Government has a responsibility to ensure that decisions affecting the Internet are reached fairly and that proper precedents are established.

This is the first major test of ICANN's decisionmaking authority, and Congress has an important role to play in establishing and enforcing the standards by which ICANN will make future decisions. Through the urging of Congress, the Department of Commerce should direct ICANN to reconsider all top-level domain applications in a manner that is fair, open, and rational.

Mr. UPTON. Mr. Kerner, I must beg that we have to stay on our schedule.

Mr. KERNER. Mr. Chairman, in that case, I will stop there. Thank you.

[The prepared statement of Lou Kerner follows:]

PREPARED STATEMENT OF LOU KERNER, CHIEF EXECUTIVE OFFICER, .TV CORPORATION INTERNATIONAL

Good morning, Mr. Chairman and members of the Committee. My name is Lou Kerner. I am Chief Executive Officer of The .tv Corporation International ("dotTV"). Thank you for allowing me the opportunity to appear today and to share our serious concerns with respect to the process by which the Internet Corporation for Assigned Names and Numbers (ICANN) proposes to introduce a new set of generic top level domains ("TLDs") to the Internet.

I want to emphasize at the outset that ICANN, a body that is largely unknown to the public, has enormous power over the Internet today. How it exercises that power has great significance for consumer choice, competition and the efficiency and viability of the Internet. Congress has an important role to play in making sure that ICANN carries out its responsibilities in the public interest.

In July of 1998, the Department of Commerce issued a "White Paper" to create a private, non-profit corporation with broad responsibility to manage the policy and operation of the Internet. This entity, which subsequently became ICANN, was to be governed "on the basis of a sound and transparent decision-making process" that was to be "fair, open, and pro-competitive." Mr. Chairman, this lofty ideal in no way resembles the events of recent months, which more accurately could be described as hurried, arbitrary and unfair. As a member of two bidding consortiums, the dotNOM Consortium and The dotPRO Consortium, it is our belief that the process prescribed and implemented by ICANN is fundamentally flawed and that due process and thoughtful decision making has been sacrificed for the sake of expediency. In reliance on this flawed process, critical decisions with irreversible and far-reaching consequences affecting the future of the Internet may soon be made.

We come here as supporters of ICANN generally, but with serious concerns about its TLD selection process which we view as fundamentally flawed and lacking due process. We continue to recognize the enormous task and power ICANN holds over the Internet today and in the future. How it exercises that power has great significance for consumer choice, competition and the efficiency and viability of the Internet. As the U.S. Department of Commerce still has oversight authority over ICANN, the U.S. Government has an important role to play in making sure that ICANN carries out its responsibilities in a responsible manner.

Following some brief background information, I first will describe the method by which ICANN selected a new set of TLDs and then identify some of the specific flaws in the TLD selection process. Finally, I will set forth the congressional action we believe is necessary to remedy ICANN's actions and to ensure that the deliberate and thoughtful process contemplated by the ICANN charter is followed in decision-making.

1. ABOUT TOP LEVEL DOMAIN NAMES:

The Internet domain name system ("DNS") is based on a hierarchical structure of names. At the top of this hierarchy are top level domain names ("TLDs") comprising "generic" TLDs ("gTLDs") such as .com, .org, .net and the two letter country code top level domains ("ccTLDs") such as .uk, .jp and .tv. Below the TLDs are the many millions of second level domain names that have been registered by individuals and organizations such as amazon.com, earthlink.net and npr.org. For some years consideration has been given to the introduction of new gTLDs, however, none have been added to the system since the mid 1980s.

2. ABOUT ICANN:

Responsibility for the overall coordination of the DNS originally resided with the Internet Assigned Numbers Authority ("IANA") under the oversight of the U.S. Department of Commerce. This responsibility was subsequently passed to ICANN which was created in 1998, however, ICANN continues to be subject to oversight by the Department of Commerce.

ICANN is a not-for-profit corporation that operates under the direction of a board of 19 directors (the "Board"); nine appointed by ICANN's supporting organizations, nine at-large directors and ICANN's President. As at November 16, (the date on

which the Board decided upon the new gTLD which were to be approved) the nine at-large directorships continued to be held by interim directors appointed by the Department of Commerce.

Five directors elected in October 2000 from the at-large Internet community did not assume their positions on the Board until immediately following the November 16 meeting and were therefore precluded from the evaluation and selection of applications for new gTLDs. This is a matter of significant controversy within the Internet community with many believing that the Board's haste to conclude the new gTLD review process was, at least in part, motivated by the desire to thwart the new directors from participating in the process.

3. ABOUT DOTTV:

dotTV is a leading global provider of Web identity services and the exclusive worldwide source for Web addresses ending in .tv. In 1999, we entered into a partnership with the sovereign nation of Tuvalu to operate the registry for its assigned country code top-level domain name, .tv. In just over nine months we have registered over 250,000 domain names and have established ourselves as the fastest growing top level domain in the history of the Internet. To meet these increasing demands and the possibility of assuming the registry function for new TLDs, we have invested millions in building a globally diverse and robust technical infrastructure that is scalable, secure and reliable.

4. ABOUT THE DOTPRO AND DOTNOM APPLICATIONS:

dotTV led a consortium of major international corporations including Lycos Inc., XO Communications, OnlineNIC, SK Telecom and 7DC which submitted two applications for ".pro" (for use by professional service providers) and ".nom" (for non-commercial use by private individuals). Information regarding the structure, operation and objectives of these proposed TLDs is contained in the attached executive summaries of the applications.

The consortium offered many collective strengths including:

- broad geographical reach through its international partners based in the US, China, Korea and Europe;
- an impressive and diverse range of Internet and related technological expertise including registry services, wireless networking, web navigation, broadband, web-hosting and online services;
- financial resources and business relationships necessary to quickly establish an international distribution network and promote the worldwide recognition and adoption of new gTLDs.

With the objective of promoting competition in the domain name industry and providing consumers with a low priced alternative, the dotTV-led Consortium proposed that both the .pro and .nom TLDs would be made available to registrars at an annual rate of $3.50. This price was significantly lower than that proposed by most other applicants including the successful rival application for .pro which proposed a price of $6.00.

5. THE APPLICATION PROCESS:

In August of 2000, ICANN began its process by announcing that it would solicit applications for new TLDs to supplement the Internet's current TLDs. Application Instructions were first posted on ICANN's website on August 15, 2000 directing that applications in the prescribed format be filed by October 2, 2000 with an accompanying non-refundable fee of $50,000. Applications were required to set forth in great detail the applicant's technical, financial and business plans with regard to the new gTLD being proposed. Some applications exceeded several hundred pages and included lengthy technical appendices.

ICANN received 47 applications by the October 2 filing deadline and publicly acknowledged that it had not expected such a large number of submissions. This volume clearly overwhelmed ICANN which fell further and further behind its stated timetable over the following weeks. In the face of the increasing backlog in the process, ICANN chose to significantly abbreviate or abandon certain planned steps in the review and evaluation process rather than push back its self-imposed November 16 deadline for completion of the process. Attached is a schedule outlining the review and evaluation timetable showing targeted and actual dates of each step in the process.

The mere 6-week period allocated by ICANN for the entire review process was extremely ambitious and, in light of the number of applications filed, completely unrealistic.

6. THE DEFECTS IN THE PROCESS:

Mr. Chairman, I am not a lawyer, and I do not claim to be an expert on the subject of procedural requirements, but the methods employed by ICANN to select new TLDs fundamentally lacked fairness, and it does not take a lawyer to reach that conclusion.

Many of the flaws in the process stem from the unrealistic timetable that ICANN imposed upon itself in evaluating and selecting successful applications. It is unclear to us why the Board should have been so motivated to conclude the process by November 16, though we note that by making its decision on this date the newly elected at-large directors were prevented from being involved in the selection process.

Mr. Chairman, we believe that the selection process was fundamentally flawed in the following three respects:

A. Vague and Unweighted Selection Criteria.

The stated criteria for assessing new top-level domain proposals were vague at best and were not weighted in any manner to give applicants a clear idea of the relative importance attributed by ICANN to each of the criteria.

B. Lack of Due Diligence.

Partly due to the unanticipated number of applicants (47) and the extensive nature of the application materials, ICANN found itself unable to review the proposals as planned and as the Internet community expected.

ICANN's original instructions contemplated that "ICANN staff may gather additional information by sending applicants e-mails asking for the information, by conducting telephone or in-person interviews with applicants, by attending (possibly with ICANN-retained experts) presentations by applicants or their experts, or by other means. These inquiries will be initiated by ICANN staff." The original timetable provided that such consultation would occur between October 18-21; however, on October 23 ICANN advised that it had abandoned this step stating that because "the applications that have been submitted do a generally good job of explaining the nature of the proposals, [we] have concluded that real-time interviews are not warranted at this time." In reality, it appeared that ICANN's decision to dispense with this important step of the review procedure was entirely motivated by its desire to expedite the process, and that applicants were being denied due process so that ICANN's staff could meet their self-imposed November 16 deadline for concluding the selection process.

In response to mounting criticism over the lack of opportunity for applicants to present their proposals in person and to respond to the staff report, the ICANN staff announced on November 14 that each of the remaining 44 applicants would be permitted to make a *three minute* presentation to the Board on the following day. Applicants who had invested tens if not hundreds of thousands of dollars and countless hours to prepare and file immensely detailed proposals incorporating financial, technical and operational plans, (in many cases comprising hundreds of pages), and paid a non-refundable fee of $50,000 now found that success or failure could hinge on a three minute "pitch". The Board heard approximately 40 of these three minute presentations back-to-back on November 15.

C. Publication of and reliance on factually inaccurate Staff Report.

Prior to the November 16 decision, the ICANN staff prepared a staff report, which though replete with errors about our proposal as well as others, profoundly influenced the final decisions by the Board of Directors. ICANN posted the staff report on its website on Friday, November 10, only one day before the start of the ICANN meetings at which the Board was to select the new gTLDs. Neither the TLD applicants nor the public had a meaningful opportunity to register objections or comments to the staff report prior to the inception of the ICANN conference. The preliminary assessments made in the staff report essentially amounted to the summary rejection of many of the applications and was formulated behind closed doors without any consultation with the public or the applicants. The staff report included serious factual errors and presented damaging misstatements to the Board and the public.

The report also ignored or downplayed important positive elements of certain applications that it appeared not to favor. Specifically, with regard to the dotTV Consortium's applications, the report inaccurately assessed dotTV's technical capabilities and failed to discuss our proposed pricing structure that would have enormously enhanced competition in the domain name business for the ultimate benefit of the consumer. dotTV issued a letter to ICANN on November 12 identifying and correcting several of the most glaring errors and misstatements contained in the report and urging the Board not to rely solely on the findings of the staff report, however,

it appears that this letter was not seriously considered by the Board before their deliberations.

The ICANN staff strongly urged the Board to rely on the staff report's findings and to adhere to its recommendations. This position was reinforced by the in-person presentation made to the Board by ICANN staff on November 15 which prompted Board member Vinton Cerf to comment "I must confess to a certain discomfort with the process because it feels like we're a venture capital firm". During this presentation, staff members advised that many applications had failed to meet certain "threshold" criteria including "completeness", though these criteria were not elaborated upon by the presenters. The presentation then went on to discuss only those applications which had satisfied the staff's undefined criteria and no reference was made to dotTV's written response which had challenged underlying assumptions contained in the staff report.

On November 14, by a vote of 78 to 52, the General Assembly of the Domain Name Supporting Organization, a supporting body of ICANN, adopted a resolution that the Board "should not decide upon new gTLDs until the applicants have had time to respond to the Staff Report." The ICANN Board ignored this resolution.

7. QUESTIONABLE SELECTIONS OF NEW TLDS.

The gTLDs selected by the Board on November 16 include: .pro, .aero, .museum, .name, .biz, .info, and .coop. Given the inherently flawed nature of the process, it is not surprising that the wisdom of these selections is being seriously questioned by the Internet public. It is generally felt that few if any of the selected gTLDs meet the criteria by which ICANN purported to evaluate the applications and that, collectively, they offer little to enhance the utility of the Internet.

It is our view that the proposals presented by the dotTV-led consortiums would provide a low-priced alternative, promoting competition and consumer choice within the domain name business. Owing to erroneous conclusions in the staff report, however, ICANN eliminated this proposal from consideration early in the selection process.

8. CONGRESS MUST INTERVENE IN THE ICANN SELECTION PROCESS TO ENSURE FAIR AND EQUITABLE METHOD FOR APPROVING NEW TLDS.

Mr. Chairman, dotTV strongly believes that the approval of new TLDs is an important matter for congressional review, and that the Department of Commerce should not be permitted to implement ICANN's recommendations until such a review takes place. We are concerned that the Department intends to treat ICANN's request for implementation of the new TLDs simply as a matter for technical review which we believe is inappropriate due to the fundamental flaws in the selection process. The United States government—and the American public—have a stake in ensuring that ICANN's procedures be as fair as possible.

Mr. Chairman, we are not advocating that the United States attempt to dominate the management of the Internet, nor are we advocating that the U.S. or any government control the Internet. As long as the Department of Commerce maintains oversight authority of ICANN, however, the U.S. government has a responsibility to ensure that decisions affecting the Internet are reached fairly. In addition, it is important to establish correct precedents for similar decisions by ICANN in the future. The Department's White Paper contemplated that ICANN would engage in fair, open, and representative decision-making, and ICANN's approval of new TLDs is the first major test of its decision-making authority. Congress has an important role to play in establishing and enforcing these standards to guide how decisions will be made in the future.

Through the urging of Congress, the Department of Commerce should direct ICANN to immediately suspend the current process and to reconsider all TLD applications—both those approved and those denied—under a procedure that is fairer and more rational than witnessed in recent months. Only by doing so will ICANN assure that the first expansion of TLDs occurs in manner that is both deliberative and pro-consumer.

Mr. UPTON. And I appreciated receiving your statement as well, which I was also able to read last night. Thank you.

Ms. Broitman.

STATEMENT OF ELANA BROITMAN

Ms. BROITMAN. Mr. Chairman, Mr. Markey, and members of the committee, thank you for inviting me to appear before you today.

I commend the committee for holding this hearing, as your role is important to continuing the stable and innovative growth of the Internet.

I am here representing register.com, an equity partner in RegistryPro, which, as you know, is one of the new registries selected by ICANN. I am here to provide the perspective of a company that was awarded a new TLD. Building on the restricted model of .gov, .edu, and .mil, RegistryPro proposed a .pro TLD to focus on professionals. I can also offer the perspective of a registrar, as we believe consumers will benefit significantly from new TLDs.

To fully answer the question, please allow me to briefly review the growth of this market. As the committee knows, from 1993 to as recently as 2 years ago, a single company was both the only registry and the sole registrar for .com, .net and .org. To introduce competition, ICANN has taken two major steps. Two years ago, ICANN launched a test bed of five registrars, and although NSI remained the sole registry, there are over 140 accredited registrars.

With competition, the domain name market has grown dramatically, from 8 million in 1999 to about 29 million .com, .net and .org names today. ICANN took its second step with these new TLDs, and the market is projected to grow to over 140 million in 4 years. The growth is key not only for registrars, but also other Internet-related businesses.

This committee has endorsed competition in this sector knowing that it would deliver value to consumers, and it has been proven right. Competition among registrars has improved technology, customer support, introduced price competition, and fostered innovative new products. Competition among registries will similarly deliver value.

First, there will be improved services; second, consumers can register for the Web address of their choice; they will also be able to distinguish their Web site, depending on the TLD they choose. Conversely, delay only serves to protect the sole global registry and deny consumer choice.

While registry competition will not exist until these new TLDs are actually operational, this will take months of preparation and significant resources. Substantial technological facilities must be built, engineering protocols and applications written and tested, and highly skilled personnel located and retained.

Competition is also critical to future innovation. New technology is on its way, but if new registries are not introduced rapidly, there will be only one registry in a position to shape and operate the new technologies.

As for the process, we believe it achieved the fundamental of introducing successful new TLDs while protecting the stability of the Internet. On August 15, ICANN posted eight specific criteria relating to stability, proof of concept, competition, utility of the domain name system, meeting unmet needs, diversity, policy, and protecting the rights of others.

RegistryPro worked hard to meet these requirements. We prepared a detailed description of state-of-the-art, innovative technology that would enhance the usefulness and dependability of the .pro Web sites. We proposed an innovative TLD that would add di-

versity and address the needs of consumers and professionals. We reached out to professional associations and credentialing bodies to work out a good trust and verification mechanism, and are establishing an advisory board to continue doing so.

We also outlined a set of policies to address the needs of the various domain name system constituencies and guaranteed a level playing field for all accredited registrars. We have invested hundreds of thousands in research, analysis, and preparation of a thorough proposal, and the build out and operation of a secure registry requires a commitment of millions more. We believe that our application, like others, received substantial scrutiny by the independent panels of experts, by ICANN's staff, by the public during several public comment periods, and, ultimately, significant independent deliberation by the ICANN board. There was an opportunity in this process for applicants to clarify their documents on the public record.

While no process is perfect, we believe a genuine effort was made by ICANN to provide notice, transparency and fairness. ICANN accomplished the ultimate goal of launching new global TLDs while minimizing risk. The variety of these TLDs paves the way for future development. As the chairman noted in the last hearing on this subject, ICANN is responsible for introducing competition. We hope that the committee's conclusion today is an endorsement of an expeditious launch of these new TLDs so that consumers can benefit from the resulting innovation and the availability of new domain names.

Mr. Chairman, and members of the committee, it has been my pleasure to testify today. I appreciate the opportunity.

Mr. UPTON. And you yield back the balance of your time. That is terrific.

[The prepared statement of Elana Broitman follows:]

PREPARED STATEMENT OF ELANA BROITMAN, DIRECTOR, POLICY AND PUBLIC AFFAIRS, REGISTER.COM, INC.

INTRODUCTION

Mr. Chairman, Members of the Committee, thank you for inviting me to appear before you today. I commend the Committee for holding this hearing. Your role is important to continuing the stability and innovative growth of the Internet.

I am here representing register.com, an equity partner in RegistryPro. RegistryPro, as you know, is one of the new registries that was selected by the Internet Corporation for Assigned Names and Numbers (ICANN) to operate a new global Top Level Domain (TLD)[1]. RegistryPro is a new company formed by register.com, one of the leading registrars on the Internet today, and Virtual Internet Ltd, a top European registrar.

I am here to provide the perspective of a company that was awarded a new TLD, .pro. Building on the restricted model of .gov, .edu, and .mil, the .pro TLD focuses on professional registrants—such as doctors, lawyers, and accountants. I can also offer the perspective of a *registrar*. Based on our two years' experience, register.com believes consumers will benefit significantly from the introduction of new TLDs.

INDUSTRY OVERVIEW

To fully answer the question about the new TLDs, please allow me to briefly review the structure and growth of the domain name market.

Securing a domain name, or Internet address, is the *first and fundamental* step for businesses, individuals, and organizations that are building a presence on the

[1] A TLD is the domain name address, such as .com, .net, and .org. The new TLDs would be .pro, .info, .biz, .name, .aero, .museum, and .coop.

web. Before setting up a website or launching e-commerce, a consumer contacts a *registrar,* such as register.com, to secure a domain name, such as www.house.gov. Registrars maintain contact with the consumer, invoice the customer, handle all customer services, and act as the technical interface to the registry on behalf of the customer.

A *registry,* such as Verisign Global Registry Services for .com, .net and .org, maintains the list of available domain names within its TLD and allocates those names on a first come, first served basis. Registrars get the domain names for the consumer by purchasing them from the registry that manages that TLD.

As this Committee knows, the Internet, and the domain name market in particular, has grown and expanded at a rapid pace. From 1993 to as recently as two years ago, a single company, Network Solutions ("NSI"), today owned by Verisign, was both the only *registry* and the sole *registrar* for .com, .net, and .org TLDs. Presently, these TLDs are the only globally available generic domain addresses.

In determining the best manner to introduce competition and oversee the domain name system, the Department of Commerce called for the creation of a not-for-profit corporation. ICANN was recognized to fill that role.

To introduce competition, ICANN has taken two major steps. First in April 1999, ICANN launched a test bed of five registrars. Register.com was the first registrar to go "live" and register .com, .net, and .org names. Although NSI remained the sole registry for the com, .net, and .org TLDs, today there are over 140 accredited registrars. Consumers have benefited from the competition in prices and services.

In November 2000, ICANN took the second step toward competition by approving the introduction of seven new global TLDs to generate competition in the registry business. RegistryPro was selected to manage the .pro TLD, which is restricted to the professional business sector. Other new TLDs include unrestricted, personal, and non-profit domain name sectors.

The domain name market has grown to about 29 million .com, .net, and .org domain names, and growth has increased dramatically since the days of the registrar monopoly, from 8-9 million in 1999, to more than 20 million in 2000, the first full year of competition. This market is projected to grow to over 140 million registrations over the next four years. This growth is fundamental not only to the health and competitiveness of the registrar business community, but the introduction of new TLDs will also expand the opportunity for other Internet-related businesses

COMPETITION AMONG REGISTRIES

This Committee has endorsed competition in this sector, knowing that it would deliver value to consumers. It has been proven right. Competition among registrars has improved technology and customer support, introduced price competition, and fostered innovative new products to better serve the needs of domain name holders and Internet businesses.

Competition among registries will similarly deliver value. First, consumers will have a choice among competitive TLDs and registries, leading to improved services. For example, alternative registries may accelerate the launch of websites and make them more secure. Second, consumers can register for the web address of their choice, as the best addresses, in many cases, are already taken in the .com, .net and .org TLDs. Third, consumers will be able to distinguish their web address based on the TLD they chose—we believe, for example, lawyers would prefer .law.pro and accountants, .cpa.pro.

Conversely, delay in launching new TLDs serves to protect the sole global TLD registry and deny consumer choice.

DO NOT DELAY LAUNCH OF NEW TLDS

While registry competition will not exist until these new TLDs are operational, this will take months of preparation and significant resources. Substantial technological facilities must be built, engineering protocols and software applications written and tested, and highly skilled personnel located and retained. In fact, substantial resources have already been spent and committed—both during the application process and since then.

Not only is competition going to improve the registry sector, it is fundamental to future innovation. New technology is on its way "if new registries are not introduced rapidly, there will be only one company in a position to operate the new technologies and determine the course of their evolution. For example, Verisign launched the worldwide test beds with respect to two recent developments—multilingual domain names, and eNUM, a convergence of telephony and domain names. There were no other competitive registries in place to create an alternative environment.

Moving expeditiously to add these new TLDs to the domain name system is critical.

REGISTRYPRO'S EXPERIENCE WITH THE PROCESS

As for the process, we believe it achieved the fundamental goals of determining whether an applicant had what it takes to run a successful TLD, and balancing the interest in new TLDs with the imperative to preserve the stability of the Internet.

While notice of its plans to authorize competitor registries has been publicly available for about two years, ICANN posted a set of criteria for assessing new TLD proposals on August 15, 2000:

1. *The need to maintain the Internet's stability.* ICANN analyzed:
   a. the prospects for the continued and unimpaired operation of the TLD,
   b. provisions to minimize unscheduled outages due to technical failures or malicious activity of others,
   c. provisions to ensure consistent compliance with technical requirements,
   d.the effect of the new TLD on the operation of the DNS and the root-server system,
   e. measures to promote rapid correction of potential technical difficulties,
   f. the protection of domain name holders from the effects of registry or registration system failure, and
   g. provisions for orderly and reliable assignment of domain names during the initial period of TLD operation.
2. *The extent to which selection of the proposal would lead to an effective "proof of concept" concerning the introduction of top-level domains in the future.* Proposals were to be examined for their ability to promote effective evaluation of
   a. the feasibility and utility of different types of new TLDs,
   b. the effectiveness of different procedures for launching new TLDs,
   c. different policies under which the TLDs can be administered in the longer term,
   d. different operational models for the registry and registrar functions,
   e. different business and economic models under which TLDs can be operated;
   f. the market demand for different types of TLDs and DNS services; and
   g. different institutional structures for the formulation of registration and operation policies within the TLD.
3. *The enhancement of competition for registration services.* ICANN noted that though the market will be the ultimate arbiter of competitive merit, the proposals were to be evaluated with regard to whether they enhanced the general goal of competition at both the registry and registrar levels.
4. *The enhancement of the utility of DNS.* Under this factor, TLDs were to be evaluated as to whether they added to the existing DNS hierarchy without adding confusion. For example does the TLD's name suggest its purpose, or in the case of a restricted TLD, would the restriction assist users in remembering or locating domain names within the TLD?
5. *The extent to which the proposal would meet previously unmet needs.* Close examination was to be given to whether submitted proposals exhibit a well-conceived plan, backed by sufficient resources, to meet presently unmet needs of the Internet community.
6. *The extent to which the proposal would enhance the diversity of the DNS and of registration services generally.*
7. *The evaluation of delegation of policy-formulation functions for special-purpose TLDs to appropriate organizations.*
8. *Appropriate protections of rights of others in connection with the operation of the TLD.* The types of protections that an application was to address included:
   a. a plan for allocation of names during the start-up phase of the TLD,
   b. a reasonably accessible and efficient mechanism for resolving domain-name disputes,
   c. intellectual property or other protections for third-party interests,
   d. adequate provision for Whois service that balances personal privacy and public access to information regarding domain-name registrations, and
   e. policies to discourage abusive registration practices.

REGISTRYPRO MET ICANN REQUIREMENTS

We worked hard to meet these requirements. We prepared a detailed description of innovative state-of-the-art technology, which would enhance the usefulness and dependability of the .pro websites. The RegistryPro technology would:

- Allow for near real time posting of websites (as opposed to today's 48-hour waiting period),

- Diminish the potential for system crashes,
- Protect consumers against potential registrar failures, and
- Provide better tools to protect against potential cyber squatters or professional imposters.

We proposed an innovative TLD that would add diversity to the current domain name space and address the needs of the marketplace. Based on our surveys of consumers and professionals, we determined that consumers were looking for a trusted way to identify professionals on the Internet, and professionals would be more inclined to register domain names if they had a designated address.

In devising that trusted addressing system, we have reached out to professional associations, to work out the mechanisms for verifying professional credentials.

We also outlined a set of policies to address the needs of various constituencies. We balanced intellectual property protections, which earned us one of the highest ratings by the intellectual property constituency, with personal privacy concerns. We also guaranteed a level playing field for all accredited registrars.

We invested hundreds of thousands of dollars—including in market research, legal drafting, and financial analysis—to prepare the application. The build out and operation of a stable and secure registry requires a commitment of millions more.

We believe that our application, like others, received substantial scrutiny—by the independent panels of international experts in technology, law and finance; by ICANN staff, by the public during several public comment periods; and ultimately by significant independent deliberation by the ICANN Board. There was an opportunity for applicants to clarify their documents, on the public record. While no process is perfect, we believe a genuine effort was made by ICANN to provide notice, transparency and due process.

ULTIMATE GOAL ACCOMPLISHED

ICANN accomplished the ultimate goal of launching new global TLDs while protecting the security of the Internet. These new TLDs offer a variety of business models and domain name addresses—from generic to non-profit. Incremental growth will protect stability and pave the way for future development.

As the Chairman had noted in the last hearing on this topic, ICANN is responsible for introducing competition into the registration of domain names. We hope that the Committee's conclusion today is an endorsement of an expeditious launch of these new TLDs, so that consumers can benefit from the resulting innovation and the availability of new domain names.

Mr. Chairman, Members of the Committee—it has been my pleasure to testify today. Thank you for the opportunity.

Mr. UPTON. Mr. Short, welcome.

STATEMENT OF DAVID E. SHORT

Mr. SHORT. Thank you. Good morning, Mr. Chairman and subcommittee members. My name is David Short, and I am the legal director for the International Air Transport Association, IATA, based in Geneva, Switzerland. IATA appreciates this opportunity to appear today to share with the committee its experience in applying to ICANN to sponsor .travel as a new Internet TLD. Copies of IATA's written comments have been previously provided to the committee staff, and, before proceeding, may I ask that they be incorporated into the record of this hearing?

Mr. UPTON. Absolutely.

Mr. SHORT. Thank you.

First, let me say a word or two about my organization, IATA. IATA lies at the very heart of the world's largest industry, travel and tourism. Our members consist of 275 airlines, which transport over 95 percent of the world's scheduled international air traffic.

Travel is one of the largest segments of e-commerce today. There are really only two things holding travel back from realizing its full potential in the new economy. The first is the fact that in the .com environment there are no quality standards applied to domain name registrants. It is the first party to show up with $35 to claim

a name not already taken by somebody else who gets it, without having to satisfy any integrity, consumer protection or quality assurance standards.

And so while many consumers may research travel on the Web, they are understandably reluctant to actually book and pay for transactions on .com Web sites they have no reason or basis to trust in. And this makes it all the harder for new Web sites to compete with the existing dominant sites like Expedia and Travelocity.

The second constraint is the depletion of commercially attractive .com names. As the committee is well aware, all the simple and obvious names, and virtually all of the common English language words, are already registered as .com domain names, thus erecting potentially insurmountable barriers to new entry and new competition.

And so when ICANN announced it would entertain applications for new TLDs, IATA conceived .travel as a dedicated TLD for the entire travel industry, where quality criteria would be applied such that consumers would have a basis to trust in and more readily do business with .travel Web sites.

The IATA application drew support on the record from individual commenters and associations representing over 1 million travel industry businesses around the world. Our application and supplemental filings with ICANN demonstrated that we fully satisfied all of the nine criteria that ICANN had announced would apply to the new TLD applications, and ICANN never disagreed with that.

What happened was the ICANN staff evaluation of our application decided to apply a new 10th criterion, which they called representativeness, and they erroneously concluded the IATA application did not reflect sufficient representativeness of the travel industry and threw it out based solely on that factor, without regard to all of its undisputed positive attributes or the widespread support it had attracted.

Obviously, it was fundamentally unfair to judge our application according to something we had no notice we even needed to address. But even more troubling is the fact that when looked at objectively, our application is, in fact, one of the most representative of all of the applications, as evidenced by the broad support it attracted on the record.

The ICANN staff conclusion was based solely on the fact that a relatively small number of comments had been filed on the comment form by a group of travel agents who have a record of opposing virtually everything proposed by the airline industry, not because it is a bad idea, but simply because they have an axe to grind against the airlines. No effort was made by the ICANN staff to assess the veracity of the statements made in these comments, nor to recognize that they were, in fact, prompted by ulterior motives rather than any valid objection to the .travel TLD.

Moreover, IATA seeks only the opportunity to offer .travel as a new competitive alternative. Any of these dissenting commenters, or anyone else for that matter, who wants to stay in the .com world remains free to do so. So there is absolutely no reason to allow a tiny minority of travel agents to veto an innovative proposal to introduce a new competitive alternative so desperately sought and supported by the great majority of our industry.

In summary, all IATA asks is that our application be given the fair shake we clearly were denied in November. One way to do so would be for ICANN to grant our pending request that our application be reconsidered. Another would be for the Commerce Department to exercise its responsibility to select the new TLDs in accordance with APA requirements.

I see my time has expired. Thank you very much.

[The prepared statement of David E. Short follows:]

PREPARED STATEMENT OF DAVID E. SHORT, DIRECTOR, LEGAL SERVICES, THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

Good morning Chairman Upton and subcommittee members:

My name is David E. Short. I am the Legal Director of the International Air Transport Association ("IATA"), Based in Geneva, Switzerland. IATA appreciates this opportunity to share with the subcommittee IATA'S experience as an applicant for one of the new Internet Top Level Domains, or "TLDs."

I am here today because IATA is committed to sponsoring ".travel" as a new Top Level Domain. Given that the travel industry represents one of the largest and most popular segments of e-commerce, ".travel" clearly is an obvious choice for one of the first new TLDs to be added to the Internet.

The addition of ".travel" to the Internet would greatly enhance competition in the Domain Name space by offering suppliers and consumers of travel-related goods and services critical advantages that are not provided by the ".com" TLD. ".com" currently is the dominant TLD for all commercial industries, including travel. Unlike ".travel," which would be a restricted TLD, ".com" is an unrestricted TLD. A ".travel" TLD would have two competitive advantages over the unrestricted TLDs.

The first advantage is that, as a restricted TLD, ".travel" would create a subdivision of the Internet which, by excluding non-travel web sites, would make it much more efficient and easier for consumers and businesses to locate the travel-related entity or information they are seeking.

The second advantage is that, with a ".travel" TLD, consumers will know that when they access a Domain name ending in ".travel," they will be in touch with a company that has shown itself to be a legitimate participant in the travel industry by satisfying certain objective and transparent quality standards. By contrast, unrestricted TLDs can offer no such indication.

Whatever their respective merits, none of the seven new TLDs selected by ICANN provides these types of advantages. The seven new TLDs divide into two groups. Either they are just as generic in scope as the ".com" TLD, or they are substantially more limited in scope than ".travel." What is missing is the critical middle area, exemplified by ".travel,"—which adds value by being restricted to a particular industry, but is not so limited in scope that it provides effectively no competitive challenge in the Domain Name space. As long as ICANN excludes TLDs such as ".travel," the true potential of e-commerce will remain untapped.

Unfortunately, because of the arbitrary and capricious manner in which it treated IATA's proposal, ICANN precluded itself from appreciating how ".travel" would significantly enhance competition in the Internet. The addition of new TLDs involves a critical asset financed and controlled by the U.S. Government—namely, the authoritative, or "a" root server. Consequently, the process for selecting new TLDs must comply with the U.S. Administrative Procedure Act.

ICANN's treatment of IATA's application fell far short of the mandates of that law. Among other things, ICANN completely ignored the fact that our ".travel" proposal satisfied each and every one of the nine criteria which ICANN said it would consider in evaluating the proposals. Instead, ICANN summarily refused to select ".travel" based solely on a new and previously undisclosed tenth criterion—"representativeness"—which ICANN applied to IATA's application in a discriminatory and otherwise unfair manner.

Before going into more details regarding how our proposal was treated, I Would like to tell you a little more about IATA. IATA is a not-for-profit association that has played a leading role in the global travel industry since 1919. It has 275 member airlines (246 active and 29 associate) in 143 countries. IATA has offices in 75 countries around the world.

Among other things, IATA has developed standardized airline ticket formats that are recognized around the world and make it possible to buy a ticket from a travel agency in Tokyo, that will be recognized and accepted by a domestic airline in South Africa, for a flight from Johannesburg to Cape Town. Similarly, the IATA "interline"

system makes it possible to purchase a single ticket, with a single payment, covering travel on a succession of different airlines. IATA has been entrusted by the industry, and by governments around the world, to design and equitably administer the coding systems essential for the smooth and efficient functioning of the travel industry. IATA also has developed standards for accreditation and endorsement of travel agencies, and it has a long-standing relationship with travel agents and travel organizations in an effort to improve both the business processes and the marketing and sale of transportation products.

In addition to its airline membership, IATA counts among its customers approximately 90,000 IATA accredited or endorsed travel agents located in 209 countries; the operators of other modes of transportation such as railways and ferry companies; and numerous other suppliers of travel-related goods and services including hotels, travel insurance providers, etc.

IATA is uniquely and ideally positioned to sponsor the ".travel" TLD because its core activities have always included the setting of industry standards to facilitate cooperation among suppliers of travel related services and goods, for the benefit of their customers. it is entirely logical that IATA exercise its traditional leadership role to enable the travel industry and its customers to fully exploit the potential of the Internet.

It is important to highlight that IATA's vision for ".travel" was never limited to only a portion of the global travel community. Rather, businesses, other organizations and individual stakeholders from the entire travel industry, including the following, would be able to obtain Domain Name registrations ending in ".travel": Scheduled Airlines; Charter Airlines; Airports; Ferries; Train Operators; Bus and Coach Operators; Ground Handlers; Catering Companies; Car Rental Companies; Hotels and Resorts; Bed and Breakfast Houses; Camp Facility Operators; Tourist Boards/Associations; Tourist Facility Operators; Travel Guide Publishers; Travel Agents; Tour Operators; Consolidators; Internet Service Providers for Travel; Computer Reservation Systems/Global; and Distribution Systems

Critical decisions affecting ".travel", including setting objective and transparent standards for determining who qualifies to obtain a Domain Name, would be made not by IATA but, rather, by the ".travel" Advisory Board, to be comprised of worldwide representatives of the travel industry. No individual sectors within the travel industry, including the airlines, would have "veto" rights over decisions approved by a majority of this board concerning the standards applicable for ".travel" Domain Names.

".travel" also would alleviate the problems that arise from the fact that many trade names in the travel industry have counterparts in non-travel related businesses. Consider the example of an entity called Southwest Insurance Company. In the current system dominated by the ".com" TLD, Southwest Airlines would have no priority over Southwest Insurance for the Domain Name "www.southwest.com." This situation limits the ability of travel-related businesses to utilize the internet to the maximum extent possible, and often causes confusion and frustration among consumers, who are unable to access a particular travel-related web site simply by typing in the trade name plus ".com." with respect to travel-related trade names, this problem would largely evaporate with the creation of the ".travel" TLD.

While IATA believes that ".travel" is an ideal selection for the new generation of competitive TLDs, and that IATA is perfectly suited to sponsor this TLD, we are not here to ask Congress to deliver this result. But we do request that the committee exercise its oversight authority to ensure that the U.S Department of Commerce fulfills its obligations with respect to the selection of new top level Domain Names.

Unfortunately, so far Commerce has given no assurance that it intends to fulfill these obligations. It has taken no measures to correct the fundamental shortcomings of the TLD selection process administered last fall by ICANN.

The Commerce Department is inescapably tied to the TLD selection process, a process which boils down to the issue of which TLDs the Commerce Department will approve to be added to the authoritative "a" root server. The "a" root server is a critical asset financed by the U.S. Government and controlled by the Commerce Department. As a practical matter, a TLD must be added to the "a" root server in order to be accessible by the vast majority of Internet users. Both ICANN and the U.S. General Accounting Office recently have confirmed that it is Commerce, not ICANN, which ultimately decides which TLDs will be added to the root server.

Because of the undeniable U.S. Government interest in and control over the root server, the selection of new TLDs to add to the root must comply with the mandates of the Administrative Procedure Act. However, neither ICANN nor Commerce has recognized that the APA applies, much less taken any action to redress the viola-

tions of U.S. Administrative Law which plagued the ICANN TLD selection process last fall.

IATA's proposal for ".travel" was widely embraced by the travel industry, with more than 75 entities submitting comments to ICANN in support of the new TLD. Supporters included the American Society of Travel Agents ("ASTA")—the world's largest association of travel professionals representing over 26,000 travel agent members (primarily in the United States); THE Universal Federation of Travel Agents' Associations ("UFTAA")—the largest federation of travel agent associations worldwide, representing over 48,000 travel agent members in 97 countries; individual travel agents and other travel agent associations; airlines, airline associations, airline equipment manufacturers, airports and airport authorities; e-commerce firms, hotels, railways (including Amtrak and others), travel and tourism organizations, and individuals. In all, over one million travel industry businesses around the world, either directly or through their recognized associations, went on the record with ICANN in support of IATA's ".travel" proposal.

The broader business community also gave its support to ".travel." in comments to ICANN, Citibank touted IATA's experience and reputation, and characterized IATA's application as perhaps "the single best example of how the Internet community can benefit from independent management of a top level domain." In addition, IATA's proposal received a nearly perfect score of 26 out of 27 possible points, which tied it for first place, in a study of the TLD applications by the Berkman Center for Internet & Society at Harvard Law School. That study also recommended that ".travel" be one of six new TLDs selected by ICANN.

Virtually the only opposition to the ".travel" TLD came from a small number of travel agents who have an agenda of opposing virtually everything the airline industry endorses—not because it is a bad idea, but just because it is something endorsed by the airlines.

Unfortunately, the significant effort and expense that IATA dedicated to its application did not receive treatment by ICANN meeting even the most basic standards of equity. At a minimum, IATA was entitled to fair and comprehensive consideration of its proposal. It received neither.

The Administrative Procedure Act prohibits decisions which are arbitrary and capricious. This requires (1) that decisions be based on a consideration of all the relevant factors, (2) that parties are not discriminated against, and (3) that decisions are not based on ex parte influences. In addition, APA-like requirements are found in ICANN's By-Laws, which require ICANN to act consistently, fairly and in a transparent manner; and the "Memorandum of Understanding" between ICANN and the Commerce Department, which requires ICANN to act in a manner that is reasonable, justifiable and not arbitrary.

ICANN's treatment of IATA's ".travel" proposal failed to consider all of the relevant factors in that ICANN gave no credit for the fact IATA's proposal met each and every one of the nine evaluation criteria that ICANN had stated it would apply in judging top level domain applications. Instead, weeks after the applications had been submitted, ICANN decided to invent a tenth and previously undisclosed criterion called "representativeness." ICANN cursorily applied this new requirement to IATA's proposal and, without any real consideration of the issue, decided that it could not find that IATA was sufficiently "representative" of the travel industry to sponsor ".travel".

In making this decision, ICANN made no effort to place into proper context the relatively de minimis opposition to ".travel." ICANN never weighed the negative comments against the overwhelming support for IATA's proposal. ICANN also did not consider the fact that rivalries among different travel agent associations meant that some agents were likely to make negative statements regarding IATA's proposal solely because the major travel agent associations were in favor of the new TLD. ICANN also appears to have been influenced by ex parte communications to which IATA was not given an opportunity to respond.

In addition, because "representativeness" was not one of the nine announced evaluation criteria, IATA had no prior warning that it need even address this factor in its application. IATA was denied adequate notice that if opposition materialized this would be assumed to constitute conclusive proof of a lack of "representativeness," regardless of whether there was any merit to the allegations made in such opposition, and regardless of the presence of the counter-balancing and overwhelming support for the application from throughout the global travel industry. In addition, IATA's treatment was discriminatory because most of the other 43 TLD applicants, including all seven of the proposals selected by ICANN, were not even subjected to this "representativeness" criterion.

In concluding that IATA was not sufficiently representative of the travel industry, ICANN, by its own admission, acted too hastily to be able to make a reasoned and

rational decision. The ICANN staff conceded that it "clearly struggled" with "how to evaluate" ".travel", it lacked "the tools to figure out" how much opposition there was to ".travel", and was unable to "give [the ICANN] board much information about [the] representativeness" of ".travel". In addition, one ICANN board member acknowledged in the deliberations that ICANN might have reached a different conclusion had it bothered to investigate the matter further. Nevertheless, ICANN passed over the ".travel" application essentially solely on the basis of the conclusion that IATA was not sufficiently "representative."

ICANN was clearly overwhelmed by the number of applications it received for top level domains. But this is not a legitimate excuse for treating IATA's proposal in such a capricious manner. Given that the Internet community had already waited ten years since the last generic top level domains were added, the Internet could have waited a few additional weeks if this was what was required in order for ICANN to conduct a comprehensive analysis and reach a thorough, well-informed and principled decision regarding the IATA proposal as well as the other applications, consistent with its obligations under the Administrative Procedure Act. Instead, ICANN rushed to judgment, placing its pre-ordained schedule for issuing its decision above its overriding need to make decisions which were well-considered, correct and in compliance with the APA.

This improvident hastiness is exemplified by the fact that ICANN refused to allow applicants more than three minutes to make oral presentations in support of their proposals, and crammed every one of these three-minute sessions into a single afternoon meeting of the ICANN board. At a minimum, ICANN needed to have provided the applicants with sufficient time to allow the proposers to receive and respond to ICANN's concerns in a meaningful fashion.

IATA is deeply concerned about the absence of fairness and due process in the selection of new TLDs. Either Commerce itself should undertake to evaluate the TLD applications in a way that complies with the Administrative Procedure Act, or Commerce should direct ICANN to do so. If Commerce accepts ICANN's decisions without scrutiny, then ICANN is acting like a Federal agency and must comply with the APA. If ICANN does not comply, then Commerce has unlawfully delegated to ICANN full, unchecked control to make critical policy decisions relating to the development of the domain name space on the Internet.

To date, neither ICANN nor Commerce has provided any indication of a willingness to correct these fundamental shortcomings in the TLD selection process. On December 15, 2000, IATA sent a letter to ICANN requesting that it reconsider its decision regarding ".travel". To our knowledge, ICANN has taken no steps towards acting on this request. On December 26, 2000, IATA sent letter to Commerce requesting that it take the necessary measures to ensure that the APA is complied with in the addition of the new TLDs. Commerce has not responded to this letter.

ICANN's failure to consider our proposal in a fair manner affects more than just our organization. ICANN's conduct towards ".travel" and other applicants can only serve to stymie the growth of competition in the Internet. The commercial side of the Internet is still extremely dependent on the generic ".com" top level domain. To increase competition in a significant way, consumers and businesses must be provided a compelling reason to move away from this behemoth. ICANN's current approach provides no such reason.

Four of the seven new top level domains selected by ICANN last November—".museum," ".coop," ".aero" and ".pro"—are limited TLDs that serve small groups. They may be useful to the insular fields they are intended to serve, but are much too restrictive in scope to offer any real alternative to ".com" for the vast majority of businesses seeking domain names. The same is true for ".name." While this TLD has a broad scope in that all individuals may qualify to register a domain name in the TLD, such domain names are personal in nature, and this TLD is not intended as a competitive alternative for businesses to ".com"

The other two awardees of TLDs—".info" and ".biz"—also do not provide much of a competitive choice vis-a-vis ".com" the TLD ".info" seeks to be as widely available as ".com" and the TLD ".biz" connotes business. But it is difficult to see how either offers much more than a duplication of the existing domain name space. There is little value-added by these TLDs relative to ".com," and this naturally limits their competitiveness to ".com."

The gaping hole in ICANN's selections is the lack of any value-added top level domains that target large sections of the ".com" constituency. The new TLDs are either too broad or too narrow in scope. To have real competition you must have effective competition, which means alternatives that add value to the currently available choices. ".travel" is a prime example of a TLD that would add such value. A ".travel" TLD would provide businesses and consumers their own specialized subdivision of the Internet, but it would not be restricted to a relatively tiny section of e-com-

merce, such as museums or cooperatives. Rather, it would encompass the entire travel industry, which represents the largest segment of e-commerce today, and that would only grow larger with its own, dedicated Internet subdivision.

However, as long as ICANN is only willing to add generic would-be clones of ".com" and limited TLDs designed to serve miniscule sectors of e-commerce, an incredibly important competitive opportunity in the Internet domain name space will continue to be lost.

IATA thanks the members of this subcommittee for providing it with this opportunity to share its perspective, and hopes that the subcommittee will encourage the Department of Commerce and ICANN to make decisions regarding new top level domain names in a manner that is fair, transparent and designed to maximize competition on the internet.

Mr. UPTON. Thank you.

Mr. Hansen.

STATEMENT OF KENNETH M. HANSEN

Mr. HANSEN. Good morning. Thank you, Mr. Chairman. My name is Ken Hansen, and I am the director of corporate development for NeuStar. NeuStar is a neutral third-party provider of clearinghouse and data base administration services. NeuStar serves as the number plan administrator and the local number portability administrator for North America. Our joint venture with Melbourne IT, a Melbourne, Australia-based provider of domain name services, was recently selected by the Internet Corporation for Assigned Names and Numbers to operate the registry for the top-level domain name .biz. During the application process, the joint venture was referred to as JVTeam and is now known as NeuLevel.

I appreciate the opportunity to appear before the subcommittee to discuss the ICANN selection process. NeuStar has been following the potential introduction of new TLDs and attending ICANN meetings for over 2 years prior to the issuance of the August 2000 RFP. NeuLevel was selected to operate the .biz registry. As such, NeuLevel was one of seven selected to operate registries for the new top-level domains.

The criteria and objectives utilized in the selection process represented the culmination of many years of well publicized industry debate and consensus concerning the introduction of new top-level domains, and not solely as a result of the most recent ICANN application process. Having been directly involved in over 100 requests for proposal processes during my 15 years in the communications industry, I can say with confidence that the manner in which ICANN conducted the application process far exceeds measures taken by private companies in conducting procurement activities for services of similar complexity. The process utilized by ICANN was conducted in an open and transparent manner.

I would like to direct your attention to the attached exhibit which contrasts these differences. The open process described in the exhibit represents a process in which all competitors had equal access to information, had an equal opportunity to prepare their responses and compete with the other applicants. We believe that the TLDs selected are a direct reflection of the evaluation criteria identified by ICANN and communicated to all applicants and the public in advance on the ICANN Web site.

The criteria is as follows: Maintain the stability of the Internet, the No. 1 priority; demonstrate an effective proof of concept con-

cerning the introduction of new top-level domains; enhance competition for registry services; enhance utility of the DNS; meet currently unmet needs; enhance diversity of the Internet; evaluate the delegation of policy formulation functions for special purpose TLDs; ensure the appropriate protections of the rights of others; and require completeness of proposals.

ICANN stated clearly that its intent was to select a limited number of TLDs initially and to proceed carefully in order to ensure that stability of the Internet was maintained. In the new TLD application process overview, which was posted to the ICANN Web site, ICANN stated that "it is anticipated that only a few of the applications that are received will be selected for further negotiations toward suitable contracts with ICANN." this statement was consistent with the resolution of the ICANN board on new TLDs in which the board, "adopted the Names Council's recommendation that policy be established for the introduction of new TLDs in a measured and responsible manner."

The selected TLDs are also consistent with ICANN's desire to create diversity. Specifically, ICANN stated that "the diversity the proposal would bring to the program would be considered in selecting new TLDs." in addition, the criteria for assessing new TLDs included the following criteria: the feasibility and utility of the different types of TLDs, the effectiveness of different procedures for launching TLDs, and a number of others. Although the qualified TLDs were not selected, ICANN made it clear that additional TLDs were likely to be introduced in the future.

The ICANN process described above will create effective competition where none exists. Competition will create new choices for individuals, for organizations and businesses in terms of name availability, pricing and functionality.

The ICANN evaluation criteria and objectives in introducing new TLDs were the result of an open public debate and widespread Internet community consensus. The market participants created the ICANN process, and the ICANN process resulted in TLD and registry operator selections that are consistent with those criteria and the objectives stated in the introduction of the selected TLDs to proceed. It is in the interest of the Internet community as a whole for the introduction of the selected TLDs to proceed while other applications pursue appeals through the ICANN request for consideration process.

I thank the subcommittee for giving me this opportunity to testify. I will answer any questions you have at this time.

[The prepared statement of Kenneth M. Hansen follows:]

PREPARED STATEMENT OF KENNETH M. HANSEN, DIRECTOR, CORPORATE DEVELOPMENT, NEUSTAR, INC.

Good morning: My name is Ken Hansen, and I am the Director of Corporate Development for NeuStar, Inc., a neutral third party provider of clearinghouse and database administration services. NeuStar serves as the Number Plan administrator and the Local Number Portability administrator for North America. Our joint venture with Melbourne IT , Ltd (MIT), a Melbourne, Australia based provider of domain name services was recently selected by the Internet Corporation for Assigned Names and Numbers to operate the Registry for the Top-Level Domain Name ".biz". During the application process the joint venture was referred to as "JVTeam" and is now known as "NeuLevel".

I appreciate the opportunity to appear before the subcommittee to discuss the ICANN selection process. NeuStar has been following the potential introduction of new TLDs and attending ICANN meetings for over two years prior to issuance of the RFP.

NeuLevel was selected to operate the Dot-Biz Registry. As such, NeuLevel was one of seven selected to operate Registries for the new Top-Level Domains (TLDs). The criteria and objectives utilized in the selection process represented the culmination of many years of well-publicized industry debate and consensus building concerning the introduction of new Top Level Domain Names (TLDs), and not solely the result of the most recent ICANN application process.

The process utilized by ICANN was conducted in an open and transparent manner. Having been directly involved in over one hundred Request for Proposal processes during my fifteen years in the communications industry, I can say with confidence that the manner in which ICANN conducted the application process far exceeds measures taken by private companies in conducting procurement activities for services of similar complexity. I would like to direct your attention to the attached exhibit which contrasts these differences.

The open process described in the Exhibit represents a process in which all competitors had equal access to information, and an equal opportunity to prepare their responses and compete with other Applicants. We believe that the TLDs selected are a direct reflection of the evaluation criteria identified by ICANN and communicated to all Applicants and the public in advance on the ICANN website. The criteria is as follows:

- The number one priority was the need to maintain the stability of the Internet
- Demonstrate an effective proof of concept concerning the introduction of new top level domains
- The enhancement of competition for registry services
- The enhancement of the utility of the DNS
- Meet currently unmet needs
- Enhance diversity of the Internet
- Evaluate the delegation of policy formulation functions for special purpose TLDs
- To ensure the appropriate protections of the rights of others, and
- Completeness of proposals

ICANN stated clearly that its intent was to select a limited number of new TLDs and to proceed carefully in order to ensure that the stability of the Internet was maintained. In the *New TLD Application Process Overview* (which was posted to the ICANN website) ICANN stated that, "It is anticipated that only a few of the applications that are received will be selected for further negotiations toward suitable contracts with ICANN". This statement was consistent with the *Resolution of the ICANN Board on New TLDs,* in which the Board "adopted the Names Council's recommendation that a policy be established for the introduction of new TLDs in a measured and responsible manner".

The selected TLDs are also consistent with ICANN's desire of creating diversity. Specifically, ICANN stated that, "the diversity the proposal would bring to the program" would be considered in selecting the new TLDs. In addition, the *Criteria for Assessing TLD Proposals* included the following criteria;

- The feasibility and utility of different types of new TLDs
- The effectiveness of different procedures for launching new TLDs,
- Different policies under which the TLDs can be administered in the longer term,
- Different operational models for the registry and registrar functions,
- Different business and economic models under which TLDs can be operated;
- The market demand for different types of TLDs and DNS services; and
- Different institutional structures for the formulation of registration and operation policies within the TLD.

Although some qualified TLDs were not selected, ICANN made it clear that additional TLDs were likely to be introduced in the future.

The ICANN process described above will create effective competition where none exists today. Competition will create new choices for individuals, organizations and businesses in terms of name availability, pricing and functionality.

The ICANN evaluation criteria and objectives in introducing new TLDs were the result of an open public debate and widespread Internet community consensus. The ICANN process resulted in TLD and Registry Operator selections that are consistent with those criteria and objectives. It is in the interest of the Internet community as a whole for the introduction of selected new TLDs to proceed, while other Applicants pursue appeals though the ICANN Request for Reconsideration process.

I thank the subcommittee for giving me the opportunity to testify. I will now answer any questions that you may have.

EXHIBIT

TYPICAL PRIVATE COMPANY RFP PROCESS vs. ICANN PROCESS

DESCRIPTION	TYPICAL PRIVATE COMPANY RFP PROCESS (for complex service or system)	ICANN PROCESS
Announcement of RFP	Potential bidders selected and notified directly. No public notice	Notice posted to the Internet for public viewing Expressions of interest requested, but not required
Who can submit a bid?	Limited number of selected companies Those bidders the company feels are qualified and can meet needs. Number of bidders limited Typically 3-5 proposals accepted	Any company permitted to submit an application Forty-seven complete applications received
Publication of the RFP	Sent directly to limited number of qualified bidders.	Posted to the Internet for public viewing
Public posting of proposals	None	Posted to the Internet for public viewing
Confidential information	Proposal considered confidential document. Not to be disclosed	Posted to the Internet for public viewing Confidential information not to be considered by evaluators
Public comment	None	Comment forum on the ICANN site Public able to submit a comments Applicants able to comment on competitors proposals All comments published on the web for viewing.
Questions concerning responses	Private correspondence with bidders Private meetings with bidders	ICANN questions and Applicant answers posted to the ICANN site
Evaluation results	Not shared with the bidders or any outside party. No opportunity to respond or comment	Written evaluation posted to the web for viewing by bidders and the public
Decision making process	Private decision making process No involvement or access by bidders	Board deliberation with access to the public Live broadcast on the Internet. Transcripts published on ICANN site
Decision announcement	Bidders privately notified by phone	Announced during public meeting Broadcast on the Internet Published on the ICANN site

Mr. UPTON. Thank you.
Ms. Gallegos.

STATEMENT OF LEAH GALLEGOS

Ms. GALLEGOS. It is still morning, so good morning, Mr. Chairman. I would like to thank the committee for the opportunity to be here and present our reasons for believing that ICANN's process for selecting new TLDs to enter into the USG root is detrimental to our survival and to the continued survival of the TLDs outside the auspices of ICANN.

I am the president of ARNI, AtlanticRoot Network, Inc., and I am the manager of the .biz TLD. This top-level domain resides in several of the inclusive name space roots which many people refer to as alternative or alternate roots. The inclusive name space roots are root server systems that operate in the same manner, but independently of the Department of Commerce root system.

The title of this hearing indicates your desire to ensure fair competition. My question is how can this be accomplished with ICANN's usurping of the .biz TLD from ARNI, thus stealing its

product? Under ICANN's policy, a competitor can pay a $50,000 fee to have ICANN usurp our business or any other at their whim.

Talk about protecting the rights of others. That rather negates that.

ARNI is a small company. Our entire business at this time is based upon domain name registrations in our TLD. With the announcement by ICANN that .biz was to be handed over to JVTeam, now New Level, e-mail began pouring in asking if we were going to be closed by ICANN or if ICANN was going to take our TLD.

Why didn't we apply? For a small company, $50,000 is a high price to pay as a nonrefundable fee that could be much better spent on development and infrastructure, as opposed to a lottery, which we considered this to be.

Why should we have to apply to keep a business that is already ours? It was well-known that the board considers our registrants to be illegitimate and registrations to be pre-registrations even though they are live, many with published commercial websites.

And we are real, we are a business. There was no need to go through the ICANN process to prove what has already been proven, that our registries are open to public, they work, that the roots which do recognize them have also proven themselves for well over 5 years.

Stability of the Internet. There is no reason on earth to consider that it would hurt stability when they have added so many TLDs over the past 10 years and the roots themselves that I am talking about have been stable for many, many years and they are very robust. So stability is really not a technical issue at all.

The .biz TLD was created in 1995 and first resolved in eDNS and later the ORSC and now the Pacific roots. We are recognized in all the major roots, except, of course, the USG root. We were delegated management of.biz in 2000 and reopened the registry to the public for registration in the spring. We were able to provide registrations manually until the launch of our automated web-based system which had been in Beta. By the way, there has been over a quarter of a million dollars spent in the ramp-up for our .biz. We have a good chance of losing all of that.

The moment the applications to ICANN were lodged, we e-mailed every applicant for our string and notified them, using the contact listed on the ICANN website, that.biz already existed and asked why they would choose an existing TLD. We also posted numerous comments on the ICANN board, as that was the only type of communication they would receive; and we received no responses. We were ignored by all recipients.

We are now faced with a substantial loss due to ICANN's refusal to recognize that we are real, that we exist. It is baffling because they obviously recognize that Image Online Designs .web exists and decided not to the award that string to Afilias as a result. Vint Cerf, who is here, stated his discomfort and reaffirmed later, and I have a quote in the written submission testimony, saying that he was uncomfortable with giving the .web string to another entity since IOD already had a functioning registry and they had existed with that registry for 5 years.

Later, Mr. Kraaijanbrink's outburst seemed to be the typical attitude of the board, saying that, knowing all of that, they still supported giving that string to another entity.

It is important to note that while ICANN insists that it has its name space and we all have ours, that the DNS is truly only one name space and that we all must work within that name space. If ICANN is successful in duplicating a TLD string in its root, there will be duplicate domain names, thousands of them. No one will know which domain they will see when keying an address into a browser because more and more ISPs are choosing to point to the so-called alternative roots, and hundreds of thousands of users will be affected.

Consider what would happen if AT&T summarily took New York's 212 number space away from Verizon. That would be considered an anti-competitive act, putting Verizon out of business. Certainly no one would consider suggesting that AT&T and Verizon issue mirror 212 numbers to different customers. The phone system wouldn't work.

It would be just as foolish to suggest that ICANN and AtlanticRoot issue mirror .biz names to different customers.

There is no reason why there cannot be new TLDs added to the roots, all of them, but there is ample reason not to duplicate existing ones. It is not a function of the government to deliberately destroy existing businesses nor is it a function of ICANN to facilitate that destruction. It is also not a function of ICANN to determine what business models should be allowed to exist or to compete, any more than any other root decides policies of TLD managers or, indeed, other roots. The market will decide which will succeed and which will fail.

Mr. UPTON. That is a good point to conclude.

Ms. GALLEGOS. Thank you very much.

[The prepared statement of Leah Gallegos follows:]

PREPARED STATEMENT OF LEAH GALLEGOS, PRESIDENT, ATLANTICROOT NETWORK, INC.

My name is Leah Gallegos, President of AtlanticRoot Network, Inc. (ARNI) The BIZ TLD Registry is an entity of AtlanticRoot Network, Inc. I am the manager of the dot BIZ TLD. This Top Level Domain resolves in several of the "inclusive name space" roots, which many people refer to as alternative or alternate roots.

As a citizen of this country, I am fortunate to be able to defend my right to have a small business and to not have my product taken from me arbitrarily by a covetous entity under agreement with the government. I thank this committee for providing the avenue to present our reasons for believing that ICANN's process for selecting new TLDs to enter into the USG root is detrimental to our survival and to the continued survival of all the TLDs outside the auspices of ICANN.

ICANN has selected seven TLD strings to enter into the USG root that is controlled by the Department of Commerce. The process used for this selection was ill advised, badly handled and ignored the very premise for which ICANN was established—to preserve the stability of the Internet and do no harm to existing entities.

The title of this hearing indicates your desire to ensure fair competition. My question is how can this be accomplished with ICANN's usurping of dot BIZ from ARNI, thus stealing its product? Under ICANN's policy, a competitor can pay a $50,000 fee to have ICANN usurp our business, or any other, at their whim.

As I said earlier, ARNI is a small company. Our entire business at this time is based upon domain name registrations. With the announcement by ICANN that dot BIZ was to be handed over to JVTeam, e-mail began pouring in asking if we were going to be closed by ICANN or if ICANN was going to take our TLD. Others asked if there were going to be duplicates of each name and who would be the legitimate registrants. Even more asked if their names would even resolve if ICANN "took" the

TLD. The public has indicated that they are afraid now to register names with us and we are losing business merely on the mistaken assumption that ICANN has the right to take it from us.

Why didn't we opt for the $50,000 application to be included in the ICANN process?

We have been asked that question many times. There are several reasons.

1. For a small company, $50,000 is a high price to pay for consideration as a non-refundable fee.

2. There was little, if any, chance that we would be selected. The application questions were stated in such a way that it was clear we would have to adopt a sunrise provision and the UDRP. Those who did not, were not in the running and we knew that.

3. $50,000 could be much better spent on development and infrastructure as opposed to a lottery—worse than a lottery. There was bias with this one.

4. It is obvious that the large dollar monopolies were favored. In fact, they are the ones who were selected. CORE, NEUSTAR, MELBOURNE IT . . . We did not have a chance.

5. It was well known that the board considers our registrants to be illegitimate and registrations to be pre-registrations even though they are live registrations, many with published commercial websites. The comments made by Esther Dyson and others at past meetings and interviews made that very clear. At the MDR meetings, our interpretations were emphatically crystalized by Mr. Kraaijanbrink and Mr. Fitzimmons, especially, and by other members in general.

6. We feel that ICANN should honor the IANA commitment to include these TLDs in the USG root as was promised. There was no need to go through this process to prove what has already been proven, that the registries are open to the public, they work and the roots which do recognize them have also proven themselves for over five years.

As it turned out, several board members recused themselves, leaving less than the required number to successfully vote on this issue. They voted anyway. It is also interesting to note that the board members (except one) waited for this recusal until after the deliberations had been made regarding qualifications, business models, etc. They had definite conflicts of interest, yet they stayed in a position to render opinions on which applicants would "make the cut." The bias was so thick, even with the remaining board members, that it was easily visible.

Just as visible was the obvious lack of understanding of the basis for adding new TLDs and the content of the applications themselves. Choices were made with flawed and foolish reasoning.

And lastly, the new at-large directors had no input in the selection of these TLDs. This is important since those directors are inclined to be more objective and are more concerned with domain name holders and small businesses.

It is crucial to understand, at this point, just what the status of ICANN is versus the rest of the Internet with regard to TLDs. ICANN manages three TLDs at present—dot com, dot net and dot org. They are under an agreement with the government to make recommendations to the root manager, the Department of Commerce, regarding the entrance of new TLDs to the root.

By comparison, ARNI is the manager of some TLDs which are homed in an inclusive name space (or alternative) root managed by another entity. The inclusive name space roots were developed with authority from IANA. If ARNI wishes to enter more TLDs into that root, then it must petition that root manager, etc. If there are no conflicts (pre-exiting TLDs) and technical standards have been met, the root manager will then most likely enter the requested new ones. Both the root manager(s) and the TLD operators cooperate in determining the existence of any conflicting TLD strings. If the requested TLD string is found to exist in another root, then the prospective TLD manager could negotiate with the existing one or withdraw the request. Often, the root manager(s) will assist in facilitating potential negotiations. There is no charge to the potential TLD operator to make this determination. With the WHEREIS TLD Finder tool, it is not difficult to ascertain whether there are conflicts with a new TLD request. This tool can be found at http://www.pccf.net/cgi-bin/root-servers/whereis-tld. Requests for the entry of new TLDs are accepted on a first come, first served basis.

In addition to the TLDs which ICANN manages, there are in excess of 240 ccTLDs which are included in the root, but managed by other entities and under different policies. In other roots, there are TLDs included which are not homed in those roots, but included in order to allow users to see all known non-colliding TLDs. Therefore, ICANN could, and should, do the same thing and include all existing non-colliding TLDs for the benefit of users world wide and still add new ones under their own overall management. Technically, it is a simple task that has been

proven with the addition of the ccTLDs. There is absolutely no need to duplicate what is already in place.

The dot BIZ TLD was created in 1995 and resolved in the eDNS and later in ORSC the (Open Root Server Confederation). We are recognized in all the major roots, except, of course, the USG root. We were delegated management of dot BIZ in 2000 and re-opened for registration in the spring. We had an automated registration system in beta at that time, but were able to provide registrations manually until the launch of the automated web-based system. That system was publicly launched in October. The re-delegation was made and the registry was open well prior to any announcement of applications for the characater string (BIZ) with ICANN. Again, dot BIZ has been in existence at least as long as dot WEB.

The moment the applications to ICANN were lodged, we e-mailed every applicant for our string and notified them, using the contact listed on the ICANN webiste, that .BIZ already existed and asked why they would choose an existing TLD. We also posted numerous comments on the ICANN board, since they would accept no communication in another form regarding TLDs. We also posted to many public mail lists questioning why ICANN would consider duplicating existing TLDs, especially dot BIZ. We received no responses from anyone. We were ignored by all recipients.

ARNI was doing just fine with dot BIZ registrations prior to the selection process for new TLDs by ICANN. There were no conflicts. We are now faced with a substantial loss due to ICANN's refusal to recognize that we exist. It is baffling because they obviously recognize that IOD's dot WEB exists and decided not to award that string to Afilias as a result. Current Chairman Vint Cerf stated his discomfort and reaffirmed later saying, "**I continue to harbor some concern and discomfort with assigning dot web to Afilias, notwithstanding the market analysis that they did, which I internally understand and appreciate. I would be personally a lot more comfortable if we were to select a different string for them and to reserve dot web.**" (See Appendix A, 2:17). Without his intervention, the board would have handed dot WEB over to IOD's competitor, Afilias, another 900 pound gorilla, and IOD would be making the same arguments I am making today. The board did "the right" thing with dot WEB, but has ignored dot BIZ.

The video clip maintained at the Berkman Center (http://cyber.law.harvard.edu/scripts/rammaker.asp?s=cyber&dir=icann&file=icann-111600&start=6-16-00) clearly illustrates the reluctance of Vint Cerf to award the TLD to any entity other than its current operator. It also illustrates the unreasonable attitude typical of most of the board to deliberately ignore any entity that is not within the ICANN framework. The video would be entertaining if it were not so important an issue at stake. In that sense, it is rather sad, and very frustrating to hear the ping pong ball going back and forth with people's futures at stake.

Why, then, has ICANN decided that it would not usurp IOD's dot WEB, but would do so with our dot BIZ?

Mr. Kraaijanbrink's outburst (Exhibit A 3:3): **"Well, I would not. I believe that we have discussed them considerably. The Afilias on .web. And, from their proposal, and from the discussions, I believe that we should award dot web KNOWNING that IOD has been in operation as an alternative root with dot web for some time. But I am reminded, and I fully support what Frank Fitzsimmons said a few minutes ago that taking account of alternatives should open an unwanted root to pre-registration of domain names and domains. So I am fully aware of what I am doing in voting in support for Afilias dot web."**

Note that this board member refuses to recognize not only the legitimacy of IOD's TLD registry, but even considers their registrants to be illegitimate, calling them pre-registrations. There are no pre-registrations in any of our TLDs or in IOD's dot WEB. They are live and resolve. It is this very attitude that has prevailed throughout ICANN's deliberations and decisions regarding the selection and adoption of new TLDs. It is also due to this posture that ICANN will irreparably harm our business and that of any other TLD operator whose product it chooses to usurp.

At these meetings in Marina del Ray, while attending via webcast, I posted questions to the ICANN Board of Directors, raising the issue of duplication and was ignored, even though one of the questions was read aloud to them. At the board meeting, the issue was never addressed at all. I did receive an acknowledgment from Board member, Vint Cerf, saying he would pass the message along. Others had been faxing him regarding this issue steadily during those meetings. If they did not "know" that dot BIZ existed, even after the postings and email, something is wrong. They are supposed to "coordionnate technical parameters" and they haven't even found the technical parameters yet.

It is important to note that while ICANN insists that it has its name space and we all have ours, that there is truly only ONE name space and that we all must work within it. If ICANN is successful in duplicating a TLD string in its root, there will be duplicate domain names—many thousands of them. No one will know which they will see when keying an address into a browser because more and more ISPs are choosing to point to inclusive name space roots. Hundreds of thousands of users will be effected. One TLD operator has indicated an increase of 30% per month in the use of one of his servers, which happens to be one of the ORSC root servers.

As an analogy, consider what would happen if AT&T summarily took New York's 212 number space away from Verizon. That would be considered an anti-competitive move, putting Verizon out of business. Certainly no one would consider suggesting that AT&T and Verizon issue mirror 212 phone numbers to different customers. The phone system wouldn't work!

It would be just as foolish to suggest that ICANN and AtlanticRoot issue mirror dot BIZ names to different customers.

How can this not harm us? Our TLD has been in existence for over 5 years. Our registrants have e-commerce businesses operating using dot BIZ domains. We have approximately 3,000 registrants and growing daily. Those businesses will be destroyed because of the fracture ICANN will cause with this duplication. In addition, if ICANN is allowed to do this now, what will happen to all the other TLDs when ICANN decides to add more in the future? We will then be talking about hundreds of thousands of domain name holders and thousands of businesses and organizations being disenfranchized—ruined.

Why do the inclusive name space roots not duplicate dot com, net or org? They could. They do not for a couple of reasons. One is that it is understood that duplication in the name space is not in the best interests of the Internet or its users. As a matter of fact doing so is detrimental. It is a cooperative effort to keep the name space uniform and consistent. The second is that they all recognize the prior existence of the USG and ccTLDs and include them in their roots. So why is ICANN doing the opposite?

If there were over one hundred TLDs available to the public and included in the USG root, we would see not only a competitive free market, but the disappearance of many of the disputes and speculation present today. The so-called scarcity of domain names has been created by the delay in entering more TLDs into the USG root. The simplest solution is to recognize the existing TLDs before entering new ones. There is no reason why there cannot be new TLDs added to the root, but there is ample reason not to duplicate existing ones. It is not a function of the government to deliberately destroy existing businesses, nor is it a function of ICANN to facilitate that destruction. It is also not a function of ICANN to determine what business models should be allowed to exist or to compete, any more than any other root dictates policies of TLD managers. The market will decide which will succeed and which will fail.

The MOU between ICANN and the government clearly states in its prohibitions, Section V:D:2. "Neither Party, either in the DNS Project or in any act related to the DNS Project, shall act unjustifiably or arbitrarily to injure particular persons or entities or particular categories of persons or entities."

ICANN has acted both arbitrarily and unjustifiably in deliberately ignoring our existence as a viable registry offering legitimate, resolving domain names to the public.

Whether ICANN/DoC chooses to include the pre-existing TLDs in the USG root or not is one thing. Whether they choose to ignore their existence and threaten them with destruction via abuse of power is another.

By moving ahead with their process they have created dissension, confusion and harm to our business and our registrants. They are eliminating true competition by assuming authority over the world's name space rather than remaining focused on their own narrow responsibility. They have shown no respect for our existence or that of all the other TLD operators who have the right to operate their businesses or organizations and they threaten, by their actions today, to crush them as they appear to intend to crush us. We must also consider the effect this situation is having on countries around the world. More and more of them are considering alternatives to the USG root and some have already moved to create them or use the existing roots; all because ICANN will not recognize the fact that they manage just one set of TLDs in one root.

Because ICANN currently enjoys the largest market share in terms of those "pointing" to the USG root, it has a commensurate responsibility to ensure fairness in a free market. It was the government that determined the Internet should be privatized, yet it has allowed ICANN to assume a governmental attitude toward the Internet. It was formed at the order of the government, and remains under the over-

sight of the government, yet it competes against small business in what should be a free market with the power to usurp the businesses it is competing against, without due process or compensation. It has invited applicants to do so.

With regard to their so-called "new" TLDs, ICANN threatens not only small businesses, but, as a result of their arrogant, ill conceived actions, actually threatens the world's economy and the stability of the Internet—in direct conflict with the agreement they signed with the United States government.

We feel that ICANN, under the oversight of DoC, has acted completely irresponsibly and probably illegally. DoC will do the same and has stated it will most likely rubber stamp any decisions made by ICANN. We feel they have breached their agreement by harming our business and will potentially do so with any other duplications placed in the USG root. In addition, we believe that DoC will, and ICANN has, abused their power and that this issue falls under the Administrative Procedures Act (APA). We have filed a Petition for a Rulemaking with the NTIA, which is attached as Exhibit B.

It is our hope that this committee will intervene to ensure that there is fair play and consideration for existing businesses; that the entry of duplicate TLDs in the USG root will not be permitted and that the promises made by IANA will be kept.

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Title of Hearing:

Is ICANN's New Generation of Internet Domain Name Selection Process Thwarting Competition?

EXHIBIT A
Excerpt from ICANN Board Meeting
Marina Del Ray, CA
http://cyber.law.harvard.edu/scripts/rammaker.asp?s=cyber&dir=icann&file=icann-111600&start=6-16-00

November 16, 2000; 06:08 on RealVideo

1 TOUTON: Just to make sure on the breadth of our consensus
2 here, Joe would like to address us.
3
4 SIMS: I would like to make absolutely certain that the
5 record is clear and that the Board members are clear, and,
6 with respect to the one that is on this list on which there
7 has been some significant discussion back and forth, and a
8 little bit of potential confusion, let's just make sure
9 there is absolutely no confusion. With respect to Afilias,
10 the string that is before the board is dot web, and not
11 dot info or dot site or any of the other applications. So,
12 when you are asked whether you approve the instruction or
13 resolution which orders the staff to negotiate this with
14 Afilias, let there be no confusion that this is with
15 respect to dot web and not one of the other strings. If
16 anyone has concerns or is confused about that, let's make

1 sure we get that on the table before we go forward.

2

3 DYSON: I have concerns, but I am not confused.

4

5 SIMS: That's fine.

6

7

8

9 ROBEERTS: While Louie is doing that, did that cover the

10 responses for that question? Thank you.

11

12 FOCKLER: I think that I was confused. I agree that the

13 discussion was about dot web, but Linda had tabled the

14 alternate, and given the kind of polling we just went

15 through, it suggests we didn't do the same thing with

16 respect to that. As to which one were we considering,

17 either which one was right or which one we were considering

18 at the time. I thought on the Afilias.

19

20 ROBERTS: My recollection of the sequence of events was that

21 the discussion this morning to get it into the basket was

22 centered on dot web, but that was not an exclusive

23 discussion. Subsequently, we aggressively narrowed this

24 and so now you are being asked by counsel to verify that

1 you are supporting this with that restriction. Vint?

2

3 **CERF: I continue to harbor some concern and discomfort with**

4 **assigning dot web to Afilias, notwithstanding the market**

5 **analysis that they did, which I internally understand and**

6 **appreciate. I would be personally a lot more comfortable if**

7 **we were to select a different string for them and to**

8 **reserve dot web.**

9

10 ROBERTAS: Other comments? 1

11

12 **KRAAIJENBRINK: Well, I would not. I believe that we have**

13 **discussed them considerably. The Afilias on .web. And, from**

14 **their proposal, and from the discussions, I believe that we**

15 **should award dot web *KNOWNING* that IOD has been in operation**

16 **as an alternative root with dot web for some time. But I am**

17 **reminded, and I fully support what Frank Fitzsimmons said a**

18 **few minutes ago *that taking account of alternatives should***

19 ***open an unwanted root to pre-registration of domain names***

20 ***and domains*. So I am *fully aware of what I am doing* in**

21 **voting in support for Afilias dot web.**

22

23 FOCKLER: I appreciate that and the process that I was

24 thinking though was that, what I am going to be asked to

1 vote for eventually is the whole package, and if we arrive
2 at that through process, I would be very comfortable to do
3 that. We may or may not, but I have a feeling this group
4 might, through its show of hands, decide that web is what
5 we're talking about. I just want to do that. Just want to
6 have that step.
7
8 ROBERTS: Perhaps we should see if there is support for
9 changing the string restriction by a show of hands.
10
11
12 SIMS: Let's just make it easier. Why don't we do just what
13 Ken has suggested and do a straw a poll on including
14 continuing to include Afilias with the dot web string on
15 this list.
16 5
17 COHEN: Joe, can I ask you a question for a minute, because
18 you're being too subtle for me. What are the consequences
19 of this?
20
21 SIMS: I don't I am really not trying to balance legal risk
22 here. I am just trying to make sure that the Board is clear
23 and there is consensus on this point, because I do think it
24 is important that when the Board makes its final decision,

1 that it, in fact, is a consensus decision. Yes, sir?

2 15

3 **CERF: Just a suggestion Joe, I would invert the proposed**

4 **straw pole. What I would like to know is whether the board**

5 **would show any support at all for the alternative which**

6 **would be to award dot info to Afilias and to reserve dot**

7 **web.** If there's no support for that, then obviously we have

8 the alternative, but it is that particular aspect that I

9 have some discomfort with.

10

11 TOUTON: Linda.

12 25WILSON: When Andrew brought us back into some of the

13 reasoning of Afilias, as I recollected, it was that they

14 felt that the strongest way to provide real competition in

15 this space was with a dot web. I think we have to go back

16 to what is it we are really trying to achieve in this

17 round, and part of what we are really trying to achieve is

18 some real difference in the domain name space and whatever

19 goes in, we have a great sense that it will succeed. That

20 tipped me in terms of some other reservations I had about

21 Afilias, and so it made me come out with a willingness not

22 to insist on setting or try to insist on setting aside web

23 because I felt that it had been a realistic approach to

24 choosing a string. **That there isn't any prior claim on it,**

1 **in terms of its not being available, and it allowed the**

2 **organization to put forward its best proposal.**

3

4 SIMS: If I might, let's I think the simplest way to make

5 the record clear here is this: Afilias with the dot web

6 string is currently on the list. Let me ask, how many of

7 the Directors would want to take that off the list?

8 Afilias dot web. We can talk then about Afilias dot site

9 and Afilias dot info, but if the board is in favor of

10 continuing the status quo, we can do it the positive way.

11 How many would favor leaving it on the list. Let's do it

12 the nice, positive way. Leaving it on the list, with dot

13 web, as it is. How many would be in favor of that? How

14 many do we have?

15

16 [Six show of hands]

17

18 SIMS: How many are not in favor of leaving it in Are the

19 others abstaining or voting against it? 7

20

21 MALE VOICE: You didn't ask.

22

23 DYSON: We are waiting to have Vint's question asked.

24

1 SIMS: OK.

2

3 **CERF: Well the way you are constructing the question, the**

4 **next question is how many are opposed to having Afilias on**

5 **the list with dot web. I would like to hear that question.**

6 SIMS: How many are opposed to having Afilias on the list

7 with dot web. I see three hands OK, so we have six in

8 favor, three against and the rest abstaining. So the Board

9 must use it own judgment then to decide whether that is the

10 consensus.

11

12

13 CERF: Actually, if you are willing to have the vote on the

14 other motion, which is to award dot info to Afilias, if

15 that doesn't carry at all then, we might

16

17 SIMS: Well, we can certainly take a straw pole.

18

19 CERF: That's what I would like you to do.

20

21 **SIMS: Let's take a straw pole on how many of the Directors**

22 **would be willing to award dot info, I take it is the one**

23 **you want, to Afilias, instead of dot web. Can we have a**

24 **show of hands on that? One, two, three, four, five, six,**

1 **seven? Is that correct?**

2

3 MALE VOICE: Count me as eight.

4

5 SIMS: Eight. How many are opposed, would be opposed to

6 that? Two. In my uneducated eyes, that appears to be more

7 of a consensus.

8

9 [Applause from audience]

10

11 CERF: My recommendation on the basis of that straw vote is

12 that Afilias should appear on the list as dot info and not

13 dot web.

14

15

16

17 WILSON: Say that again, Vint.

18

19 **CERF: I said that my interpretation of this is that Afilias**

20 **should appear on the list under the name dot info and not**

21 **dot web. That would be my interpretation of what we just**

22 **did.**

23

1 SIMS: Well, should we Just to button this up, can we take
2 one final straw pole on that question. Should Afilias be on
3 the list I am sorry Helmut?
4
5 SCHINK: Are we going to do this procedure for all the other
6 applicants?
7
8 SIMS: No, because this is the one on which there has been
9 lack some not as clear consensus. Everything else there
10 has been very clear consensus. This one there wasn't as
11 clear consensus. So I think we want to try to get to
12 consensus, if possible. So let me put the question again.
13 How many directors would favor leaving Afilias on the list
14 with dot info as a string instead of dot web. Can I have a
15 show of hands there? One, two, three, four, five, six,
16 seven, eight, nine. I think that is a consensus of the
17 Board. Yes, sir?
18
19 FOCKLER: I hesitate, but just for clarification, going over
20 my notes when I read the application, I thought they asked
21 for, they suggested site was their second choice to info,
22 and I am not sure that the letter that you just read
23 changed that.
24

1 TOUTON: We better check the records. I was under the
2 impression that it was info.
3
4 CERF: While we're waiting, can we have a recount?
5
6 [Laughter]
7
8 FOCKLER: It's in the TLD policies section of their
9 application.
10
11 TOUTON: Let me ask a question of clarification to you Vint.
12 In some of your comments you spoke of reserving dot web.
13 Did you in fact mean to reserve it for any particular
14 purpose or simply not to assign it?
15
16 CERF: No, to withhold assigning in this round, that's all.
17
18 TOUTON: OK.
19
20
21 McLAUGHLIN: I am quoting from their application right now.
22 This is section E2, the second paragraph ..third paragraph
23 in the section says "additionally, Afilias is proposing to
24 introduce dot info as a second alternative followed by dot

1 site."

2

3 FOCKLER: Great. Thank you. I stand corrected.

4

5 **End: 06:22on RealVideo**

6 *****

Exhibit B

February 6, 2001

VIA HAND DELIVERY
The Honorable Gregory L. Rohde
Director
National Telecommunications and Information Administration
1401 Constitution Ave., N.W.
Room 4985
Washington, D.C. 20230

The Honorable Secretary Norman Y. Mineta
Office of the Secretary
U.S. Department of Commerce
14th & Constitution Ave.
Washington D.C. 20230

Re: ICANN Recommended Internet Top Level Domain Names/Petition for Hearing

Dear Gentlemen:

On behalf of Atlantic Root Network, Inc., a private registry for the ".biz" Top Level Domain Name ("TLD"), we hereby petition the National Telecommunications and Information Agency ("NTIA") and the Department of Commerce ("DoC") to hold a public hearing pursuant to the Administrative Procedures Act ("APA") (5 U.S.C.A. Sec. 551, et. seq.) prior to consideration and approval of the ICANN recommended TLDs. The approval of the ICANN recommended ".biz" TLD would impair the rights of Atlantic Root Network, Inc., and would violate the U.S. Constitution, federal statute, and the common law. The approval of the ".biz" TLD would also violate the Memorandum of Understanding between ICANN and the DoC.

Background

Interest of Atlantic Root Network, Inc.

Atlantic Root Network, Inc. ("ARNI") is a Georgia corporation that has been delegated maintenance and operation of the ".biz" TLD in the Open Root Server Confederation ("ORSC"), the PacificRoot, and the North American Root Server Confederation ("NARSC") internet root server systems. MCSNet established the ".biz" TLD in 1996, and began accepting registrations in 1996. ARNI acquired authority to operate the ".biz" TLD in May of 2000, and has been accepting domain name registrations through PacificRoot.com pursuant to a contractual arrangement. ARNI currently manages over 1,000 Internet domain names actively using the ".biz" TLD. ARNI and the PacificRoot have expended considerable capital and effort in maintaining the ".biz" TLD.

The ORSC is a public, viable "inclusive name space" root server system that operates in parallel with, and complements, the ICANN/DoC root server system. Established as an alternative root server system to the NSF/NSI operated system in 1995, the public can readily obtain access to ORSC (or other inclusive name space root servers such as the PacificRoot and Superroot). This is done by merely "pointing" their computer to them, or requesting their Internet Service Provider to designate the alternative root server. In turn, the inclusive name space root managers accommodate communication with the ICANN/DoC managed root server, including the "A" root server, by incorporating the DOC root TLDs in their root system as "baseline" TLDs. Specifically, to ensure universal Internet name space compatibility, the inclusive name space root server managers imprint on their system and carry all of the recognized ICANN/DoC TLDs (.com/.net/.org/.edu/.us), as well as, the country code (cc) TLDs as a complementary set. The TLDs that are approved and then activated on their systems thus complement and augment the "baseline" ICANN/DoC TLDs. In this way the interests of the Internet public in choice and convenience are advanced, while governmental interests in competition and efficiency are preserved.

Obviously, the functioning of the entire Internet name space system – ICANN/DoC's 13 root servers, and the alternative root servers – would be compromised were ICANN/DoC to commission new TLDs, which collided with existing TLDs in the greater Internet name space system. It is just this collision, however, that is threatened by the recent announcement of ICANN that it will recommend for approval the proposed ".biz" TLD for inclusion in the ICANN/DoC root server system.

ICANN TLD Proceedings

In conformance with the general mandate conveyed in the "White Paper" (63 FR 31741-01 (June 10, 1998), and in its Memorandum of Understanding with DoC, ICANN commenced a process in approximately August 2000 to solicit, evaluate, and approve new TLDs. This process is well documented in the ICANN website (icann.org). The Process culminated in an ICANN announcement that "on 16 November 2000, the ICANN Board selected seven new top-level domains (TLDs) for negotiation of agreements." (*See*, ICANN web page, Announcements) Furthermore, ICANN is now apparently engaging in deliberations with the chosen TLD applicants to negotiate operating agreements. ICANN states that it anticipates that final agreements will be secured in the near future. Thus, if these TLDs are approved by DoC and implemented, including the ".biz" TLD , the rights of ARNI in the ".biz" TLD will be immediately compromised.

Petition for Hearing

ARNI asserts that ICANN has no inherent authority to approve new TLDs (Indeed, even ICANN's authority to operate is questionable as matter of law. *See Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution* (Duke Law Journal 50:17 (Prof. M. Froomkin, October 2000)). The Government Accounting Office ("GAO") has affirmed that ICANN can make no authoritative decision concerning Domain Name administration without express approval from the DoC. In its definitive July 7, 2000 letter/report to Congress ("Department of Commerce: Relationship with the Internet Corporation for Assigned Names and Numbers") the GAO was emphatic that final authority over the root server and its administration rests with DoC. GAO interpreted the November 25, 1998 Memorandum of Understanding between ICANN and DoC as a "joint project agreement" for the domain name system management, including "the policy for determining the circumstances under which new toplevel domains would be added to the system." Report at page 16. The GAO made it clear that the transfer of decision-making to ICANN would constitute a transfer of property, which would be unlawful under the doctrine of subdelegation. *See National Parks and Conservation Association v. Stanton*, 54 F. Supp. 2d. 7, 18-19 (D.D.C. 1999). Finally, the GAO noted that such a violation of law is not implicated in light of the language included in Amendment 11 to the Cooperative Agreement with Network Solutions, Inc. Pursuant to Amendment 11, the GAO states, "Network Solutions, Inc. must receive written authorization from a Department official before making or rejecting any modifications, additions, or deletions to the root zone file." Further, citing to the November 1999 agreements among ICANN, Network Solutions, and the DoC, the GAO found that collectively, these agreements "make clear that the Department retains final policy authorization over the "A" root server." Report page 30. This includes, of course, final decision-making on the entry of new TLDs to the "A" root server.

ICANN itself clearly agrees with the GAO legal analysis. In recent litigation, *Economic Solutions, Inc. v. Internet Corporation for Assigned Names and Numbers* (U.S. District Court, Eastern District of Missouri (No. 4:00CV1785-DJS)) ICANN submitted the Declaration of its officer and general counsel, Louis Touton, in opposition to the Motion for a Preliminary Injunction filed by Economic Solutions, Inc. Mr. Touton explicitly states in this Declaration that only the DoC can make a decision regarding new TLDs, and that ICANN has no inherent power to do so. The federal district court, in reliance on this Declaration, denied the motion holding: "ICANN represents that it has no authority to implement TLDs, and that instead, it merely makes recommendations to the Commerce Department, which has the ultimate authority to make such a decision."

Based on these authorities, and the elemental application of constitutional and statutory law, it is clear that the DoC will shortly be tasked with the responsibility for

considering ruling on the ICANN recommended TLDs. Based on this legal premise, ARNI hereby petitions NTIA to implement a Rulemaking pursuant to the provisions of Sections 556, 557, and 558 of the APA. Given the abundance of case law authority, it can not be denied that the approval of TLDs constitutes either a "rule" or "license" within the meaning of the APA. Once this is established it is mandatory under the APA for the NTIA to conduct a Rulemaking. This in turn, requires a statement of the proposed rule, a request for public comment, and a studied consideration of these comments. In particular, NTIA will be required to consider not only the rationale and criteria developed by ICANN, but more broadly, the competitive impact of the recommended TLDs on Internet name space, the interests of efficiency, the legal ramification of approval, and the availability of alternate TLDs.

ARNI petitions for this Rulemaking fully convinced that when NTIA carefully evaluates all of the factors it must consider as an executive agency of the U.S. government it must reject the ICANN recommended ".biz" TLD. In particular, ARNI believes that the ".biz" TDL violates ARNI's constitutional safeguards, conflicts with a number of statutory requirements, undermines ARNI's property rights, and offends the Memorandum of Understanding between ICANN and DoC. Indeed, the essence of these safeguards is captured in the Memorandum of Understanding which states under paragraph D(2) "Prohibitions" that "Neither Party, either in the DNS Project, or in any act related to the DNS Project, shall act unjustifiably or arbitrarily to injure particular persons or entities or particular categories of persons or entities." The adoption of the ".biz" TLD would violate this provision with respect to ARNI and threatens the viability of inclusive name space providers.

Conclusion

Only the NTIA/DoC may authorize and commission new, "A" root TLDs; ICANN can not. The new TLDs recommended by ICANN must be subject to formal Rulemaking under the Administrative Procedures Act. Such a rulemaking will reveal the legal infirmity of the contemplated ".biz" TLD.

Respectfully Submitted,

William H. Bode

cc Senator John W. Warner
225 Russell Senate Office Building
Washington, D.C. 20510

Senator John McCain

Chairman, Commerce, Science and Transportation
254 Russell Senate Office Building
Washington, D.C. 20510

Congressman W.J. Tauzin
Chairman, Subcommittee on Trade, Telecommunication
And Consumer Protection
2125 Rayburn House Office Building
Washington, D.C. 20515

Congressman Tom Bliley, Jr.
Chairman, House Commerce Committee
2125 Rayburn House Office Building
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Mr. Michael M. Roberts
President & CEO
Internet Corporation for Advanced Names and Numbers

Mr. Louis Touton, Esq.
Vice President and General Counsel
Internet Corporation for Advanced Names and Numbers

Mr. Michael W. Donohue
Federal Trade Commission
Planning & Information Division
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Mr. UPTON. Professor Froomkin.

STATEMENT OF A. MICHAEL FROOMKIN

Mr. FROOMKIN. Mr. Chairman and members of the subcommittee, my name is Michael Froomkin. I would like to thank the subcommittee very much for inviting me to appear here today.

I am a law professor at the University of Miami, specializing in the law of the Internet. I have published more than 20 papers on the subject of Internet-related topics.

Five points. No. 1, the shortage of gTLDs today is entirely artificial and easily curable. Experts including Dr. Cerf, as far as I know, agree there is no technical obstacle to the creation of at least thousands and possibly tens of thousands, hundreds of thousands, maybe millions of new TLDs. The only issue is rolling them out in some sequence where you don't do them all the same day.

Removing the shortage would have competitive benefits in each of the three markets identified in my prepared statement, the registry, registrar and market for domain names. The spillover effects would benefit e-commerce and, thus, the entire economy.

Now why do we have this shortage now? We have it because the people with the power to fix it, the Department of Commerce, has simply chosen not to do so, instead have delegated the question to ICANN which they see as a private body and they say is a standards body. I am going to explain that it is not.

ICANN says it is a standards body, but in this case it is not acting as one nor as a technical coordination body. It justifies its very tentative approach by saying it is a proof of concept. But it hasn't told us what the concept is it is trying to prove. It hasn't told us when the test is going to be evaluated or how we tell if it is a success.

The concept can't gTLD creation itself because we know there is no rocket science to the mechanics of that. You just type a few lines to a computer across the river here in Virginia and it just takes a few minutes and then it propagates naturally through the design of the Internet.

Just how arbitrary ICANN was in this past process can be illustrated by two simple stories. One is it rejected the .union proposal based on unfounded last-minute speculation that maybe the international labor organizations that were part of the union movement somehow aren't democratic enough. It also rejected something called .iii because somebody on the board thought it was hard to pronounce. But that had never been a criterion and ever, ever mentioned before that very last minute.

Now why is ICANN acting in this arbitrary fashion? Why did it put in this limit on there? Why did it rush? I think the reason is—and despite its very nice rhetoric and the very welcome presence of genuine Internet visionaries such as Dr. Cerf—that ICANN isn't a standards body. It isn't coordinating anything. It doesn't act by consensus of all the affected parties, just for the parties who get to have a seat at ICANN's table. It doesn't listen much to the public or end users. It welcomes their comments and then ignores them. In fact, what happened is ICANN skipped one of the goals in the white paper.

In July 1999, then ICANN Chair Esther Dyson came before this committee's Subcommittee on Oversight and Investigation and assured that ICANN's highest priority was to elect nine at-large board members, exactly as ICANN had committed to do to the Department of Commerce when it was set up. They didn't do it. They reneged. Instead, they decided to only have five elected. Then they decided to have another study and take those five away and maybe zero-base it, think it all over again. And who knows? Meanwhile, they amended their timetable to rush the selection of new gTLDs so all the decisions would be made before even those five elected people got to be at the table.

The subsidiary organizations like the Names Council and domain name supporting organizations have charters right now that exclude the participation of individuals. As an individual, you can't be a member of any of those things. It is not surprising, therefore, that when ICANN defines its consensus it gets the view of only a narrow part of the Internet.

In my prepared statement I have explained in some detail why it is that Commerce is going to have to act in conformity with the APA and the Constitution. You can say ICANN is private. Then there is a nondelegation problem. You can say it is public, and then the APA ought to apply. I am not going to repeat that here. I know your long-suffering staff has actually read that in detail, and I am real impressed with them.

Let me talk about what ICANN ought to do and maybe you might do to help them. It seems to me the right thing for ICANN to do to maximize competition and to be fair is to accept all applicants who meet a preannounced, open, neutral and objective standard of competence. You can define competence in lots of interesting ways. Financial might be part of that. But it shouldn't be making case-by-case allocations decisions and amateurish comparative hearings. It is just not right, and it doesn't work, and they have shown us that.

Let me also in my last minute suggest to you an alternate approach to gTLD creation, one that would certainly enhance competition and would take its inspiration from the fundamental design of the Internet and from major league sports. The Internet was designed to continue to function even if large parts of the network sustained damage. The Internet network design avoids, whenever possible, the creation of single points of failure. But when it comes to policy, ICANN right now is that single point of failure.

The solution to the problem, therefore, would be to share out the policy function and leave in ICANN only the coordinating functions. What it would do then would be to keep a master list of TLDs to prevent collisions, make sure no registries ever try to run the same string, fix an annual quota of new gTLDs, run an annual gTLD draft, just like the pros do with the college athletes, and coordinate the new process so the gTLDs come on stream in an orderly way and not all at once.

Each of ICANN's policy partners, and they could be groups from all around the world—government, civil society groups, corporations—you can have a real healthy mix, would get some draft choices, some would get one, some might get more, and then

ICANN would randomly or otherwise assign them the picks and work the system.

Thank you very much.

[The prepared statement of A. Michael Froomkin follows:]

PREPARED STATEMENT OF A. MICHAEL FROOMKIN, PROFESSOR OF LAW, UNIVERSITY OF MIAMI SCHOOL OF LAW

Mr. Chairman and members of the Subcommittee, my name is Michael Froomkin. I would like to thank the Subcommittee for inviting me to appear today at this hearing on "Is ICANN's New Generation of Internet Domain Name Selection Process Thwarting Competition?"

I am a law professor at the University of Miami, specializing in the law of the Internet. I have published more than 20 academic papers on Internet governance, ICANN, e-commerce, cryptography, and privacy. I maintain a web site at http://www.law.tm where my articles on these and related topics can be found. I am co-director of ICANNWatch.org, an independent watchdog group that comments on ICANN policies. Two years ago the World Intellectual Property Association (WIPO) appointed me to serve as the sole public interest representative on its "Panel of Experts" that advised WIPO on its report on *The Management of Internet Names and Addresses: Intellectual Property Issues.* I am also a director of disputes.org which, in partnership with eresolution.ca, has been involved in dispute services provision under ICANN's UDRP.

My role in ICANN's selection of new global Top Level Domains (gTLDs), however, is strictly that of an academic observer and commentator, and sometime participant in public comment fora. I have no past or present financial relationship with any gTLD applicant. My goal is to advance what I understand to be the public interest by advocating policies that increase access to the Internet by enhancing free speech and promoting competition. Vigorous competition makes for a healthy marketplace of ideas, and also for a healthy market, as it lowers prices and improves the quality of service - thus enhancing access to the Internet and to Internet-based information.

SUMMARY OF TESTIMONY

I have four basic points that I would like to draw to your attention:

1. **ICANN's decision to artificially restrict new gTLDs to a small number of arbitrary selections, further hemmed in by ICANN's insistence on anti-competitive terms of service, has negative consequences for competition in three markets: the market for registry services, the market for registrar services, and the market for second-level domains (including the aftermarket), with spill-over effects on e-commerce generally.** Each of these markets would be more competitive if ICANN and the Department of Commerce were to lift their limit on new gTLDs and accept all competent applicants according to open, neutral, and objective criteria. It should be noted, however, that the negative consequences for competition I describe below would be even worse if there were no new gTLDs at all. This is, in summary, a situation where the ordinary rules of supply and demand operate. It is axiomatic that competition increases if one removes barriers to entry.

2. **The shortage of gTLDs today is entirely artificial, and easily curable.** There is a great pent-up demand for short and attractive second-level registrations in new gTLDs but experts agree there is *NO* technical obstacle to the creation of at least thousands and possibly tens or hundreds of thousands of new gTLDs, or even more. The current shortage exists only because the body with the power to create new gTLDs—the U.S. Department of Commerce—has not yet chosen to do so. The Department of Commerce—in what I have argued is a violation of the Constitution and/or the Administrative Procedures Act [1]—has chosen to delegate the power to make an initial recommendation regarding new gTLDs and the registry operators to the Internet Corporation for Assigned Names and Numbers (ICANN). Commerce has also delegated to ICANN the power to negotiate restrictive contractual terms with these registry operators—negotiations that were due to conclude by Jan. 1, 2001, but are currently continuing in secret.

3. **ICANN purports to be a technical standards or technical coordination body, but it did not act like one in this process, as it made arbitrary allocation decisions.** When it came to the creation of new gTLDs, rather than act as a

[1] A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution,* 50 DUKE L.J. 17 (2000), *available online* http://www.law.miami.edu/froomkin/articles/icann.pdf .

technical standards body and promulgate a standard under which all technically and financially qualified new registry operators could qualify, ICANN instead decided to act like an allocation authority for its artificially limited resource. ICANN arbitrarily limited the number of new gTLDs it would approve to under ten. ICANN then solicited $50,000 applications from prospective registries. Instead of considering the applications solely on technical merit, or indeed on any other set of neutral and objective criteria, ICANN selected seven winners on the basis of a series of often subjective and indeed often arbitrary criteria, in some cases applied so arbitrarily as to be almost random.

I have no reason to believe that the seven TLDs selected are bad choices; but given ICANN's arbitrary procedures I also have no doubt that many other applicants would have been at least as good. The striking arbitrariness of the ICANN decision-making process is illustrated by the rejection of the ".union" proposal based on unfounded last-minute speculation by an ICANN board member that the international labor organizations proposing the gTLD were somehow undemocratic. The procedures ICANN designed gave the applicants no opportunity to reply to unfounded accusations. ICANN then rejected ".iii" because someone on the Board was concerned that the name was difficult to pronounce, even though the ability to pronounce a proposed gTLD had never before been mentioned as a decision criterion.

4. **The correct strategy for maximizing competition would have been to accept all applicants who met a pre-announced, open, neutral, and objective standard of competence, rather than to pick and choose among the applicants on the basis of the ICANN Board's vague and inconsistent ideas of aesthetic merit, market appeal, capitalization, or experience.** As a result of its relationship with the Department of Commerce, ICANN is a state actor. Accordingly, its arbitrary and capricious decisions violate both the APA and the Due Process Clause of the Constitution. Rubber-stamping of its decisions by the Department of Commerce will only make these violations explicit, since the U.S. government would essentially endorse both ICANN's practices and its conclusions. Alternately, ICANN might be converted into a true technical coordination body, whose main functions were to set quotas for new gTLD creation, to prevent TLD name collisions by maintaining a master list, and to coordinate the management of parallel TLD creation processes by public and private policy partners around the globe.

I. BASIC PRINCIPLES OF SUPPLY AND DEMAND APPLY IN THE RELEVANT MARKETS

Two principles should shape any analysis of the competitive effects of ICANN's gTLD selection process: (1) Careful definition of the relevant markets; (2) An understanding that each of these markets obeys the normal laws of supply and demand, and that despite attempts by some to obfuscate the issues, in each of these markets there are at most only very minor and easily surmounted technical obstacles to allowing normal market forces to operate.

Terminological note: A "registrar" is a firm that contracts with clients ("registrants") to collect their information and payment in order to make a definitive and unique entry into a database containing all domain names registered in a top-level domain (TLD). This database is maintained by a "registry." Top-level domains are sometimes grouped into "generic TLDs" (gTLDs), which are currently three- or four-letter transnational domains, and "country code TLDs" (ccTLDs) which are currently two-letter TLDs. The "root" is the master file containing the authoritative list of which TLDs exist, and where to find the authoritative registries that have the data for those TLDs. Registrants typically register second-level domains (e.g. myname.com), but sometimes are limited to third-level domains (e.g. myname.genericword.com).

The Three Relevant Markets

There are at least three markets affected by ICANN's decisions relating to the creation of new gTLDs: the market for registry services, the market for registrar services, and the market for domain names (including the secondary market). This last market has spillover effects on e-commerce generally. In order to examine the overall competitive effects of ICANN's recent actions relating to gTLDs, it is important to understand what those three markets are and how the supply of new gTLDs affects them.

(1) The market for registry services. For technical reasons, each gTLD has a single registry. A single registry can serve more than one gTLD, but under the current architecture having multiple registries serve a single gTLD creates potential problems that most internet engineers would prefer to avoid. A registry maintains the authoritative database containing registration information for a given TLD. This database includes the name of the second level domain (SLD) [e.g. the "miami" in "miami.edu"], the registrant's contact information, and the information about which

nameservers carry the authoritative data that allows users to resolve the domain name to an IP number.

Currently, pursuant to an agreement between NSI and the US Department of Commerce,[2] NSI (Verisign) is the single monopoly registry for the lucrative .com, .org, and .net domains. That agreement also set a fixed $6/year price per registration that the registry may charge to registrars,[3] which they then pass on to registrants. There is currently no competition in this market, although when Verisign's exclusive rights lapse there may be some sort of bidding process instituted to decide who will run the registry in the future. Verisign also runs a registrar, which has competitors. Under Verisign's agreement with the Department of Commerce, Verisign soon must divest itself of either its registry or its registrar business in order to benefit from a contractual opportunity to extend its registry monopoly by four years.

Verisign has just announced a planned divestiture of its registrar. As a result of this divestiture, competition for registry services in .com, .org. and .net—and the legal wrangles over intellectual property rights it will engender—remains far in the future. Meanwhile, Verisign's monopoly registry will continue to require its $6 per year payment from every registration in .com, .org, and .net—a number that is probably well over the market-clearing price, and indeed is greater than the prices projected by many registry applicants to ICANN.

Since the price charged to registrars by Verisign is fixed for the time being by an agreement that ICANN lacks the power to vary, ICANN's ability in the short and medium term to enhance competition in the market for registry services turns on its willingness to recommend that the Department of Commerce create attractive competitors to the exiting gTLDs. If enough gTLDs with attractive names are created, and if the registries are free to set prices and policies as the market demands, this should create pressure on the price charged to registrants. Given that there is already substantial competition among *registrars* and that the market price of domains in gTLDs is already as low as $9.99 per year, the $6 being charged annually by Verisign becomes a very significant part of the total cost of a registration in the TLDs for which it is a registry. It is almost certain that having multiple attractively named gTLDs would promote price and service competition that would work to the advantage of the end-user.

As new gTLDs are created, each will have its own registry. Indeed, what ICANN really did at its LA meeting was to select *registries* from among the applications, in which the registry's proposed gTLD was only one of several factors that ICANN considered. ICANN, as the Department of Commerce's delegate, is currently negotiating contract terms with these registries. Despite ICANN's obligation under paragraph 4 of its Articles of Incorporation to use transparent procedures in conducting its affairs "to the maximum extent feasible" those negotiations have been completely secret, and we know only what was in the proposals submitted by the would-be registries. The absence of this information makes a precise discussion of the effect of the new gTLDs difficult. One can, however, make informed speculation based on the content of the proposals selected by ICANN.

In order to produce maximum price and service competition in the registry market, ICANN and the Department of Commerce would have to approve a large number of attractively named gTLDs. The registries would have had to have the freedom to adopt pricing and registration policies of their own, based on market conditions, rather than having their business plans selected and enforced by ICANN. The proposals that ICANN has stated it intends to send to the Department of Commerce do not appear to be likely to create the optimal amount of competition with Verisign. The creation of the seven new gTLDs proposed by ICANN will introduce competition to the market for registry services, but this will be less than the optimal amount, probably substantially less, for three reasons: (1) the small number of relatively open new gTLDs, (2) the actual names selected, and (3) the restrictive conditions that the registries and associated registrars may be contractually obligated to impose on the public.

Small Number. For technical reasons, each registry will have a monopoly over the gTLD(s) it controls. The seven gTLDs selected by ICANN are .aero, .biz, .coop, .info,

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[2] DoC-NSI Cooperative Agreement, Amendment 19, § I.B.10 (Nov. 4, 1999), http://www.icann.org/nsi/coopagmt-amend19-04nov99.htm .

[3] Paragraph 5.2(b) of the Registry-Registrar Agreement, required by ICANN of every registrar, states that "Registrar agrees to pay NSI the non-refundable amounts of $6 United States dollars for each annual increment of an initial domain name registration and $6 United States dollars for each annual increment of a domain name re-registration (collectively, the "Registration Fees") registered by Registrar through the System." http://www.icann.org/nsi/nsi-rla-04nov 99.htm .

.museum, .name and .pro. Of these seven proposed gTLDs, three—. aero, .coop, and .museum—will limit themselves to a very select group of potential registrants; their effect on the overall competitive market will therefore be quite trivial. The other four—.biz, .info, .name, and .pro—will have much broader charters, and their competitive impact should therefore be greater also.

Names Selected. In the view of many observers, the gTLDs ICANN selected are not the ones most calculated to meet registrants' desires. Ted Byfield's comprehensive article, "Ushering in Banality"[4] quotes BBC Online as saying "The net's new domain names may do little to open up the internet and the range of names that people can pick." My personal guess, and it is only a guess, is that the pent-up demand for attractive names is sufficiently strong that there will be significant take-up in the new open gTLDs. That is not to say, however, that the take-up would not be greater, and registrant satisfaction higher, if there were a greater variety of choices available.

Restrictive Conditions. Of the four relatively open gTLDs ICANN selected, both .pro and .name will restrict registrants to third-level domains, potentially lessening their attractiveness. As we do not know what conditions are currently being negotiated between the registries and ICANN, we can only speculate as to what conditions ICANN will impose on them. It seems likely that in general the registries will not be fully free to compete on terms of service, as they will be required to adhere to ICANN's controversial dispute resolution policy, by which ICANN requires every registrant to agree to an adhesive third-party beneficiary agreement promising to arbitrate disputes initiated by any trade or service mark owner in the world-before a tribunal chosen and paid for by the mark holder. It appears that both .biz and .info will be hampered by restrictive pre-registration policies that will give substantial preferences to trademark holders over start-ups and other potential registrants. Why the Australian makers of "computer" brand socks should have priority right to register computer.biz, or how this enhances competition for computers (or socks) is not evident.

Additional competitive issues raised by ICANN's hostility to "alternate" or "non-legacy" roots and registries. One other factor shaping the market for registry services is ICANN's apparently deep-seated hostility to "alternate" or "non-legacy" registries. ICANN's discrimination against these very minor competitors (measured by market share) appears anti-competitive. It was striking that in the beginning of the first paragraph of its list of criteria for evaluating applications for the new gTLDs, ICANN warned applicants that any application which ICANN found could "create alternate root systems" would be rejected.[5] Note also that in one of a series of agreements between Verisign (then NSI), the Department of Commerce, and ICANN, NSI—probably the only company then capable of deploying an alternate root with instant worldwide acceptance—promised the Department of Commerce that it would not deploy alternative DNS root server systems.[6]

There are technical reasons why it is highly desirable, at least for most people most of the time, to have a single common root. "Splitting the root" is indeed anathema to Internet traditionalists. On the other hand, the alternate roots currently deployed and in use by a small fraction of Internet users appear to harm no one. As a technical coordination body, ICANN's hostility to these small independent registries may therefore seem surprising. It is the case, however, that ICANN derives a major part of its current and planned revenue from registrars or registries that contract with it in order to be listed in the Department of Commerce's so-called "legacy" root, and that the creation of new ICANN-affiliated gTLD registries could increase this revenue stream. In the relatively unlikely event that the alternate registries were to acquire a substantial market share independent of the legacy root, they would not only compete with the registries that have contracted with ICANN, but would strike at the financial and political foundations of ICANN's continued existence. This financial interest may not be irrelevant to the legal consequences of ICANN's insistence that registries who deal with it abjure alternatives and competitors.

(2) The market for registrar services. Where once there was a monopoly, there is now cut-throat competition in the market for registrar services. Prices have dropped very substantially as a result. A recent report stated that NSI's market share for last year had fallen to less than 60% of the total for the open gTLDs, with

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[4] Ted Byfield, *Ushering In Banality,* Telopolis, http://www.heise.de/tp/english/inhalt/te/4347/1.html .

[5] ICANN, *Criteria for Assessing TLD Proposals* ¶1 (Aug. 15, 2000), http://www.icann.org/tlds/tld-criteria-15aug00.htm .

[6] DoC-NSI Cooperative Agreement, Amendment 19, § I.B.4.E. (Nov. 4, 1999), http://www.icann.org/nsi/coopagmt-amend19-04nov99.htm

its next competitors, Register.com at 11.5% BulkRegister.com at 6.5%; Tucows.com, Inc. at 5.9%; and CORE Internet Council of Registrars at 3.5%. More than 50 competitors shared the remaining 14% of the registrations business last year. (I have not considered whether there is cross-ownership of registrars by registries or others, and it is possible that this may cut against what appears on the surface to be healthy competition.)

The introduction of new gTLDs, several of which will be available to be marketed by multiple registrars, should increase competition in this market further, although again competition might be enhanced even more by a larger supply. Registrars need product to sell, and the introduction of new gTLDs provides that. Furthermore, NSI's advantages in both branding and automatic renewal deriving from its former monopoly position, will be absent in the new TLDs.

(3) The market for domain names (including aftermarket). It is an article of faith among Internet entrepreneurs that possession of a good domain name is a necessity for an Internet startup. Many traditional firms also consider the acquisition of a memorable or short domain name to be of strategic importance. Recently, for Internet startups, possession of a "good" name was seen as a major asset—reputedly enough in some cases to secure venture financing.

For some time now, however, it has also been an article of faith in the Internet community that "all the good names are taken" Recently it has seemed as if simply all the names that were a single word were taken. This apparent shortage, especially in .com, has driven firms seeking catchy names into the aftermarket. There does appear to be a reasonably large stock of names in the existing gTLDs being held by domain name brokers for resale in the aftermarket. Prices are very variable. Although few firms paid millions of dollars like the purchasers of business.com, and loans.com, it appears that at least until the .com bubble burst, the shortage of attractive names in .com , and the resulting need to purchase them at high markups in the aftermarket created what amounted to a substantial "startup tax" on new businesses.

In this respect, it might seem that the creation of new gTLDs can only be good for competition as it will increase supply and thus drive down prices. And indeed, supply will increase. Unfortunately, of the new gTLDs, only .biz and maybe .info are likely to be of attractive to the majority of startups and other Internet newcomers. Because there are only two such domains, and because there is no easily foreseeable date at which additional gTLDs might become available, there is a substantial risk of a speculative frenzy in which domain name brokers, cybersquatters, and amateur arbitragers all seek to register the catchy names that have not already been snapped up by trademark holders who took advantage of their pre-registration period.

The surest way to drive down and keep down the price of domain names, thus eliminating the "startup tax" and enhancing the ability of new firms to enter new markets and incidentally greatly reducing, perhaps even almost eliminating, cybersquatting, is to create healthy expectations. As soon as participants in the market understand that a steady supply of new domain names in attractive gTLDs will continue to become available on a predictable schedule, the bottom will fall out of the after-market, and the incentive (albeit not the opportunities) for cybersquatting will be greatly reduced, thus helping e-commerce by making attractive names available on reasonable terms to a much greater number, and wider variety, of persons and firms.

II. THE SHORTAGE OF GTLDS TODAY IS ENTIRELY ARTIFICIAL, AND EASILY CURABLE.

I am not an expert on Internet engineering. However, my understanding is that although experts do not agree on precisely how many gTLDs could be created without adverse consequences to DNS response time, there appears to be a technical consensus that we are nowhere near even the lowest possible limit. ICANN At-Large Director Karl Auerbach, himself a technical expert, has suggested that the smallest technically-mandated upper level for the number of gTLDs might be as high as a million.[7] Persons with long experience in DNS matters, including BIND author Paul Vixie, apparently agree.[8] Others have performed tests loading the entire .com file as if it were a root file, and found that it works. In principle, this is not surprising, as there is no technical difference between the root file containing the information about TLDs and a second-level domain file. Given that there are

[7] Posting of Karl Auerbach, karl71484CaveBear.com, http://www.dnso.org/wgroups/wg-c/Arc01/msg00195.html .

[8] E-mail from Paul Vixie, BIND 8 Primary Author, to Eric Brunner (Dec. 15, 1999) ("A million names under '.' isn't fundamentally harder to write code or operate computers for than are a million names under 'COM.'"), http://www.dnso.org/wgroups/wg-c/Arc01/msg00203.html .

currently about sixteen million registrations in .com, if this argument is right, then the maximum number of TLDs may be *very* high.[9] Some experts worry, however, that a very large number of new TLDs, such as a million, might affect DNS response time.[10] If so, that still means that with fewer than 300 TLDs in operation today (gTLDs + ccTLDs), we can afford to create tens of thousands, and probably hundreds of thousands, more.

Thus, the pre-ICANN moratorium on the creation of new gTLDs had no technical basis, and neither does the current go-very-slow policy adopted by ICANN. It is a purely political choice, a product of an internal deliberative process devised by ICANN that under-weighs the interests of the public at large and in so doing tends towards anti-competitive, or competitively weak, outcomes skewed by special interests.

The source of this tendency is the distribution of decision-making authority on the ICANN Board, and in ICANN's subsidiary institutions. In July, 1999, ICANN Chair Esther Dyson told this Committee's Subcommittee on Oversight and Investigation that ICANN's "highest priority" was to elect nine at-large Board members,[11] exactly as ICANN had committed to do as an original condition of being approved by the Department of Commerce. Instead, ICANN reneged on its commitment to the United States government, and to the public, that half its Board would be elected by an at-large membership. Indeed, the Board amended its bylaws and rushed its timetable so that its selection of the new gTLDs would be complete before even the five elected at-large directors could participate. Similarly, the institutions that ICANN created to take the lead in domain name policy—the seven constituencies in the "Domain Name Supporting Organization"—were designed from the start to exclude individuals from membership.

The interest groups that acquired a voting majority in those institutions have shown relatively little interest in the rights and needs of small businesses, non-commercial entities, or individuals. They have shown considerably more interest in securing special protections for trademarks, above and beyond what is provided by statute, than they have in maximizing the competitive potential of the Internet.

ICANN justifies its very tentative initial foray into gTLD creation as a "proof of concept" but it has not disclosed the concept that is believes it is trying to prove, nor described how one tells if the test is successful, nor even when one might expect ICANN to do the evaluation. The "concept" cannot be gTLD creation itself: There is no rocket science to the mechanics of creating a new gTLD. From a technical perspective, creating a new gTLD is exactly like creating a new ccTLD, and creating new ccTLDs is quite routine. Indeed, .ps, a TLD for Palestine, was created less than a year ago with no noticeable effect on the Internet at all.[12]

III. ICANN PURPORTS TO BE A TECHNICAL STANDARDS OR TECHNICAL COORDINATION BODY, BUT IT DID NOT ACT LIKE ONE IN THIS PROCESS, AS IT MADE ARBITRARY ALLOCATION DECISIONS.

ICANN usually justifies its processes by claiming to be either a technical standards body or a technical coordination body. In the case of the recent gTLD process, however, ICANN acted not as a standards or coordination body, but as if it were allocating scarce broadcast spectrum is some kind of comparative hearing process. ICANN created no standard. It 'coordinated' no projects with running code being deployed by outside parties. Rather, ICANN acted like a foundation grant committee, trying to pick 'winners.' In practice, ICANN's exercise of its gatekeeper committee role contributes to the artificial shortage of gTLDs. Worse, the selection processes ICANN employed were amateurish and arbitrary.

In fairness, ICANN is not originally responsible for the gridlock in gTLD creation policy, which in fact long predates it. Indeed the Department of Commerce called ICANN into being because it wanted to find a politically feasible way to create new TLDs in the face of difficult political obstacles, not least a belief in the intellectual property rights holders community that new TLDs might add to the risk of customer confusion and trademark dilution.

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[9] *See Quickstats, at* http://www.dotcom.com/facts/quickstats.html (reporting twenty million registrations, of which 80% are in .com).

[10] See, e.g., E-mail from Paul V. Mockapetris, BIND Author, to Paul Vixie, BIND 8 Primary Author, & Eric Brunner (Dec. 15, 1999) (querying whether one million new TLDs would impose performance costs on DNS), http://www.dnso.org/wgroups/wg-c/Arc01/msg00202.html .

[11] Testimony of Esther Dyson, Chair, ICANN, before the House Commerce Committee, Subcommittee on Oversight and Investigations, July 22, 1999, http://www.icann.org/dyson-testimony-22july99.htm .

[12] *See IANA Report on Request for Delegation of the .ps Top-Level Domain, at* http://www.icann.org/general/ps-report-22mar00.htm (Mar. 22, 2000).

This fear, more than any technical consideration, explains why ICANN imposed a needlessly low limit on the number of new gTLDs it would recommend the Department of Commerce create in this first round, and why ICANN has as yet not been able to consider when if ever it will contemplate future rounds of gTLD recommendations. It does not explain, however, why ICANN went about selecting its seven finalists in the manner it did. Indeed, ICANN's gTLD selection procedures were characterized by substantial failures.

First, although all applicants were charged the same non-refundable $50,000 fee, it appears not all received equal treatment. During the Los Angeles ICANN Board Meeting, it transpired that the staff had not subjected all the proposals to the same level of analysis. Thus, when Board members sought more detailed information about proposals that interested them, but which the staff had relegated to the second tier, that information sometimes did not exist, although it existed for the staff's preferred picks.

Second, both the staff and the Board seemed excessively concerned with avoiding risk. Although true competition in a fully competitive market requires that participants be allowed to fail if they deserve to do so, there are reasonable arguments why it makes sense to have a body like ICANN require potential registry operators to meet some minimum standard of technical competence. One can even make a case for requiring a showing of some financial resources, and for requiring the advance preparation of basic registry policy documents spelling out who will be allowed to register names and under what terms. Perhaps there are other neutral criteria that should also be required and assessed. This is a far cry from ICANN's apparent tendency to tend to prefer established institutions and big corporations, and to downplay the value of experience in running code. If in 1985 the Internet itself had been a proposal placed before a committee that behaved as ICANN did in 2000, the Internet would have been rejected as too risky. Risk aversion of this type is antithetical to entrepreneurship and competition.

Worst of all, ICANN applied its criteria arbitrarily, even making them up as it went along. The striking arbitrariness of the ICANN decision-making process is illustrated by the rejection of the ".union" proposal based on unfounded last-minute speculation by an ICANN board member that the international labor organizations proposing the gTLD were somehow undemocratic. (That this same Board member was at the time recused from the process only adds to the strangeness.) The procedures ICANN designed gave the applicants no opportunity to reply to unfounded accusations. ICANN then rejected ".iii" because someone on the Board was concerned that the name was difficult to pronounce, even though the ability to pronounce a proposed gTLD had never before been mentioned as a decision criterion. I am not in a position to vouch for the accuracy of each of the claims of error made by the firms that filed reconsideration requests after the Los Angeles meeting (available at http://www.icann.org/committees/reconsideration/index.html) but as a group these make for very sobering reading.

IV. THE CORRECT STRATEGY WOULD HAVE BEEN TO ACCEPT ALL APPLICANTS WHO MET A PRE-ANNOUNCED, OPEN, NEUTRAL, AND OBJECTIVE STANDARD OF COMPETENCE, RATHER THAN TO PICK AND CHOOSE AMONG THE APPLICANTS ON THE BASIS OF THE ICANN BOARD'S VAGUE AND INCONSISTENT IDEAS OF AESTHETIC MERIT, MARKET APPEAL, CAPITALIZATION, OR EXPERIENCE.

The procedural mess described above makes it impossible for me, at least, to form an opinion as to which were the "best" applicants. That sort of decision is in any case one more properly made by markets rather than by ICANN or by academics. I have no reason to believe that any of the seven TLDs selected are bad choices; but given ICANN's arbitrary procedures I also have no real doubt that many other applicants would have been at least as good. But in any case these are really the wrong questions. Other than rejecting technically incompetent or otherwise abusive applications, e.g. a single registry improperly claiming a large number of gTLDs, ICANN should not be acting as a barrier to entry. The right questions, which ICANN apparently never asked, are

- What is the minimum standard of competence (technical, financial, whatever) to be found qualified to run a registry for a given type of TLD?
- What open, neutral, and objective means should be used to decide among competing applicants when two or more would-be registries seek the same TLD string?
- What are the technical limits on the number of new TLDs that can reasonably be created in an orderly fashion per year?
- What open, neutral, and objective means should be used to decide among competing applicants, or to sequence applicants, if the number of applicants meet-

ing the qualification threshold exceeds the number of gTLDs being created in a given year?

Today, reasonable people could no doubt disagree on the fine details of some of these questions, and perhaps on almost every aspect of others. Resolving these issues in the abstract would not necessarily be easy. It would, however, be valuable and appropriate work for an Internet standards body, and would greatly enhance competition in all the affected markets. A thoughtful answer would inevitably resolve a number of difficult questions, not least the terms on which a marriage might be made between the Department of Commerce's "legacy" root and the so-called "alternate" roots.

Using a standards-based approach, rather than an ad-hoc comparative hearing or committee allocation approach, could only enhance competition in each of the affected markets.

Once ICANN makes its formal recommendations, the Department of Commerce will have to decide how to proceed. As I have argued elsewhere, as a result of its relationship with the Department of Commerce, ICANN is a state actor. Accordingly, its arbitrary and capricious decisions violate both the APA and the Due Process Clause of the Constitution. Rubber-stamping of its decisions by the Department of Commerce will only make these violations explicit, since the U.S. government would essentially endorse both ICANN's practices and its conclusions. If, on the other hand, ICANN is private, then rubber-stamping ICANN's decisions will amount to endorsing a deeply flawed procedure.

The Department of Commerce has maintained that its relations with ICANN are not subject to the APA, or indeed to any legal constraint other than those relating to relations with a government contractor and/or a participant in a cooperative research agreement. This characterization twists forms to obliterate substance. But whatever the legal arguments, when contemplating decisions which will shape the very nature of the Internet naming system, Commerce should proceed with deliberation, and act only on the basis of reliable information. The need for reliable information, proper public participation, and transparent and accountable decision-making is even stronger when Commerce contemplates making the sort of social policy choices—as opposed to mere technical standard-setting—embodied in creating new gTLDs and imposing conditions on their use. Basic requirements of fairness, due process, and the need to make reasonable decisions counsel in favor of notice, public access, the making of an official record, and deliberation.

There is no question but that if a federal agency had acted as the ICANN Board did, its decisions would not satisfy even cursory judicial review. In the circumstances, therefore, it would be unreasonable and a denial of due process for Commerce to rely on the outcome of such a flawed process without conducting its own review.

An Alternate Approach

An alternate approach to gTLD creation, one that would most certainly enhance competition, would take its inspiration from the fundamental design of the Internet itself—and from major league sports. The Internet was designed to continue to function even if large parts of the network sustained damage. Internet network design avoids, whenever possible, the creation of single points of failure. When it comes to policy, however, ICANN is currently a single point of failure for the network. A solution to this problem would be to share out part of ICANN's current functions to a variety of institutions.

In this scenario, ICANN would become a true technical coordination body, coordinating the activities of a large number of gTLD policy partners. ICANN's functions would be: (1) to keep a master list of TLDs, (2) to ensure that there were no 'name collisions'—two registries attempting to mange the same TLD string; (3) to fix an annual quota of new gTLDs; (4) to run an annual gTLD draft; (5) to coordinate the gTLD creation process so that new gTLDs came on stream in an orderly fashion instead of all at once.

Each of ICANN's policy partners would be assigned one or more draft choices, and then ICANN would randomly (or, perhaps, otherwise) assign each one their draft picks. As each policy partner's turn came up, it would be entitled to select a registry—imposing whatever conditions it wished—to manage any gTLD that had not yet been claimed on ICANN's master list. In keeping with the transnational and public/private nature of the Internet, ICANN's policy partners could be a highly diverse mix of international, national, and private "civil society" bodies.

While I think this alternate solution would best achieve the ends of internationalization, competition, and diversity, it might well require legislation since it is unclear if the Department of Commerce has the will (or the authority) to implement

such a plan, and it is quite clear that ICANN is not about to divest itself of any policy authority unless forced to do so.

Mr. UPTON. Very good.

Mr. Davidson.

STATEMENT OF ALAN B. DAVIDSON

Mr. DAVIDSON. Good morning, Mr. Chairman, members of the subcommittee. I am Alan Davidson, Associate Director of the Center for Democracy and Technology, CDT. I want to thank you for the opportunity to testify today.

CDT is a nonprofit, public interest organization dedicated to promoting civil liberties and democratic values on the Internet. We have been active in the domain name issues as advocates for open and representative governance mechanisms that protect basic human rights, the interests of Internet users, and the public voice, the appropriate public voice in these kinds of decisions.

I have entered a statement for the record, but I would like to try to emphasize a few elements of it.

We believe in the promise of ICANN, the possibility laid out in the white paper of a nongovernmental, bottom-up, self-governance organization in the best traditions of the Internet. And, you know, we believe that that kind of mechanism is what is most appropriate for a global network that needs flexibility and rapid change in its organizational institutions and that the possibility of ICANN as the nongovernmental flexible organization is one that would maximize openness and competition and individual liberty online. So our comments are offered as a critique of the gTLD process and of ICANN and as a road map for fixing what we view as in many ways a flawed process, as you have heard today.

Our bottom line, however, is that the Commerce Department and this Congress should not undo this decision that ICANN has made because, on balance, our belief is that the interests of consumers in the expansion of the gTLD space and the danger of the U.S. Government intervening in a heavy-handed way outweigh the benefits of redoing what is admittedly a flawed process.

I would like to quickly make four points. The first is that ICANN's decisions and particularly its collection of new gTLDs do raise issues of public concern. In an ideal world, this would be a boring hearing, and this would be a boring issue. I guess some people in the audience might say we have succeeded in part of that. But I think there are many reasons to believe that ICANN is, in fact, an important institution that we should be paying attention to.

There are at least two reasons. One is that there is a potential for ICANN to be much more of a central authority and a policy-making body for the Internet. In an otherwise decentralized world, ICANN sits on centralized functions of coordination for the Internet from which it can exert a much broader set of authorities. It has, to its credit, not done so to date, but a future more powerful ICANN might choose to do something differently.

Even the technical decisions that ICANN makes can—quote, unquote, technical decisions—can have broader policy impact. The gTLD example is a very good one. There is a free clear speech interest in the creation of new name spaces. It affects the way that

people navigate and find information on the Internet. And ICANN's decision, albeit, a good one based on the needs for stability and the interests of trademark owners and others to create a narrow test bed when in fact there are probably technical reasons to think that ICANN could have created many more TLDs, led it down a road of having to make what many believe were arbitrary decisions or at least policy-based decisions to go from this objective set of people who could have created TLDs to the seven that ultimately ICANN chose.

Second, the ICANN board, as you know—as a threshold matter we might ask, is this structure that made this decision appropriately representative? And I think there are many reasons to believe that the current ICANN structure is not broadly representative of the Internet community.

I will just speak quickly from the experience of a nonprofit group who has tried to participate in ICANN. It is a community that is receptive to input but at the same time is very difficult to participate in with meetings all over the world. It is difficult for many organizations that are not represented there, and we have had a difficulty in creating a civil society, a meaningful active civil society community at ICANN to represent the public interest.

Third, ICANN's process for selecting the gTLD's in fact was flawed. As we have heard today and is spelled out in our testimony, there are many reasons to believe the process could have done better. I think the $50,000 barrier to entry especially had a big impact on noncommercial players. That is not to say that no entry fee should have been required, but there could have a been a way to waive it, especially for nonprofit groups.

Finally, as I have said, I think, on balance, our belief is that a rollback is not what is required here but that, moving forward, ICANN needs to reform its process to stay out of the policymaking game to create a prime directive of sorts that keeps it out of the policymaking business and that restores ICANN to its promise of being a bottom-up, technical, objective policymaking—nonpolicymaking body that is representative of the public interest and the domain name space.

Thank you very much.

[The prepared statement of Alan B. Davidson and Jerry Berman follows:]

PREPARED STATEMENT OF JERRY BERMAN, EXECUTIVE DIRECTOR, AND ALAN B. DAVIDSON, ASSOCIATE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

1. ICANN'S DECISIONS, AND PARTICULARLY ITS SELECTION OF NEW GTLDS, RAISE ISSUES OF BROAD PUBLIC CONCERN.

Should the public and policymakers care about ICANN and its new gTLD decisions? The answer today is yes.

There are two competing visions of ICANN. In one, ICANN is a new world government for the Net—using its control over central domain name and IP address functions as a way to make policy for the Internet globally. In the second, ICANN is a purely technical body, making boring decisions on straightforward technical issues of minimal day-to-day interest to the public—like a corporate board or a technical standards group.

In reality, ICANN is somewhere in between and is likely to require public attention for at least some time to come. There are at least two important reasons why ICANN is of public concern:

- *ICANN's has the potential for broad policy-making*—On the decentralized global Internet there are few gatekeepers and a great deal of openness—features that have contributed to expression, competition, and innovation online. In this decentralized world ICANN oversees a crucial centralized function—the coordination of unique names and addresses. In this role, ICANN has the potential to exercise a great deal of control over Internet activities. For example, ICANN has already required that all domain registrars impose a uniform policy for resolving trademark disputes. Without a check on its authority, ICANN could seek to impose other requirements or even content regulations. While the current ICANN Board has shown an admirable lack of interest in such policy-making, a more powerful future ICANN might not be so restrained, particularly without any checks on its authority.
- *Even ICANN's narrow technical decisions have broader policy impacts*—"Technical" decisions often have broader impact. Expanding the gTLD space, choosing which registry is recognized for a country code, or even selecting a method for recognizing when new country-code domains get assigned (as .ps was recently assigned to Palestine), for example, all have broader political and social implications.

The Consumer and Free Expression Interest in New gTLDs

Today, access to the domain name system is access to the Internet. Domain names are the signposts in cyberspace that help make content available and visible on the Internet. (For further explanation, see CDT's overview *Your Place in Cyberspace: A Guide to the Domain Name System.*) The domain name system may ultimately be replaced by other methods of locating content online. But for the time being, a useful and compelling domain name is seen by many as an essential prerequisite to having content widely published and viewed online.

There is an increasing consumer interest in creating new gTLDs. The current gTLD name spaces, and the .com space in particular, are highly congested. The most desirable names are auctioned off in secondary markets for large sums of money. It is increasingly difficult to find descriptive and meaningful new names. Moreover, the lack of differentiation in gTLDs creates trademark and intellectual property problems: there is no easy way for United AirLines and United Van Lines to both own *united.com.*

ICANN's decisions about new gTLDs can have other implications for free expression. If, in choosing among otherwise equal proposals, ICANN were to create a new gTLD *.democrats* but refuse to create *.gop*, or added *.catholic* but refused to add *.islam*, it would be making content-based choices that could have a broad impact on what speech is favored online.

In addition, CDT has some concern that the creation of "restricted" domains that require registrants to meet certain criteria—such as .edu or the new .museum—risks creating a class of gatekeepers who control access to the name space. Today, access to open gTLDs like .com and .org does not require any proof of a business model or professional license. This easy access to the Internet supports innovation and expression. Who should decide who is a legitimate business, union, or human rights group? CDT has called for a diversity of both open and restricted gTLDs, and will monitor the impact of restricted domains on speech.

There is increasing evidence of an *artificial* scarcity in gTLDs. It is now widely acknowledged that it is technically feasible to add many new gTLDs to the root—perhaps thousands or even hundred of thousands. Limiting the number of gTLDs without objective technical criteria creates unnecessary congestion; potentially discriminates against the speech of non-commercial publishers or small businesses who cannot compete for the most desirable spaces; and places ICANN in the role of gatekeeper over speech online by deciding which gTLDs to create and under what circumstances.

There are many legitimate concerns that call for a slower deployment of new gTLDs. Some have expressed concern about stability of the Internet given a lack of experience in adding many new gTLDs. Trademark holders have also raised concerns about their ability to police their marks in a multitude of new spaces.

CDT believes that these concerns support the notion of a phased "proof of concept" rollout of new gTLDs. However, we believe that the consumer interest will be best served by a rapid introduction of the first set of new TLDs—followed quickly by a larger number of domains.

The phased "proof of concept" adopted by ICANN, however, creates a major problem: *Because ICANN could add many new gTLDs, but has chosen to add just a few, it has forced itself to make policy-based and possibly arbitrary decisions among legitimate candidates.*

In this environment, it is most important that gTLDs be allocated through a process that is widely perceived as fair, that is based on objective criteria, fair application of those criteria, and open and transparent decision-making. There are many reasons to believe ICANN's first selection process for new gTLDs has been highly flawed.

2. THE ICANN BOARD AND GOVERNANCE STRUCTURE THAT MADE THE GTLD SELECTION IS NOT APPROPRIATELY REPRESENTATIVE OF THE PUBLIC INTEREST.

A starting point for evaluating the gTLD decision is asking: Is the group that made this decision appropriately structured and representative? The governance of ICANN itself is an issue of ongoing debate. Despite efforts to make ICANN inclusive, there are many indications that ICANN has failed to be appropriately representative of all the interests affected by its decisions—casting doubt on the legitimacy of the gTLD decision.

ICANN organization underrepresents many interests.

Members of the Internet user community and advocates for user interests have often been under-represented in ICANN. ICANN's physical meetings, where many major decisions are made, occur all over the world, pursuing an admirable goal of global inclusiveness. However, the expenses associated with physical attendance at such meetings place it out of reach for many NGOs and public interest advocates.

CDT's own experience has been that the ICANN community is receptive to thoughtful input and advocacy, but that it requires a concerted and ongoing effort to be effective. In our case, that effort has only been possible through the support of the Markle Foundation, which early on committed to support efforts to improve the public voice in ICANN. We have received further support from the Ford Foundation as well. These grants provided CDT with the ability to attend and follow ICANN activities, which many other potentially interested organizations in the educational, civil liberties, or library communities cannot do.

ICANN's bottom-up structures offer imperfect avenues for public participation. While ICANN explicitly provides representation to a number of commercial interests, it fails to properly represent the millions of individuals that own Internet domain names or have an interest in ICANN's decisions. The main outlet for individual participation-the General Assembly of the Domain Names Supporting Organization-appears increasingly ineffective. Non-commercial organizations have a constituency, the Non-Commercial Constituency, but it is only one of seven groups making up one of the three supporting organizations.

ICANN's Board of Directors fails to adequately represent the public voice.

In the absence of other structures for representation, the main outlet for public input is the nine At-Large Directors of the Board. These nine directors are to be elected from within a broad At-Large membership, but there has been a great deal of debate about the election mechanism and even the existence of the At-Large Directors. To date only five of the nine At-Large directors have been elected (the seats were otherwise filled with appointed directors), and even those five were not seated in time for the gTLD decision in November.

CDT, along with Common Cause and the Carter Center, has strongly advocated for broadly representative and fair mechanisms to fill all nine At-Large seats as quickly as possible. Last March CDT and Common Cause prepared a study of ICANN's election system, concluding that the proposed "indirect election" would not adequately represent the public's voice. ICANN agreed to hold more democratic direct elections (held last October), but only for five of the nine At-Large Directors, to be followed by a study of the election process. CDT is currently engaged in an international research effort, the NGO and Academic ICANN Study (NAIS), examining last year's election, and in June will offer its suggestions to ICANN regarding future selection of Directors.

In the meantime, serious questions remain about adequate public representation on the current board, and the future of the public voice in selecting the Directors who will make decisions about additional gTLDs.

ICANN has shifted away from bottom-up coordination.

ICANN's founding conceptual documents, the Green and White Papers, called for "private bottom-up coordination" as the governance model for ICANN. Despite early attempts at consensus-based decision-making, authority in ICANN increasingly rests at the top, with the Corporation's nineteen-member Board of Directors. The Supporting Organizations have proven to have limited roles in policy generation and consensus-building. Increasingly, final ICANN policies are generated by ICANN staff and Board members. As a result the Board has moved away from the con-

sensus-based, bottom-up practices which were originally a critical element of its conception.

3. ICANN'S PROCESS FOR SELECTING NEW GTLDS WAS FLAWED.

CDT has not taken a position on the merits of any particular gTLD or registry operator chosen by ICANN. Our focus has been on the process ICANN has used to select these domains and the potential rules it may impose on the use of domains. A different, better process might have yielded very similar results.

We note also that ICANN and its staff undertook this final selection in a very compressed period at the end of a years-long debate about the addition of new gTLDs. They did so in the face of tensions between at least three competing goals: an open, inclusive, and fair process; rapid completion of that process, with less than two months between the submission of proposals and the selection by the Board; and a "proof of concept" goal of a small number of finalists. These often irreconcilable goals led to many of the problems with the process.

ICANN staff made substantial efforts to conduct an open and accountable process in the face of these constraints, including the publication of hundreds of pages of applications and the creation of forums to discuss the proposals. Still, it is important to recognize features of the selection process that were flawed, that had anti-consumer and anti-competitive impacts, and that should not be repeated.

Initial Criteria—ICANN took the helpful step of publishing a set of criteria it would use in judging applications. In general, the substantive areas of the criteria reflected objective goals that had support within much of the ICANN user community. However, the criteria themselves were vaguely worded and their ultimate application was poorly understood. Most importantly, they were not purely technical in nature—reflecting policy goals as much as technical needs—and were not precise enough to be purely objective in their application.

High Application Fee—ICANN required a $50,000 *non-refundable* application fee for all gTLD applicants. This high fee was a clear barrier to entry for many potential non-commercial applicants and biased the applicant pool in favor of large organizations that could risk the fee. This issue was raised by CDT at the Yokohama ICANN Board meeting, and the Board specifically refused to offer any form of lower application fees for non-profit or non-commercial proposals. Additionally, it appeared that the selection process would weed out applications without sophisticated business plans, legal counsel and technical expertise. These important qualifications for a strong application required access to large resources. Given the very short timeframe of the application period, non-commercial applicants were therefore put at an even greater disadvantage.

Legitimacy of the Board—As noted above, policy-making at ICANN is still hampered by institutional challenges regarding its legitimacy and decision-making mechanisms. ICANN took the unorthodox step of seating newly elected At-Large Directors *after* the gTLD decision was made (even though in previous years new Board members had been seated at the beginning of meetings.) The argument that new Directors would not be sufficiently up to speed on the new gTLD decision is specious. The entire ICANN community was highly focused on the gTLD debate, the new Board members showed in public appearances that they were highly versed in the issue, and each of them had gone through an intense campaign in the Fall answering numerous questions that likely made them more expert on the nuances of the gTLD issue than many sitting Board members.

Evaluation of Applicants—The ICANN staff attempted, with the help of outside consultants, to apply its criteria to the 47 applications received. The published Staff Report provided a useful guide to this evaluation, but was published just days before the Marina Del Rey meeting with little opportunity for public comment or debate. There was little time for public presentation by each of the applicants, or for each applicant to answer questions or misconceptions about their submissions. But beyond that, the staff report indicated that about half (23) of the applicants had met their objective criteria for technical competence and economic viability. Having met the objective threshold, the Board was left with only the somewhat arbitrary application of other criteria to narrow the number of applications to the desired low number.

Final Selection Arbitrary—With a high number of objectively qualified applicants, and a commitment to a low number of final gTLDs, the final decision by the Board at Marina Del Rey was dominated by the arbitrary application of its remaining criteria as well as other new criteria—many of which had little to do with technical standards. Instead, Directors referenced conceptions about the "sound" of names, the democratic nature of the applicants, or the promotion of free expression—cri-

teria to which CDT is sympathetic, but some of which were highly subjective and unforeseen review criteria.

Reporting and Post-selection Accountability—There is currently a lack of any serious objective mechanism for evaluating or appealing the Board's decision. While CDT is not in a position to judge the merits of their arguments, the eight petitions for reconsideration filed by applicants after the Board meeting (see http://www.icann.org/reconsideration) raise concerns. Moreover, the final contractual negotiations between ICANN and the selected applicants are likely to include rules of great interest to the user community—yet are occurring with little transparency.

Taken as a whole, the process for selecting new gTLDs contained serious flaws that at the very least need to be corrected before another round of selections. Importantly, the process shows how the line between a "purely technical coordination body" and a "policy-making body" is easily crossed by ICANN. The selection made by ICANN was not a standards-making process or a technical decision. Even ICANN's "objective" criteria were based on social values like economic viability and diversity (values which CDT supports, but which represent policy choices nonetheless.) Once it applied these "objective" criteria, the ICANN Board did not hesitate to engage in other policy-making approaches as well.

4. MOVING FORWARD: SUGGESTIONS FOR REFORMING ICANN AND THE GTLD PROCESS

The flaws in ICANN's process for allocating new gTLDs, as outlined above, are highly troubling. They point to a need for reform in both the ways the ICANN makes decisions about gTLDs, and ICANN's entire structure.

CDT still believes that Internet users have an interest in the vision spelled out in the White Paper—in the creation of a non-governmental, international coordination body, based on bottom-up self-governance, to administer central naming and numbering functions online. Were the Commerce Department to substantially revisit and change ICANN's decisions on the new gTLDs, the global community would likely question the existence and utility of ICANN. We also believe that there is a dominant consumer interest in rapid rollout of new domains, which would be dramatically slowed by an APA-based rule-making on gTLDs by Commerce. *Therefore, on balance, we do not support a major effort to roll back ICANN's decision on the initial domains, but rather would favor rapid creation of the new domains followed coupled with an investigation into the processes ICANN used to create gTLDs.*

Among our specific suggestions:

- ICANN must reform the method and process it uses for selecting the next round of new gTLDs. A logical step would be to publish an objective and specific set of criteria, and apply it in a more open and transparent way with greater opportunities for public comment. ICANN should stay away from policy-oriented criteria, and attempt to promote criteria based on technical merit and stability. Applicants that meet the criteria should be given the opportunity to participate in new gTLDs.
- Barriers to diversity should be mitigated. In particular, the $50,000 fee should be reduced or waived for non-commercial or non-profit entrants.
- A study of the method of selecting domains should be set in motion. In addition, careful consideration should be given to the potential openness, competitiveness, and free speech implications of creating a large number of "chartered" or restricted domains that establish gatekeepers on access to domain names.

ICANN's governance itself is implicated in the gTLD process. Among the major structural reforms ICANN should pursue include:

- Limited mission—Steps must be taken to structurally limit the mission of ICANN to technical management and coordination. Clear by-laws and charter limitations should be created to delineate "powers reserved to the users"—much as the Bill of Rights and other constitutional limitations limit the power of the government under the U.S. system.
- Empower the public voice in ICANN—The internal study underway of ICANN's At-Large membership and elections should be a vehicle for ensuring that the public voice finds appropriate ways to be heard in ICANN's decision-making processes.
- Expanded review process and bottom-up governance—ICANN should build internal review processes that produce faith in the ability to appeal decisions of the Board, and continue to pursue the consensus-based governance model.

While we do not believe the Commerce Department and Congress should intervene in the initial selection decision, they have a role in this reform. Just like any national government, the U.S. has an interest in making sure that the needs of its Internet users and businesses are protected in ICANN. While the U.S. must be sensitive to the global character of ICANN, it cannot ignore that at least for the time

being it retains a backstop role of final oversight over the current root system. It should exercise that oversight judiciously, but to the end of improving ICANN for all Internet users. It is only by restoring the public voice in ICANN, limiting its mission, and returning to first principles of bottom-up governance that ICANN will be able fulfill its vision of a new international self-regulatory body that promotes openness and expression online.

Mr. UPTON. Thank you.

Thank you all.

I am going to be just as quick on the gavel on the members up here, I want you to know. So we will try to speak fast as well.

Mr. Davidson, I appreciated your comments at the end of the panel here as well. I know I viewed this hearing as a constructive one from the get-go and tried to make things better, particularly when we hear a number of complaints not only from you all but others across the country and even the world.

And I know, Mr. Cerf, as you embarked on this adventure you had to have known that you were going to be subject to criticism at the end. In fact, that was buried in your remarks as well in terms of the fee and what may come out in terms of the legal challenges later on.

As I understand it, you have always reported that—at least ICANN has always reported that it has, in fact, a purely technical coordination policy. Maybe, to use Mr. Davidson's words, pretty boring, if it is just that. But it is not. We know that it is not. In fact, you play a very significant role in the policy side of things in the implications for the Internet as well.

As you look back, I know you were aware of some of these criticisms before this hearing, how was it that you only chose seven? You indicated you felt that the process was overwhelming in terms of the comments and the numbers, the names that came in. But why was it that you only chose seven instead of 10, 12, 15, 20?

The complaint, of course, is on 3 minutes at the end, a lot of decisions were made before that. Even in this hearing process, with a full house, you get 5 minutes, not 3. Why is it that you took—in essence, I think it has been about 8 to 10 years since we came up with our first domain names. Why couldn't it have lasted a couple more weeks so that in fact a variety of different players would be able to find out exactly what the criticisms were and you be able to respond to them and perhaps make some adjustments so that you weren't locked at seven?

You know, as I began my preparation for the hearing—I helped chair the hearing back in 1999 as well. Personally, I think .travel would have made a lot of sense. I travel, too. Whether it is a rental car or place to stay, .travel makes more personal sense than maybe just .aero in terms of the entire need of the traveling public, whether they be on business travel or individual.

So there are a lot of questions out there. And I guess if you had the chance 2 years ago to have heard a number of the complaints here, criticisms, some positive, some negative, where would you have changed things, particularly as you have looked to the future in terms of opening up that door again?

Mr. CERF. Mr. Chairman, I really like the boring idea a lot. If we could get to that state——

Mr. UPTON. The line outside the door still goes around.

Mr. CERF. First of all, I think it would be helpful to keep in mind what our objective was in this first go around. We have had, as you know, a great deal of discussion over a period of years about how many top-level domains should be increased, how many should be added to the system. We didn't come to any consensus. All the advice that we got was to start slow and start carefully. But there was no absolute numbers. So we weren't fixed at seven, particularly. That is where we ended up.

Our objective, though, was to get a test case with a fairly broad range of different kinds of TLDs into operation and see what would happen. The current circumstances of the Internet, as you know, are heavily commercially oriented now, whereas 10 years ago they weren't. So the conditions under which the first gTLDs were created was very different than 2001.

So our objective was to simply start with a small number, selected from a set that were offered to us by the applicants. We never expected as a board to approve every single application which might be qualified to operate as a TLD. We anticipated, however, once we got the results of the first new TLDs in operation that we would use that to guide our next selections.

Indeed, I think and hope that once we do get results from this first set we will be able to simplify the process and I hope make it a lot easier for the applicants.

I might also mention that, about the $50,000 fee, we made estimates about how much time and energy would be required to evaluate the proposals, bearing in mind that we would scrutinize these pretty carefully given this is the first time we have done anything of this type. It turns out that in the long run one hopes that one could reduce that cost, assuming the process becomes very boring.

The one thing I would point out is that had the fee been significantly lower, we might have gotten more than 47 proposals in which case we would have had even more difficulty processing them. So in a funny sense there is a balance that was fortunately met. We have consumed about half of the funds that were made available, and we are not done with all the negotiations with the new applicants.

Mr. UPTON. So much for my 2 minutes. I think we will have a second round of questions, though.

Mr. Markey.

Mr. MARKEY. I thank you very much. We probably should have done this for 3 minutes just to get a sense of what it is like to try to get to the important issues. Just to get out one question is, you know, difficult in 5 minutes.

Mr. Cerf, you and the others who developed DARPANET are clearly amongst the geniuses of our time, and we very much appreciate everything that you did to develop DARPANET which turned into Internet. It is true back in the old days you and the other founding fathers and mothers of the DARPANET were able to just get together and work out whatever standards were necessary and it worked very well, but we have now transitioned over the last 8 or 10 years into a commercial model and most of the people who were once with DARPANET are now in private sector jobs, not this

university setting that was originally the basis for the development of it.

So my first question to you would be, were the seven selected the only applicants that met the technical and financial standards?

Mr. CERF. No.

Mr. MARKEY. How did you weigh the criteria, then, to whittle it down to seven? In other words, at MIT if 3,000 kids have 800's on their boards and there is only 1,000 seats, then of course all these kids with 800's who worked hard—but that is private sector. That is kind of the university setting. Here we are in kind of a quasi-public situation where the Department of Commerce has subcontracted this to you. So if more than seven actually had qualified applications, what did you then use to disqualify everyone but the seven?

Mr. CERF. Well, keep in mind, of course, that our intent was to establish a modest number for purposes of doing the experiment. So our objective was indeed to not have all 47 or whatever number qualified. There was discussion toward the end of the period of debate on which one should be accepted. And as each one of those was considered, the issues were raised that caused the board ultimately to form consensus around only those seven.

Mr. MARKEY. Of the 47, how many actually met the technical and financial standards?

Mr. CERF. I am not sure that I remember exactly the number, but probably it was more than seven.

Mr. MARKEY. But was it more like 10 or more like 20 that met the technical and financial standards?

Mr. CERF. It is very hard to say because there were a number of different criteria. Some of these proposals met some of the criteria.

Mr. MARKEY. What I am saying is, did you reach a semi-final stage in your process whereby you whittled out of the 47 down to 20 or how did you get to the final seven?

Mr. CERF. The last discussions, as I remember them, were somewhere around 10.

Mr. MARKEY. Ten. Ten.

Now, let me ask you, Mr. Kerner, if you want to appeal this decision, what is the appeal process that you would use if you are unhappy with what Dr. Cerf and the others have decided in terms of whittling down from 10 to 7? Let's assume you are one of the three that was excluded. How would you appeal now?

Mr. KERNER. Well, ICANN has a process for reconsideration; and we have applied to be reconsidered. According to ICANN's policy, they are supposed to respond to that in 30 days.

Mr. MARKEY. What is the criteria which they have given you in order to file your appeal?

Mr. KERNER. It is a very general reconsideration policy. It is not particular to the TLD selection process we just went through.

Mr. MARKEY. Let me ask, Dr. Cerf, what criteria would you look at on appeal in order to expand the number——

Mr. CERF. The reconsideration process, as Mr. Kerner points out, is a very general one. It is for any actions taken by the board, and principally it looks to see whether the process was followed. It is not intended to reconsider decisions made by the board on, you

know, on the merits. In fact, one of the things that allowed us to I think achieve consensus was the belief that any of the qualifying TLD applications would, in fact, be considered later once we had——

Mr. MARKEY. Let me move to Professor Froomkin then.

Let me ask you, Professor Froomkin, due process, it seems to me, isn't an analog or a digital concept. It is just an American concept of fair play. So as you look at the process, do you believe that—Dr. Cerf was saying he is not going to look at the merits, only whether or not the process was fair. Do you believe that the process was fair in the selection of the seven and the exclusion of the other 40?

Mr. FROOMKIN. If we look by the standards that we apply to a Federal administrative agency, there is no question in my mind that a court would find they were not. In particular, I would like to point out——

Mr. MARKEY. Let me ask you this: Was the criteria subjective or technical?

Mr. FROOMKIN. There were clearly some technical criteria used to get rid of a few, and then they went to subjective ones. I watched the whole thing happen. I did not see a moment where they said, okay, here's the batch who meet minimum criteria. Now what do we do? They went after them one at a time. The criteria that were applied were—appeared to be applied erratically to different applications. So it was not this tiered process of here is the semifinalists and now let's have a beauty contest.

Mr. MARKEY. Do you agree with that, Mr. Short, the process for appeal?

Mr. SHORT. Absolutely. I would like to concur with what the professor said about the criteria being applied erratically.

To give an example, in the category that ICANN placed the IATA application which was called a restricted commercial content, one of the other applicants was .pro, which was successful. They were not asked to and did not make any showing on the record of representativeness. We, on the other hand, were disqualified solely because ICANN found that we were not representative and, despite as I said earlier, the fact that 1 million travel industry businesses around the world went on the record saying they agreed with our proposal.

Mr. MARKEY. So you felt you were rejected on a subjective rather that a technical basis.

Mr. SHORT. Absolutely. And I believe, sir, that the record bears that out.

Mr. MARKEY. Thirty seconds for Mr. Davidson.

Mr. DAVIDSON. I think you are really on to something here, which is to say that—anyway, that——

Mr. MARKEY. Even a blind squirrel finds an acorn once in a while.

Mr. DAVIDSON. ICANN published a detailed set of criteria. That was a very welcome move. Some of those criteria were technical and economic and objectively applied. Some of them, as much as we agreed on ideas like diversity and competition, they are not easily objectively applied. I think the boards, in retrospect, did not do so.

Mr. MARKEY. Thank you, Mr. Chairman.

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

Chairman TAUZIN. Thank you, Mr. Chairman.

First, Mr. Chairman, let me thank you for the hearing. This is an excellent first start for the subcommittee. And like Mr. Markey, Mr. Cerf, I also want to welcome you and thank you and our good friend Al for the pioneering work you did on the Internet.

Second, let me say this discussion you just had is settled in Mr. Cerf's testimony, if you look on page 26. He indicates criteria he included in this experiment were in some measures suggestive. It is an admission that this was a subjective process. Which raises a question, Mr. Cerf. You also say that the effort was not a contest to find the most qualified or the most worthy or most attractive. Why not?

Mr. CERF. I think because we didn't believe that it was necessary to do that in order to conduct a credible experiment and in order to get the data that we needed to determine whether or not we could open this process up.

Chairman TAUZIN. You understand the concern of applicants who met all your criteria and then learned that your selection process was suggestive and it was not designed to find the most qualified, most worthy and most attractive applicant.

Mr. CERF. It was——

Chairman TAUZIN. In ordinary business practices, that would be considered rather unfair.

Mr. CERF. In this case, it was considered—what we needed was a sufficient set of candidates who we thought would likely successfully function so that we could then open this up to our test case.

Chairman TAUZIN. Well, I only make the point I am not sure that the relief some of these applicants are asking for is merited under the circumstances. But you will be doing this in the future, and one of the concerns I think of this committee is whether or not in the future as you go forward with approving new TLDs whether or not the criteria is going to be a bit more objective and a bit more designed to find the most qualified, most worthy and, for the consuming public, the most attractive TLDs.

Mr. CERF. In fact, what I hope is that the criteria can be so objective that we don't have to make any value judgments about the likelihood of business success of the applicants.

Chairman TAUZIN. I hope so, too.

Let me quickly put on record something I put in my opening statement, Mr. Chairman. I believe it has already been made part of the record. That is, Mr. Cerf, I hope in the future you and your representatives will pay attention to our committee rule on testimony being submitted 48 hours in advance. The committee members read this testimony, need to prepare for these hearings; and I was a little disappointed that our staff was unable to get your testimony within the time of our rules. I hope all of you will follow those rules in the future.

Let me conclude with an area that really intrigues me, and that is questions posed by Ms. Gallegos to this process. In selecting a TLD that is already currently being used, .biz, that raises several concerns. There is more than one root server. You obviously govern

the USG domain name system root server, but there are others, the Open Root Server Council, the Pacific Root Server System, all of which have alternative and, you know, approved TLDs in their systems.

In choosing a TLD that is already being used as in the case of Ms. Gallegos, recognizing that all the personal computers we buy today have a default system that points to the USG domain name system, did you not realize that you would be affecting her business and perhaps negatively financially if every one of her customers has to literally reroute their computer so that it doesn't automatically point to your own root system, root service system?

Mr. CERF. There is a serious problem with the notion of alternate roots. The original design of the system had a single root for a very good reason. It is to make sure there was no ambiguity as to what a particular domain name would translate into. The alternate roots were not introduced with the concurrence and agreement of the existing initial government root-based system, and if we were to allow any arbitrary entity to create alternate domain names in alternate roots we will have exactly the situation that we can see emerging right now. If you have anyone who can create an alternate root and then create a domain name which happens to be the name as some other domain name in an alternate root——

Chairman TAUZIN. What happens when they collide?

Mr. CERF. What happens is that you get one or the other of the translations, but you don't get both; and, worse, you have uncertainty as to who is the other end of the line.

Ms. Gallegos made a very good point about the dangers of having ambiguity, but that is the consequence of even having an alternate root system. That is why ICANN continues to believe there should be only one root.

Chairman TAUZIN. You believe that. Have you received legal opinions regarding the selection of .biz as it relates to the use of .biz by alternate DNS root servers?

Mr. CERF. Yes, I did.

Chairman TAUZIN. Can you address Ms. Gallegos' complaints here today?

Mr. CERF. My understanding is that the creation of alternate routes, since it was outside of ICANN's purview, does not bind ICANN to any decisions made by the alternate root activity. We are responsible for a single root system, and that is the bounds of our responsibility.

Chairman TAUZIN. Do you have the authority, I guess is what I am asking, to overrun an alternate root server? Because, essentially, that is what you are doing. When you approve a .biz under U.S. Government domain system root server and all of our computers basically point to your system automatically in default, unless we adjust—are you not overrunning the alternate root and do have you that authority in law?

Mr. CERF. Let me turn this around for just a moment and point out for any alternate root to work you have to go and modify the customer's personal computer to point to the alternate root but not to the U.S. Government root. So already there has been some damage in some sense done to the architecture because now that particular customer has to be modified specially instead of what comes

naturally from the manufacturers. Our responsibility, ICANN, as I understand it, is to manage the creation of top-level domains within that single root; and that is my understanding of the scope of our responsibility.

Chairman TAUZIN. Just to finalize, Mr. Chairman, that has the affect of overrunning, does it not, the alternative root still?

Mr. CERF. Yes. Although I would also turn this around and say the creation of the alternate root system has the effect of potentially overrunning the single root that ICANN runs. We have no control over someone who creates domain names which conflict with those that have been assigned within the ICANN purview.

Chairman TAUZIN. Thank you, Mr. Chairman.

Mr. UPTON. Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. This is, obviously, a great hearing.

Dr. Cerf, pleased to have you back here. How many members are on the board?

Mr. CERF. Nineteen.

Mr. SHIMKUS. It is established through a contract from the Department of Commerce. How are we assured that—are there any financial disclosure requirements on board members that are accessible to the public?

Mr. CERF. There are no financial disclosure requirements that I am aware of. However, we do ask the board members to advise us of any conflicts of interest that they might have in the conduct of their service.

Mr. SHIMKUS. So if we have a subjective system, decisionmaking process with the public not having or the applicants not knowing through an open disclosure system possible conflicts of interest, that raises concerns, wouldn't you agree?

Mr. CERF. Yes. They certainly could.

May I point out that during the course of the review of the TLD applications four of our board members voluntarily recused themselves on what proved to be fairly thin concerns over conflict.

Mr. SHIMKUS. But—I applaud that, but I would say if there is a contractual arrangement with the Federal Government that is making business decisions that are affecting applicants who have a financial interest who may not know a possible conflict of interest of the board members, that is something that you ought to rectify.

Mr. CERF. Indeed.

Mr. SHIMKUS. When you appear before us you are supposed to identify what government contacts that you all have, and we have to do it as Members of Congress. So I think that is an issue that you ought to look at.

Mr. CERF. Thank you. That is a good point.

Mr. SHIMKUS. I am a West Point graduate and served as a recruiter for the academies. We have very qualified young men and women who apply to the service academies every year. It is not different from everyone meeting—47 people meeting the criteria established for the domain names.

They have—what they do is develop a whole candidate. They do a scoring based upon some subjective issues. But there is still a score. And then the academies, based upon this score and the openings, choose those who get acceptance letters.

Subjectivity without scoring raises some level of disputes which, if there is no quantitative possibility of analysis or even defense, that is why we are here. And, again, just another recommendation.

Question. Politically, you would have had a stronger, favorable reception from this committee had you used your position to address pornographic material on the Internet. I understand that—and many of us feel that you have failed in a great opportunity. Especially us politicians, when we are addressing this, you invite us now to legislatively get involved in forcing this issue. Because of the cries of the public and those of us who understand first amendment principles, how do we protect the individual's right to free speech while ensuring that our children are protected?

So I would like to ask—our understanding is it was rejected due to the controversy surrounding the idea. Again, it may be a subjective type of analysis. I am not sure. How is a .xxx avenue any different than current zoning laws or issues in which the public has kind of addressed this in other mediums?

Mr. CERF. There was discussion of xxx, and one of the problems that we encountered is not knowing how we would prevent any pornographic sites from registering in other than xxx. The principal question was enforcement. It wasn't clear how to do that and whether it could be effectively done. The sites which already exist presumably have established their brands, if you will—I guess that is the right word—and we don't know or were not clear at the time we were making these TLD decisions what mechanism would be available to move them away from where they are.

Mr. SHIMKUS. Since my time has expired, let me go to the flip question. Since you didn't want to address that, why didn't you address the green light domain, an area of protection of kids? If you weren't going to do it on the punitive aspect, why not do something positive?

Mr. CERF. There was a lot of sympathy for the .kids domain, which I assume you are talking about.

Mr. SHIMKUS. Correct.

Mr. CERF. And there was quite a bit of discussion about this. One of the things that kept returning to the theme of the discussion is that all of these are global domains, and there came a moment when many realized that it wasn't clear what .kids actually meant. In other words, what is a child? At what age—what is the age range for which this material would be considered appropriate?

Given that .kids is global, it wasn't clear what criteria would be applicable globally for content that would be acceptable. In some countries, some things might be acceptable and other things they might not for the same age ranges. It got less and less clear as the discussion ensued how it would be possible to specify satisfactorily what those limitations were and how would they be enforced.

Perhaps in the worst case, suppose that a parent sees something on .kids that he or she felt was inappropriate. Would that now come back to ICANN? Would we be sued for having permitted inappropriate content? We didn't see how we could enforce it.

Mr. SHIMKUS. I know my time has expired. I would just say you are inviting us to have many more of these hearings to address some of these issues. I wish you would have solved them.

I yield back my time.

Mr. UPTON. Mr. Pickering.

Mr. PICKERING. Thank you, Mr. Chairman. I appreciate this hearing and the importance of what we are discussing today.

From the very beginning of this debate, I was fortunate enough to be a part, first on the Science Committee as the acting chairman of the basic research subcommittee as we went from the transition from a government-run, monopoly based policy in domain names to a nongovernmental, private competitive model; and my concern all the way through has been somewhat different but I think highlighted by this hearing today.

Many I believe did not realize that, in essence, by setting up ICANN and what we are doing was fundamentally the Constitution of the Internet, just as our Founders set up the decisionmaking process of a representative democracy, the House, the Senate, the executive, the judicial, making sure that you had the openness and transparency, hopefully the credibility and the confidence in the integrity of the decisions being made and then the checks and balances of that process.

What we have today is, as Mr. Davidson talked about, the great promise and the great potential of what we had hoped for at the very beginning; and that is a grass-root, bottom-up, inclusive, open international body that would be making the decisions as we govern the Internet and the use of the Internet. But as Mr. Davidson highlighted his concerns, and I would like to associate myself with his concerns, I think he captures where we are today and where we need to be.

We do need immediate reform, and I hope it is done voluntarily. We still have the promise of a nongovernmental, private, open competitive model; and that is the objective in the policy that I want to see. But the way that this has occurred to date, I am concerned, as Mr. Davidson is, that the process was arbitrary, subjective. Decisions are being questioned. The confidence, the credibility, the integrity is in question. And that if we do not take our steps toward reform quickly that the promise and the potential of ICANN and what we are trying to do could be at risk.

Mr. Davidson—let me ask the rest of the panel, how many of you have read Mr. Davidson's testimony or would agree with the reforms that he has laid out in his testimony? Mr. Cerf?

Mr. CERF. I am not sure that I am prepared to agree to all of them, but I absolutely accept the idea that we need to reexamine the procedures that we used. I certainly would like something simpler and less complicated than we had to go through in November. So I welcome Mr. Davidson's organization's inputs and others who have constructively commented today.

Mr. PICKERING. Mr. Short, Ms. Gallegos, you all were very critical of the process. Have you all had a chance to read Mr. Davidson's testimony?

Ms. GALLEGOS. I have not had a chance to read his testimony.

Mr. PICKERING. Or his reforms?

Ms. GALLEGOS. No, I have not had a chance to read them.

Mr. PICKERING. If I could ask you to respond to the committee in writing as we conclude the hearing today as to your comments with your views concerning his proposed reforms, that would be helpful to the committee.

Mr. Davidson.

Mr. DAVIDSON. Well, Mr. Pickering, I very much appreciate those remarks. I do think that there is a sense here that we don't want to throw the baby out here, that there is a potential here. And I have tried to lay out some steps. I think there are things that many in the ICANN community agree with, especially the notion of really trying to focus on ICANN's mission of being as much as possible a technical and objective body. I think, unfortunately, the process that we have right now shows how easy it is to morph out of that world. I am hopeful that we can all work together and try and make it better and I think get the appropriate level of public input where it is needed to the extent it does engage in policy-oriented activities.

Thank you.

Mr. PICKERING. Mr. Short.

Mr. SHORT. Thank you, Mr. Pickering.

I have to say I have not had an opportunity to read Mr. Davidson's testimony yet. It was just provided to me this morning. But I would say that we feel all we are asking for really is a fair shake. We are not asking this committee or Congress to direct that we get .travel, but we feel the record makes it abundantly clear what has happened is not in conformity with the requirements of the Administrative Procedure Act or basic notions of due process, a point I think Professor Froomkin has confirmed; and any reforms that would take the process in that direction, which I think is essential for any asset funded by the U.S. Government, we would certainly support.

Thank you.

Mr. PICKERING. Yes, Ms. Gallegos.

Ms. GALLEGOS. In terms of the APA, we, of course, had a petition for rulemaking, you know, that was presented to the DOC. We haven't heard anything on that yet. We would really like to see that take place.

I think that one of the problems that we have perceived is that there really is no public process. There is no due process. There is no appeals process. There is no transparency. And most of what is done by ICANN is done in secret. The deliberations and considerations over all of these gTLDs was done in secret. We knew nothing—we, the public, knew nothing until we saw the reviews that were published on the website, which were woefully inadequate.

I think that the premise behind having an ICANN is a good one. I think that to throw it out is like cutting the head off of the monster, it grows back two. I think what we need to do is look at ICANN as something that needs to be reformatted perhaps, but it is a good idea.

From our perspective, also we need to look at, as opposed to what Mr. Cerf had said, the alternative roots were formed for a reason. IANA did facilitate the first alternative root because they were supposed to be new TLDs entered into the root. They were promised and they were not given. The root was formed because of that. And it needed to be a test bed so IANA approved the formation of that root. Then it was scrapped. So all of that time, effort and money had gone into that, proved that the root was workable, proved that it could coexist, and then it was scrapped.

So they said, well, we have it. Let's use it. And that is what they have been doing. This has been going on for many, many, many years. We do coexist. There is no reason for our government to take the posture that we can just wipe out a business because we can; and, basically, this is what has happened.

I think there is a lot of merit in looking at the coexistence, and not only that but a very simple solution to having new TLDs, use the ones that are already there, are working and have been proving to work and are successful, and you might have a good avenue.

Thank you.

Mr. PICKERING. I have some additional questions, but I will wait until the second round. Thank you very much.

Mr. UPTON. Very good. Thank you.

Professor Froomkin, you indicated in your testimony you questioned or you raised the question how many are needed. How many do you think we need?

Mr. FROOMKIN. I think that is a decision only the market can tell us. I think that if people are willing to take the trouble to build them and go through a modest application process and run them, do whatever other things we require them, maybe even a small bond, whatever it takes to meet a threshold, as long as we are willing to do that let's let the market decide. I couldn't begin to know how any human being would know the answer to that question.

Mr. UPTON. Dr. Cerf, your question—your answer to Mr. Markey that you thought about 10 or so were actually sufficient, passed all of the barriers to be approved, did you ever consider as a body whether you ought to move the number from 7 to 10 or 11 to 9? At what point did you lock in 7?

Mr. CERF. We locked in seven at the—in fact, we went down from a collection that looked like they might be adequate down to seven of them that we had full consensus on. The board did not uniformly agree on all 10. That is my opinion, that maybe that many were acceptable. But we were looking for full consensus on the board. We achieved full consensus on seven of them. Since that lay within the range that all the recommendations were to start with, we felt, I felt satisfied that the board had come to a reasonable conclusion, especially given the belief that we would add more of them once we could demonstrate that this first set in fact worked adequately and didn't cause any trouble.

Mr. UPTON. Is this process that you embarked on, is it pretty much over now? I mean, that is that and at what point are you looking for a second round?

Mr. CERF. Two things have to happen before I think we would be well-advised to proceed to a second round. First, we need to complete the negotiations with the applicants. Those negotiations are ongoing but not complete.

The second, we need to get some experience with what happens as those new TLDs are introduced. I am sure you are familiar with terms like land rush or gold rush and so on. We don't know, quite honestly, what kinds of behavior we will see from the market as these new TLDs are introduced. Some of them are of the restricted type, like .museum. But others are quite open, like .info; and so we don't know what behavior will be. Until we can see that, I would say it was probably inadvisable to begin reconsideration of addi-

tional TLDs. I hope that we could do that with about 6 months of experience with the new ones.

Mr. UPTON. All ICANN-accredited registers currently adhere to this agreement which, among other things, requires registers to provide real time public access to registrant contact information, WHOIS data. Consumers, law enforcement, intellectual property owners, among others, rely on this public availability of WHOIS data.

What is your sense as to whether you intend—this is a question for Mr. Kerner through Ms. Gallegos—what is your sense about embracing the policy as set forth in this register agreement in any new TLDs that you might operate? Mr. Kerner.

Mr. KERNER. As the current operators of the .tv top-level domain, we in fact have a very robust, easily accessible WHOIS that we find is used quite frequently by trademark holders. And we are actually find that ICANN's GDRP resolution procedure is actually quite effective in enabling trademark holders to get back their trademarks.

Mr. UPTON. Ms. Broitman.

Ms. BROITMAN. In the registry preapplication we designed a system that is slightly different from today's system. That was on the advice of a lot of consensus thinking, and that is what is known as a thick WHOIS data base where all of the information resides in a single place. So that a trademark owner, for example, could go to a single place to go searching for cybersquatters.

Mr. UPTON. Mr. Short.

Mr. SHORT. Mr. Chairman, we are—our back-in provider actually is New Star New Level. Mr. Hansen can provide more of the technical information. But I would just say we are fully committed to protection of intellectual property rights. It is my understanding we were proposing to offer the highest level of WHOIS service as part of our proposal.

Thank you.

Mr. HANSEN. The new technology that we have proposed creates the ability to create a centralized data base. This centralized data base, because of a new protocol that would be used to collect data from the registrars, allows for the collection of data that is of a much higher quality than you would find in today's very distributed model. The registrars today inconsistently collect data. Some collect data better than others. It is updated in some cases very rigorously; in other cases, it is not.

The requirement the centralized data base can impose upon the registrars in terms of submitting a consistent set of data that will be contained in the data base will actually be an enhancement that the trademark and intellectual property community should embrace, partly because today they do have to go around to all of these various data bases to collect the data. The reliability of the data, consistency of the data is questionable.

Mr. UPTON. Mr. Davidson.

Mr. DAVIDSON. I would like to make a quick comment to say we should note that there are some privacy aspects to this whole question of the availability of WHOIS data and what exactly is included in there. These privacy concerns are being raised especially as many more individuals and small businesses get involved in reg-

istering domain names and finding certain kinds of information that might be personal being put into data base. I think it is a question for ongoing debate about how we balance those interests and find ways to give—you know, protect legitimate interests in getting in data while still protecting the privacy, especially of consumers and noncommercial interests.

Mr. UPTON. Ms. Gallegos.

Ms. GALLEGOS. I think I would like to, if it is okay with you, relate just one story. When I started in my business it was a soho, small office home office. When I got my first domain name I had no choice but to put all the relevant information into the thick WHOIS; and, as a result of that, I was stalked. I had to change my phone number. I had to have security dogs. I finally got a post office box and started using that.

There are some very serious privacy issues. With more and more businesses operating out of their homes now, that means that a person has to give up his personal information, put his family at risk. So I think that, you know, we need to consider that.

I know that with the.biz, we have a thick WHOIS, and it does have all of the relevant information, but we are going to be instituting a situation where people can use a dummy contact that will show up in the WHOIS. And if there is a need for that information to be given to a person that has legitimate need for that information, it will be given but only with an order.

As far as intellectual property is concerned, that act was designed for the consumer and not for the trademark holder. I think that we need to really protect the consumer and let the trademark holder police his marks.

Mr. UPTON. Thank you.

Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman.

Here's what I would like. I would like each one of you to give us your top-level recommendation, your one recommendation for improving the ICANN process. So we will go right down. One recommendation to improve ICANN process. Mr. Davidson.

Mr. DAVIDSON. Thank you.

I just want to say, by the way, it has been our observation over the years that, in fact, sir, you are no blind squirrel, so I thank you for your earlier question.

I guess my No. 1 recommendation would be the institution of a prime directive in the mind-set of ICANN that is to always stay out of policy-oriented decisionmaking as much as possible and stick as much as possible to the technical and objectively measured approach. It may not always be possible. But I think, for example, even in the gTLD context, if it turned out that you had, you know, 20 otherwise absolutely equal people and you felt compelled to only choose seven, do a lottery, do something, stay out of the business of—even as attractive as it may be to many of us, stay out of the business of trying to make policy.

Mr. MARKEY. Thank you.

Professor.

Mr. FROOMKIN. I would put that slightly different but close. I think ICANN needs to be told it has got to take one of two roads and not try to mix the two. Either it becomes the true standards

body and does the kind of things that Alan Davidson was just talking about, or it is going to have to recognize if it is doing policy, given its relationship with the Department of Commerce as a State actor, a governmental body, be subjected to the APA and the Constitution.

This is heresy to say among Internet people, but this is an issue that is bigger than the Internet. This issue—what the Department of Commerce has tried to do with these strange zero cost procurement contracts, these research contracts where the research turns out to be running things and so on, is a blueprint for an end run around accountable government and the APA. And if ICANN can be put back in the standards body box where it probably could live very happily in a more modest vision I think a lot of people would be really happy, and that would be great. If it takes the other road, it has go to understand the consequences against, and those need to be applied to.

Mr. MARKEY. By APA you mean the Administrative Procedures Act, which is kind of the constitution of all decisions that are made in all administrative agencies in terms of protecting due process and using a reasonable standard.

Mr. FROOMKIN. When I get back to Miami I am going to tell my students that Congress gets it.

Mr. MARKEY. Okay. Thank you.

Excuse me, what was your final——

Mr. FROOMKIN. When I go back to Miami I am going to tell my students that Congress gets it.

Mr. MARKEY. Congress gets it. Some people define that Congress gets it by saying, well, you know Congress knows that it can never understand these issues, so they don't ask questions. But I would prefer to use your definition is that we get it when we do understand and we are asking relevant questions.

Ms. GALLEGOS. Representative Markey, thank you.

I think I would have to echo what the professor has said. We need to keep it technical. It is either going to be a standards body or a governmental body. Let's decide what it is going to be. While I disagree that it should be a governmental body, I think it should go to the private sector. It should be a standards body only.

But I think the one thing that we really have to recognize from the get-go is that the board seated itself. It has never been elected. We have an interim board that has been an interim board since the beginning except for the five elected members. I think that the whole board needs to be elected appropriately, and maybe that is a start if we have the proper representation. Right now, we have a special interest representation except for the five elected members.

Mr. MARKEY. By the way, I would recommend that we have a hearing with just the five members here and we just be allowed to ask them questions.

Mr. Hansen.

Mr. HANSEN. Yes. The recommendation I would make, focusing on the process itself, is I think it would have been helpful had minimum qualifications for applications—the companies who were submitting applications, for instance, be established up front at the beginning of the process. That may have resulted in fewer applica-

tions but probably would have helped on the—once the selections were made, people would understand that, you know—they wouldn't submit an application at the beginning if their company wasn't qualified based on the minimum criteria established by ICANN. So you would have fewer applications. That would enhance the assessment process, allow more time to focus on the fewer number of applications and would improve the quality of the applications as well.

Mr. MARKEY. Mr. Short.

Mr. SHORT. Thank you, Mr. Markey. Our principal recommendation would be that the Administrative Procedures Act principles should apply to decisionmaking in this area. What we would be looking for is fairness and an actual decision on the record.

I would just add that before going off to join IATA, I spent many years hear in Washington as a regulatory lawyer and have some familiarity with proceedings under the APA. And while there are always going to be winners and losers, at least in my assessment the APA principles generally deliver results that are in the public interest, and that is all we are really asking for here.

Mr. MARKEY. Ms. Broitman.

Ms. BROITMAN. Thank you, Congressman.

I think that one of the opportunities to reform the process in the future is to provide a bit more time during the entire process, and particularly between an intermediate recommendation and the final board decision.

What was very helpful actually in the ICANN process is that there were questions and answers on the record as well as public comment periods on the record during the entire 6-week period. And in the future, having some more of that sort of opportunity beyond the staff report I think would be helpful to all.

Mr. MARKEY. Mr. Kerner.

Mr. KERNER. Mr. Chairman, I think, speaking as an applicant, what we would have most appreciated is an iterative open selection process where we could have had a dialog, ICANN could have had a dialog with all the applicants to address concerns that they had, and those decisions wouldn't have been reached by the board, but was based on factually inaccurate information provided by the staff report.

Dr. Cerf indicated that seven final selections were made from what he estimated at 10 qualified applicants. I don't think he considered either one of our applications from .com or .pro to be qualified applicants because the staff had indicated that our consortium did not have the technical capabilities to run a top-level domain. And that was said even though, again, we had a proven robust technical infrastructure that was capable of resolving domain names at about 10 times the rate as currently experienced with .com.

Mr. MARKEY. Dr. Cerf.

Mr. CERF. I think the most salient thing for us, apart from some very good suggestions that we have just heard, is, in fact, to find more objective ways of making these decisions wherever we can and, as I said before, to make them as boring as possible.

Mr. MARKEY. And what would be the one recommendation you would make in order to make the process more clear?

Mr. CERF. I would like to see that the objective criteria are principally that the applicants simply be able to demonstrate technical capability to perform the function. The big concern in this first go-round was that if the applicants also didn't have the financial and other ability to execute, that we might not have a very good proof of concept because some of them wouldn't work at all. But in the long run, it would be nice to let the market decide that.

Mr. MARKEY. Thank you, Doctor.

Thank you, Mr. Chairman.

Mr. UPTON. Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Mr. Hansen, in your opinion, did the criteria posted and used by ICANN change along the way, or did ICANN act consistently throughout the process?

Mr. HANSEN. I believe ICANN did act consistently as it applies to the criteria that were laid out. We understood at the very beginning that stability of the Internet was the No. 1 priority, and we focused on that in our application. We focused on the technical aspects of our proposal for that very reason and other ways in which we could support stability of the Internet in introducing a new top-level domain name.

Mr. SHIMKUS. Thank you.

Mr. Kerner, I always find it interesting on the disclosure, you have indicated that ICANN made poor choices in selecting these top-level domains, although you also submitted two that were accepted; is that correct?

Mr. KERNER. That is correct. We were part of two consortiums, .nom and .pro.

Mr. SHIMKUS. Why do you think you were successful in the two and not successful in the other?

Mr. KERNER. I don't think that it is possible for me to address those individually. I just think by definition if you have a flawed process, by definition the results of that process are going to be flawed as well.

Mr. SHIMKUS. But was it flawed in the selection of the two that got accepted?

Mr. KERNER. Again, I think we believe that the entire process was flawed.

Mr. SHIMKUS. So should we undo the two that were selected?

Mr. KERNER. I think what we are proposing is that we basically start again at the beginning and we institute a fair and open process.

Mr. SHIMKUS. I agree with that. This is always fun. It may not be fun for people on the panels, and I have been on the other side, too, but there is discrepancy in the testimony when you are attacking a system that you have also benefited by successfully.

So in one part it has failed, but in the other part it was successful in two applications which you supported; is that correct?

Mr. KERNER. I am sorry, let me just clarify to make sure we are both talking on the same page here.

We made applications for, again, the .nom and .pro. Our applications were not accepted. Other applicants for the same top-level domains were accepted. Now, obviously, we think that those would be good choices for this first round.

Mr. SHIMKUS. So your track record in this recent round is zero?

Mr. KERNER. Correct; 0 for 2.

Mr. SHIMKUS. Well, then, I can see why you are upset.

Dr. Cerf, the last question is the $50,000 nonrefundable; you are a not-for-profit corporation. Obviously the basic financial records should be available, and this is an experimental round. I know you probably haven't done an after-action review of cost-benefit analysis and the time effort. Are you expecting the cost to go up in the next round or the cost to go down?

Again, I think there is an agreement there should be more transparency, and there probably should be transparency in the fee structure based upon Ms. Gallegos's testimony.

Mr. CERF. The fee structure is based almost entirely on what the costs turn out to be for evaluating proposals. That is the principal basis.

Mr. SHIMKUS. But you have to set the fee structure before you accept the proposal.

Mr. CERF. Exactly. That is why this cycle is so important, because I hope in the end we get a simplified procedure which will be less strenuous and less expensive. But, again, all these costs do have to be borne somehow.

Mr. PICKERING. If the gentleman would yield just a second to clarify.

ICANN has had difficulty in raising funds to support itself. They looked at a fee at one time that created a firestorm of controversy. They pulled back from the fee. In previous answers you said you still have half of the receipts that came in from the applications, which would indicate that, in fact, it was not a cost-based fee, but that you actually have double what it costs you to assess them, and that it could be a way for you to finance ICANN. Could you clarify that for me?

Mr. CERF. I understand your line of reasoning, Congressman Pickering; however, it turns out we have additional expenses associated with processing the applications. We now have to go through the negotiating process to actually come to agreements with each one of the seven applicants. That costs money as well. And so we expect there will be continued expenses associated with finally executing on all of the seven proposals that are under way.

Mr. SHIMKUS. And I am going to end my period of time. I appreciate all your attention. I think we have learned a lot. Mr. Chairman, I yield back.

Mr. UPTON. Mr. Pickering.

Mr. PICKERING. Let me try to cover as much ground as quickly as possible. On your recommendations to Mr. Markey, you talked about ICANN performing just a standard or a technical role. But similar to the way budget in this place drives policy and policy drives budget, does not technical drive policy and policy drive technical in the Internet world? And how do you solve that dilemma?

Mr. DAVIDSON. It is difficult to draw that line, admittedly, and I think we are seeing the struggle that ICANN itself is having in drawing that line. And we may not be able to perfectly do it. There may be technical decisions that have policy implications. That is why actually I think the real set of recommendations here is that we really have to be thinking about a three-legged stool here.

One is limitation to the technical objective of things as much as possible. The second is having appropriate governance, structure and policy to the extent there are other kinds of issues that get dealt with, and that means having a good representative board and having good structures internally. And the other is doing it in this bottom-up consensus way. As my statement says, the promise of ICANN is to go back to this bottom-up nature of self-organizing that the Internet has done best.

Those are the three things I think ICANN needs to work on.

Mr. PICKERING. Is there a way to limit the mission of ICANN to strictly technical and standards setting better and more effectively than we currently have?

Mr. DAVIDSON. I believe there is. We have talked about it in our testimony, and I think it is an ongoing thing for ICANN. There are no real strong structural limitations like, to use a U.S. example, the Bill of Rights, which reserves powers for the people here in our constitutional system. Finding structural ways to do similar kinds of things for ICANN, I think, would be a major step forward.

Mr. PICKERING. How do you—or who, maybe more appropriately, would limit their mission and set up the structural safeguards and do the Internet bill of rights for Internet users? Who has the authority to do that, and who should do that? Should Congress? Should ICANN?

Mr. DAVIDSON. It is a tricky question. I think that on some level much of this is best if it comes from within ICANN, and if ICANN could itself find ways to do that.

There is a role here for the U.S. Government just as, A, there is a role for other governments that are involved in ICANN and in watching what ICANN does. But we should note there is a special backstop kind of responsibility that the U.S. Commerce Department has in this area.

Mr. PICKERING. Dr. Cerf, would you be willing, as the Chair of the board of ICANN, to limit your mission to technical and standard? Would you submit a bill of rights, so to speak, for Internet users and provide the structural safeguards? Would you do that voluntarily?

Mr. CERF. I am a strong proponent, Congressman, of limiting the role of ICANN. In fact, I speak regularly about its unnecessary expansion; to use a phrase that is a buzzword, Internet governance, which I think is a very broad term that ICANN has no business trying to achieve.

With respect to a bill of rights, it sounds good on the surface. I need to understand more about the substance of it before I would know what I was signing up for. But in principle the notion that we protect the users of the Internet from abuse and from technical failures and the like is really important, I think.

Mr. PICKERING. Mr. Chairman, one quick follow-up question.

If we limit the role, if we establish safeguards, then the question is who does policy? If ICANN doesn't do policy, who should do policy?

Mr. CERF. I wonder if Mr. Froomkin——

Mr. FROOMKIN. Well, I guess the question is what sort of policy do you mean? In a sense we all do policy when we turn on our computers and decide what we want to use the Internet for. The Inter-

net is a set of communication standards. We don't do policies about the alphabet; we don't do policies much about pencils. And in a sense it is that kind of a tool. So those policy questions are probably left best to homes and families and individuals.

Mr. PICKERING. This is the dilemma for us and has been for the very beginning. The reason we have ICANN is to avoid APA, the Administrative Procedures Act, as much as any reason. We didn't want the APA to apply to ICANN.

Now, the problem with due process and other rights is that you have a private body that is not subject to APA, that is making decisions that many feel like should have some due process or APA or some safeguard. So how do we ensure that it continues to be private, nongovernmental, but have the safeguards? What is the appropriate balance?

In, for example, policy, when ICANN wanted to set a fee, the question was do they have in essence a taxing authority, an authority to tax people? Clearly they do not. But now they are running into a problem with questions of the $50,000 fee; is that the way to finance themselves. How will ICANN sustain itself financially? Those are all policy questions. Who will make those decisions? That is the dilemma we all have.

Mr. DAVIDSON. I think you have really hit the nail on the head here, and this is difficult. It is in some ways an experiment. One answer, in some ways also, is to see if there are ways to make ICANN a healthier organization; that to the extent that it is appropriate, to the extent that ICANN is getting into these other areas, that the affected user community feels like this is a legitimate organization. That is something that happens over time and we all need to keep working on. I don't think it has happened yet.

There is a great deal of internal debate within ICANN, for example, about how its board is selected, especially a section of the board that is selected at large. And I think the outcome of those kinds of debates is going to have a lot to do with whether we can have faith in an ICANN-like body to make these decisions to the extent that they are not simply objective, technical standard decisions. So it is tough.

And, again, this bottom-up consensus-oriented idea is very important in thinking about whether the user community that is affected by this can trust the organization.

Mr. PICKERING. Mr. Chairman, I know that my time is up, but I think that we are beginning to focus on the issues, and maybe this is just the beginning with this hearing to see if we can come up with the reforms and the steps that we need to take to make sure that the promise of the potential of the Internet, ICANN, and domain names does have the credibility and the confidence of the American people, and what we can do as a committee to be a catalyst to answer these questions.

I look forward to working with all of you, Dr. Cerf and all of the others, to try to get the right reforms as quickly as possible, and hopefully done in a voluntary, private, nongovernmental way.

Mr. UPTON. Thank you.

Mr. Cox.

Mr. COX. Thank you, Mr. Chairman, and I would like to welcome all of our panelists and thank you especially for your excellent tes-

timony. We have covered a lot of ground in the last 14 months, and I think you have improved our knowledge base a great deal here this morning.

The debate that has gone on this morning has included questions of the role that ICANN can or should play in the development of policy. One of the policy issues that I would like to use is the basis for furthering that discussion in just a few minutes, that we have discussed here in this committee and also throughout the House and the Senate, and that is what to do about pornography on the Internet.

One of several ideas that has been discussed is the creation of a top-level domain that would essentially zone the Internet voluntarily. We rejected early on the idea of a government mandate for this to occur, but we have been very interested in whether the private sector might migrate in that direction, because if it did, it might then be possible for Congress to offer incentives, not penalties, which would run afoul of first amendment guarantees, but incentives for people to list on that adults only top-level domain.

Obviously, the most primitive screening software, indeed no screening software at all virtually, would be needed, to the extent that this were successful in the marketplace, for people then to discriminate among content that they were seeking, and indeed, if you are an aficionado of pornography, probably simplify your life. But for everyone else who wished to avoid it, it would also simplify theirs.

So I would begin by putting that question to you, Dr. Cerf, and I perhaps ought to know the answer to this question, but I haven't found it in what has gone by thus far, whether any of the 44 applications you reviewed was for such a top-level domain?

Mr. CERF. Indeed one of the applications did propose a .xxx. The discussions that ensued among the board on this point turned in large measure on our uncertainty of how to enforce movement or registration of those pornographic sites to that top-level domain.

As we all know, you can reach literally every domain on the Internet by using the domain name system. So everywhere in the world, not just in the United States, one would need to create the incentives that you mentioned in order to persuade these purveyors to move over into this single global top-level domain.

Mr. COX. Let's pause just there for a moment, because there is an assumption there that I think is not empirically in evidence, and that is that there would not be an advantage to being registered in a place where people might expect to find you, and .com is crowded with all sorts of things that you have to sort through. One might expect rather rapidly to find what one was looking for on a domain that were—like the other top-level domains—you expected were descriptive of its purpose.

Mr. CERF. I don't think that the board was able to conclude that we could guarantee that everyone would move over, even though, as you say, there might be some incentive. So in the absence of knowing for sure it could be guaranteed, we also ran into the question whether someone would then complain or, in fact, take legal action if, in fact, not everyone did move over. So enforcement was of principal concern there.

Mr. COX. I take it your process for evaluation of this was discussion at the board level?

Mr. CERF. It was discussed in public during the course of the GTLD evaluations, so it is documented on the Web site, in fact.

Mr. COX. And the participants in that discussion were?

Mr. CERF. The members of the board.

Mr. COX. Well, that tees up—and I know you are dying to get in here, too, but that tees up a question that I would then put to Mr. Davidson and Professor Froomkin about whether you think using this as an example of the kinds of policy decisions that ICANN is being called upon to make, whether you think this process is working and is workable for resolving such questions.

Mr. DAVIDSON. I would like to say two things. One is the Congressman has been one of the thoughtful commentators on this question of how we deal with the very compelling issue of protecting kids on the Internet. I would just say on the specific question of the .xxx and .kids as presented to ICANN right now, I really have to rise to ICANN's defense on some level and say I think they did exactly the right thing by not going there, as it were.

There are a lot of reasons to believe these are difficult and troubling concepts. The Congressional Commission on Child On-Line Protection, in fact, which recently reported to Congress and came out of the COPA statute, raised a lot of questions about particularly .xxx, because, for example, it could be viewed as an attractive nuisance where people could go to find a collection of materials that were troubling. Or there is definitely an issue with the fact that these are binary labels; you are either in or you are out. They don't have any of the granularity that many of the other much more sophisticated tools out there for parents do. They do not scale well globally. What we think ought to be in .kids here in the United States might not be what they think ought to be in .kids in Europe or in Asia or in Germany or elsewhere. So it is not clear these are actually as useful solutions as many of us might have hoped.

The second thing is that, given that they are highly controversial because of their impact on speech, in that respect ICANN did the right thing here by saying this is an area where there are major policy impacts. We should stay out of it. If ICANN were to create .dems but not .gop, we would say, gosh, there is a problem there, right? I think ICANN should stay out of making decisions in areas where there are very, very clear policy concerns that have been raised.

Mr. COX. Let me add that, as you know, but perhaps the other panelists or other Members don't know, the center has been very active on this, and I have been much reliant on your research and advice and guidance, and it is one of the reasons I have not introduced legislation on this topic.

My question, however, is slightly different. Maybe I should give Professor Froomkin a chance to answer it. It is not so much whether at the moment you come down yea or nay on the question of whether you would have approved a particular application, but rather whether this, as emblematic of the kinds of tough policy questions that are getting put to ICANN, is something which is tractable within the current structure and whether there are struc-

tural changes that need to be made to address this; whether ICANN is the right body to address such questions and so on. I think you did answer that partially, but that is the nub of my question.

Professor Froomkin.

Mr. FROOMKIN. I will do my best to meet it head on, Congressman. I think for ICANN to get involved in any issue that smacks of content control will bring the whole thing justifiably crashing down, and they were very wise to run away from it.

Now, that doesn't answer the implicit question, which is if not ICANN, then what? Let me just take a tiny crack at that, if I may, and everyone will hate me for this.

There is the .U.S. domain. If we are trying to make rules that meet the needs of people in this country, we could create something with granularity for different age groups and so on. People wouldn't be required to use it, but it would be a resource that would be available.

That would be one way to do something that didn't run into the transnational problem, and giving ICANN, which is supposed a technical standards body and not a speech regulation body, problems. That might be an avenue to approach. Again, if linking it to the U.S. brings it right to the fore of the problem of first amendment values, then that is where it belongs.

Mr. COX. I don't know if I have a moment. It seems the chairman is forbearing, and I will take advantage.

I will just put it back to Dr. Cerf to wrap up for us. The two commentators have just opined that you made the right choice, and that one of the reasons that you made the right choice is that ICANN ought to—normatively ought to stay away from issues that carry this kind of policy controversy. Can you tell us your views on that general topic?

Mr. CERF. Well, I certainly hope that ICANN doesn't have to ever get into things like content control. We edge in that direction a little bit when we have the specialized domains that have restricted membership. But in the cases that we approved, it appeared to us that the restrictions were pretty objective; are you a museum or not a museum, are you a co-op or not a co-op, and so on. In the case of .pro, do you have a professional affiliation or degree or not? The notion of content control is such a slippery slope.

We have seen some international debates on this subject. Perhaps you are aware of the court case in France against Yahoo. All of these matters are extremely complicated. And as was pointed out a little bit earlier, the top-level domain system is a very crude mechanism for describing content. It is an extraordinarily unsatisfying way of trying to imply what will be found in a particular top-level domain, and as a result it feels like that is not the place where ICANN should be trying to make decisions.

We do have a problem if multiple parties propose the same top-level domains. We do have a policy question. How do we choose among them, even within the root that we are responsible for? That is hard. And it is the sort of thing that I am not satisfied that we understand how to deal with that, especially if qualified parties come with conflicting proposals. That is a very difficult thing.

Mr. COX. Well, I thank you, and I think what we have touched on here is something that is not only difficult for ICANN to handle, but also something that may be beyond the capacity of any top-level domain system to handle.

It has been suggested, I might add, just for local color, that a better way to do this, in a purely voluntary fashion, would be for people to organize around the principle of including somewhere an Internet address, for example .adu, as an abbreviation for adult or age-appropriate material, and that way people could have any address they wanted, any domain they wanted, and still there would be some unifying theme that robots could notice. But that is a carol for another Christmas.

Mr. CERF. That is an interesting idea, in fact.

Mr. COX. Well, I thank the panel again, and my time surely has expired.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you, Mr. Cox.

This finishes up and concludes the hearing. I would note for the record, particularly for those Members that were not able to come, and I know there are some other hearings taking place at the same time, that we may see some written questions come your way. You can respond to them on e-mail, if you would like. We look forward, if that happens, to a timely response.

I would just offer this one conclusion to the hearing. Based on the questions of all Members here and the statements—opening statements as well, we don't want a boring or exciting process. Our goal here is to make sure that it is fair and open in every way, particularly for those that are qualified parties with a qualified application, so that they may, in fact, succeed, and so that all of us users and businesses succeed as well.

I have viewed this hearing as a constructive one. I hope all of you have taken that to heart. I think there is room for improvement as this process continues, and we will continue to oversee this process in the days ahead not only through my chairmanship of this subcommittee, but I know Mr. Greenwood would like to do the same as part of the oversight subcommittee as well. We look forward to that, and we thank you for your time and look forward to seeing you again.

Thank you very much.

[Whereupon, at 12:34 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF NAME.SPACE, INC.

Over the past several years a widespread myth was that adding new Toplevel Domains to the internet would cause the net to break. The reality is and has been for five years now that the net is already broken by NOT adding the new TLDs that have existed since 1996. In a word, censorship by "default". There are places that exist on the internet that most of the world can't see because they are artificially and arbitrarily excluded from publication in the global ROOT—the top of the "domain tree" that identifies all the available top level domains to the rest of the internet.

Many new toplevel domains have been added to the ROOT just as smoothly as any new "dot-com" domain is added to the "COM" domain. On a daily basis sometimes 10,000 or more new entries are added to "COM" with no ill effects. At its most basic level, adding one or more entries into the ROOT domain database (or ANY level of the domain tree) is nothing more than a mundane administrative task, essentially copying or typing some lines into a file and saving it. With a simple "copy

and paste" the internet can be richly enhanced with these new domain extensions. A very simple and incredibly inexpensive operation that results in the enabling of vast economic opportunities, making the best use of the existing ubiquitous and essential DNS technology while at the same time extending the benefits of expanding the spectrum of expressive and uniquely descriptive names to support a growing, commercially and culturally diverse global network.

What should be an everyday mundane administrative task has turned into the most expensive text edit in history, and one that is delayed more than five years!

Name.Space has been working toward introducing new TLDs since the company was formed in 1996 predating ICANN by more than two years. Since that time Name.Space has been listening to its customers and users of the internet at large and responding to their desire for new domain names besides ".com" and over the years out of all the customer requests selected over 540 new extensions and published them on a distributed DNS infrastructure, (see attatched) available to all for free. We listened to our clients demands and have worked hard to bring them the services and quality of service that they were not getting elsewhere, building useful new tools as we needed them along the way to improve the security and capabilities of the Name.Space root domain registry. We would like to share our work with the rest of the world and of course profit by it so we can create jobs and spinoff opportunities. The barrier in front of us is a very expensive text edit that my company paid dearly for and which has yet to happen.

To answer the question raised by this Committee, Is ICANN thwarting competition? The answer is unmistakedly yes.

Name.Space has been ready to serve the internet with new domains since 1996 and has been repeatedly denied access to the market by an artifical and arbitrary exclusion from the ROOT. ICANNs decision to exclude Name.Space and other qualified applicants unjustly delays the introduction of true diversity of business model, competition and consumer choice to the domain industry. It directly harms our business at Name.Space by the loss of revenues that we have suffered over the years that most of the world could not resolve our domains, and it harms individual internet users and non commercial organizations by depriving them of free speech and consumer choice.

I respectfully request that this Committee reject the ICANN board selection of 7 TLDs and their operators and ask that the NTIA reconsider all applicants who were excluded by ICANN and resolve the terms of inclusion of existing new TLDs into the global ROOT so this "most expensive text edit in history" can finally bring about the logical evolution of the domain name system that is more than five years in the making—in "internet time" five years is an eternity.

ATLANTICROOT NETWORK, INC.

DEAR REPRESENTATIVE PICKERING: Thank you for inviting me to respond to the Center for Democracy and Technology testimony of February 8, 2001.

In order to respond in an organized manner, I have decided to follow the actual written testimony on a section by section basis. My comments will be enclosed in brackets [ ] and italicized. For the most part, Mr. Davidson and I agree. There are, however, some areas in which I would like to elaborate and some where we disagree.

Summary

The Internet's great promise to promote speech, commerce, and civic discourse relies largely on its open, decentralized nature. Within this architecture, the centralized administration of the Internet Corporation for Assigned Names and Numbers (ICANN) is a double-edged sword that presents both the possibility of bottom-up Internet self-governance and the threat of unchecked policy-making by a powerful new central authority. ICANN's recent move to create new global Top Level Domains (gTLDs) is a welcome step towards openness and competition. But the process ICANN used to select those gTLDs was flawed and demonstrates the need for ICANN to take steps to ensure greater transparency, representation, and legitimacy.

The Center for Democracy and Technology (CDT) welcomes this opportunity to testify before the Subcommittee on this issue of importance to both competition and free expression online. CDT is a non-profit, public interest organization dedicated to promoting civil liberties and democratic values on the Internet. We have participated in ICANN as advocates for open and representative governance mechanisms that protect basic human rights, the interests of Internet users, and the public voice.

We wish to make four main points in our testimony:

- *ICANN's decisions, and particularly its selection of new gTLDs, raise issues of broad public concern*—While ICANN purports to be a purely technical coordination body, it has the potential to exert a great deal of control over the Internet, and many of its "technical" decisions have broader policy implications. The selection of new gTLDs—particularly in the manner exercised by ICANN—impacts free expression and the competitive landscape of the Internet. ICANN is not equipped to make policy decisions, and does not even apparently want to. But the gTLD selection process suggests that ICANN could be engaged in broader policy-based decisions than its mission or mandate should allow.
- *The ICANN Board and governance structure that made the gTLD selection is not appropriately representative of the public voice*—A starting point for evaluating the gTLD decision is asking: Is the group that made this decision appropriately structured and representative? The Directors that made the gTLD selection did not include any of the elected members of ICANN's Board, and there is an ongoing controversy within ICANN about the appropriate structure and selection of the Board. Despite efforts to make ICANN inclusive, non-commercial interests continue to be underrepresented in its deliberations—casting doubt on the legitimacy of the gTLD decision.
- *ICANN's process for selecting new gTLDs was flawed.*—A $50,000 non-refundable application fee and stringent criteria created a high barrier for non-commercial applicants and skewed the applicant pool towards large organizations. The "testbed" concept for creating a small number of initial domains, while not without its merits, also led to the uneven application of vague criteria in order to reduce the number of applicants from those who passed more objective criteria. ICANN has produced little support for its final decisions—decisions that appeared arbitrary. The appeals process is unsatisfying and post-selection transparency of the important final contract negotiations is minimal.
- *Nevertheless, on balance a rollback of the gTLD decision is not in the consumer interest. ICANN should reform its selection process and governance model, and Congress and the Commerce Department should exercise oversight in this reform.*—While the selection process was flawed, new gTLDs are needed. CDT believes that on balance the consumer interest in rapid deployment of new gTLDs, and the violence done to the global interest in ICANN by U.S. intervention, are not outweighed by the benefit of the Commerce Department's reconsidering the entire gTLD decision. Rather, Commerce and the U.S. Congress should insist on a more objective process for gTLD selection moving forward, and on reform of ICANN's structure and mission moving forward to make it appropriately representative.

ICANN's founding documents held out the vision of a new form of international, non-governmental, bottom-up, consensus-driven, self-organizing structure for key Internet functions. The promise of that vision was to promote openness, good governance, and competition on a global network. Today, that promise is threatened. As the gTLD selection process demonstrates, serious reform is needed to limit the injection of policy-making into ICANN's technical coordination functions, reassert the bottom-up consensus nature of ICANN's deliberations, and ensure that the public voice is appropriately represented in ICANN's decisions.

The Center for Democracy and Technology is a 501(c)(3) non-profit, public interest organization dedicated to promoting civil liberties and democratic values on the Internet. Our core goals include ensuring that principles of fundamental human rights and the U.S. Constitution's protections extend to the Internet and other new media. CDT co-authored ICANN's Global Elections: On the Internet, For the Internet, a March 2000 study of ICANN's elections. CDT also serves in the secretariat for the "NGO and Academic ICANN Study" (NAIS), a collaboration of international researchers and advocates studying ICANN's governance and At-Large Membership structure.

1. ICANN's decisions, and particularly its selection of new gTLDs, raise issues of broad public concern.

Should the public and policymakers care about ICANN and its new gTLD decisions? The answer today is yes.

There are two competing visions of ICANN. In one, ICANN is a new world government for the Net—using its control over central domain name and IP address functions as a way to make policy for the Internet globally. In the second, ICANN is a purely technical body, making boring decisions on straightforward technical issues of minimal day-to-day interest to the public—like a corporate board or a technical standards group.

In reality, ICANN is somewhere in between and is likely to require public attention for at least some time to come. There are at least two important reasons why ICANN is of public concern:

• **ICANN's has the potential for broad policy-making**—On the decentralized global Internet there are few gatekeepers and a great deal of openness—features that have contributed to expression, competition, and innovation online. In this decentralized world ICANN oversees a crucial centralized function—the coordination of unique names and addresses. In this role, ICANN has the potential to exercise a great deal of control over Internet activities. For example, ICANN has already required that all domain registrars impose a uniform policy for resolving trademark disputes. Without a check on its authority, ICANN could seek to impose other requirements or even content regulations. While the current ICANN Board has shown an admirable lack of interest in such policy-making, a more powerful future ICANN might not be so restrained, particularly without any checks on its authority.

[The UDRP is horribly flawed .

1. There is no avenue for non-trademark holders to file a complaint. It is designed strictly for the Trademark Lobby and large multi-national corporations to obtain domain names they did not have the foresight to register when they had the opportunity to do so. Further, it allows these interests to restrain fair use of domain names.

2. Free speech has been curtailed as a result of the UDRP and the courts have now begun to use these flawed decisions to deny it. While it has been determined that names like <anynamesucks.com> do not constitute free speech in some cases, others have ruled that it does. There is inconsistency and bias throughout. Does a name infer free speech or does it not?

3. What is a bad faith registration? If Irving B. Matthews, CPA registers ibm.com or ibm.biz, does that mean a bad faith registration? It seems so in many decisions involving acronyms and other names. Who has the rights to Ford, Acme, Amex, clue, Barcelona and a host of others? Does a trademark holder "own" words? Does anyone own language? Is it proper to allow a claim to words such as "easy" in any form and to deny their use to others? This is currently one such claim. Another is a claim to "my"—any use of the word!

4. There is no appeals process, yet the complainant may supplement comments for a fee with one arbitration forum. The respondent may not. Either side may go to court, of course, but in most cases, the respondent does not have the resources to do so, and the complainant knows this. Many respondents simply give up, especially individuals. There is nothing to prevent a loop. A respondent went to court and won. The complainant then filed a UDRP claim. The UDRP does not have to honor a court judgment and ICANN accepted the claim. In case of a UDRP loss, the complainant could go back to court, and so on. There is nothing to stop the cycle, so a trademark holder with deep pockets could easily bully a respondent into giving up a legitimately held domain.

5. Forum shopping is standard. WIPO has most applications because of its obvious bias. In my opinion, WIPO should not be a provider at all, given its mission as advocate for the IP industry.

6. Respondents have no choice in which arbitration provider is used. In order to have any voice at all, he must choose a three member panel and pay for it. For most respondents, this is prohibitive. We must consider that most complaints are filed by established businesses against individuals or very small businesses. Many complaints are simply intimidation and theft by fiat, since they know the respondents many times simply cannot afford representation or the three member panel choice.

There are many other areas of the UDRP that cry for reform. I am one of a great many who feel it needs total reform and that WIPO should be only an advisor for one interest group. There must be advisors from all stakeholders.

It seems that the large commercial interests have little or no understanding of the DNS, or do not wish to recognize its hierarchal structure. Since there can be only one unique character string (name) at each level, trademarks do not fit the model at all. A domain name is just a locator for a numerical address.

One solution may be to absolve trademark holders from the responsibility of policing their marks within the domain name system. Without that requirement, there would be no need for such a dispute resolution process. In addition, the ACPA language is so over broad, that it invites abuse—abuse that is already apparent.

The term "cybersquatter" was meant to refer to those who would deliberately register a known trademark and then attempt to extort the trademark holder for large sums of money or sell it to a known competitor to direct customers away from it. Instead, it has been used to refer to domain name holders who have not used a name at all for the web or who wish to enter the secondary market—a perfectly legal activity. While it has been determined that free speech does not apply to a domain name in itself, the ACPA and UDRP allow a determination that one is a cybersquatter for

registering a domain name. There is a great disparity here. Remember, a domain name is a locator, even though it uses what appears to be common language.

I feel that the ACPA language requires change to a narrowly defined criteria and definition of "cybersquatter."

The Lanham Act was written to protect consumers and has now been perverted to protect trademark holders against both small business and consumers. It is resulting in restrained trade and free speech.]

• **Even ICANN's narrow technical decisions have broader policy impacts**—"Technical" decisions often have broader impact. Expanding the gTLD space, choosing which registry is recognized for a country code, or even selecting a method for recognizing when new country-code domains get assigned (as .ps was recently assigned to Palestine), for example, all have broader political and social implications.

[The ccTLDs are not at all happy with proposed actions by ICANN. Tri-lateral contracts, involving governments in contracts where delegations belong to individuals or corporations within a country, forcing gTLD status on a ccTLD . . . These are areas where ICANN imposes broad policy and it should not.

ccTLDs are and should be autonomous. In my opinion, I do not see why any of them should be forced into contracts at all. ICANN provides little or no services to them and there is little or no cost involved to maintain an entry in the rootzone. ICANN could, if necessary charge a nominal fee for making contact or nameserver changes, but this fee should be no more than a nominal administrative charge of five or ten dollars. If it is automated, there should be no fee at all. It is in the public interest to have a "whois" database for TLDs, but even this is a minimal cost.

ICANN should not be engaged in policy making for any TLDs beyond those held by the DoC. Aside from basic technical requirements that ensure viability of a TLD (nameservers), ICANN should stand aside. Business models, dispute policies, payment policies, restrictions, charters should not be within their purview These are business decisions or decisions within the realm of national sovereignty.]

The Consumer and Free Expression Interest in New gTLDs

Today, access to the domain name system is access to the Internet. Domain names are the signposts in cyberspace that help make content available and visible on the Internet. (For further explanation, see CDT's overview Your Place in Cyberspace: A Guide to the Domain Name System.) The domain name system may ultimately be replaced by other methods of locating content online. But for the time being, a useful and compelling domain name is seen by many as an essential prerequisite to having content widely published and viewed online.

There is an increasing consumer interest in creating new gTLDs. The current gTLD name spaces, and the .com space in particular, are highly congested. The most desirable names are auctioned off in secondary markets for large sums of money. It is increasingly difficult to find descriptive and meaningful new names. Moreover, the lack of differentiation in gTLDs creates trademark and intellectual property problems: there is no easy way for United AirLines and United Van Lines to both own united.com.

[Congestion has occurred due to the delay of introduction of TLDs to the USG root. It has created a perceived shortage of names and fostered speculation. If existing TLDs had been entered into the root years ago, the situation would have been very different today. While further delay will exacerbate the problem, imprudent decision now will have serious negative impact later.]

ICANN's decisions about new gTLDs can have other implications for free expression. If, in choosing among otherwise equal proposals, ICANN were to create a new gTLD .democrats but refuse to create .gop, or added .catholic but refused to add .islam, it would be making content-based choices that could have a broad impact on what speech is favored online.

[There is no reason to refuse to enter a TLD into the root . . . All candidates with demonstrable technical capabilities should have been included, and should be included in the future.]

In addition, CDT has some concern that the creation of "restricted" domains that require registrants to meet certain criteria—such as .edu or the new .museum—risks creating a class of gatekeepers who control access to the name space. Today, access to open gTLDs like .com and .org does not require any proof of a business model or professional license. This easy access to the Internet supports innovation and expression. Who should decide who is a legitimate business, union, or human rights group? CDT has called for a diversity of both open and restricted gTLDs, and will monitor the impact of restricted domains on speech.

[I disagree that there is a problem with creation of "chartered" TLDs. To the contrary, chartered or "restricted" TLDS should be desirable. It allows for consumers to

search within categories and can provide an indication that they will find a bone fide organization, business, profession or individual within a specified TLD. However, for this to work well in practice there must be a multitude of TLDs available. And this is the point, is it not? ICANN/DoC have been reluctant to provide them and impose such measures that it is nearly impossible to do so for the vast majority of the world].

There is increasing evidence of an artificial scarcity in gTLDs. It is now widely acknowledged that it is technically feasible to add many new gTLDs to the root—perhaps thousands or even hundred of thousands. Limiting the number of gTLDs without objective technical criteria creates unnecessary congestion; potentially discriminates against the speech of non-commercial publishers or small businesses who cannot compete for the most desirable spaces; and places ICANN in the role of gatekeeper over speech online by deciding which gTLDs to create and under what circumstances.

There are many legitimate concerns that call for a slower deployment of new gTLDs. Some have expressed concern about stability of the Internet given a lack of experience in adding many new gTLDs. Trademark holders have also raised concerns about their ability to police their marks in a multitude of new spaces.

[The fallacy of lack of experience is acutely apparent. There are TLDs such as .WEB and many others that prove it. There are also companies, such as Diebold Inc., that have been deploying "new" services successfully for many years.

Other roots have been adding TLDS frequently with no problems and DoC has added ccTLDs in droves over the last decade, and during the most explosive growth period for the Internet. If failure or success is a criteria, it should be dropped, since the market will determine that issue.

As for Trademark concerns, let us consider having 500 TLDs (they exist today) and then determine whether Trademarks have a place in the DNS. If, as I mentioned earlier, Trademark holders were absolved of having to police their marks in the DNS, the purpose of alleviating the scarcity of names would be accomplished. The trademark issue has become so over blown and powerful that it threatens to overshadow any advantage in introducing new gTLDs. What is the point if trademark holders get first choice before any other entity has a chance in every TLD? It makes no sense at all. With hundreds of TLDs, it is almost humorous. One possible solution would be to relegate Trademark holders to a .TMK or .REG for protection of their marks. However, to say they have first choice in all new gTLDs is ludicrous.]

CDT believes that these concerns support the notion of a phased "proof of concept" rollout of new gTLDs. However, we believe that the consumer interest will be best served by a rapid introduction of the first set of new TLDs—followed quickly by a larger number of domains.

[I disagree strongly that there is need for "proof of concept" since it has already been accomplished by several TLDs, including .BIZ, .WEB, .ONLINE, ccTLDs and many others. It makes much more sense to introduce as many as possible (really simple) immediately, with one caveat. There should be no duplication in THE NAME SPACE.

I have always advocated that DoC should simply include all known viable TLDs in their root, just as the other major roots include the DoC TLDs and ccTLDs in theirs. This is a common reciprocal arrangement. It provides a singular name space and enhances the stability of the Internet by providing a multiple system of networks for load balancing and avoidance of a single point of failure.

What is generally not understood is that while THE name space is absolutely singular, root systems are not. There can and will be many roots. There is no way to prevent this occurrence. It is in the best interests of the global community for ICANN/DoC to recognize the phenomenon and cooperate with it. The alternative is apparent. ICANN refuses to acknowledge the existence of pre-existing roots and TLDs and then simply duplicates them. The potential result is chaotic with much of the innovation in new systems occurring outside of the US where our national law would have no effect in any case. Cooperation, on the other hand, would tend to bring these disparate groups to the table.

This attitude and practice blatantly breaks the agreement with DoC (the ICANN-DOC MOU) and also the APA that ICANN was designed to avoid. Since the situation is not going to disappear, and will rear its head frequently, it is my considered opinion that ICANN/DoC move to cooperate with all existing entities rather than ignore them. One can choose to ignore warnings of an impending hurricane, but it will still make landfall. Once you feel the wind, it's too late to plan. In fact, once DoC introduces a collider and the registry for that collider is open to the public, the damage may be irreversible.

We still have a chance to deal with impending chaos, but time is very short. No amount of US legislation will prevent the global problem. No one country can "rule"

the Internet and certainly no single corporation can do so. ICANN could go a long way to mitigate the situation, but it must be reformed and focused in task in order to accomplish the task.]

The phased "proof of concept" adopted by ICANN, however, creates a major problem:Because ICANN could add many new gTLDs, but has chosen to add just a few, it has forced itself to make policy-based and possibly arbitrary decisions among legitimate candidates.

[ICANN made decisions based on business models, financials, ethics, mnemonics, and other arbitrary criteria that should not be within its purview. In addition, it relied on the sometimes grossly erroneous reports by staff to render decisions without a thorough personal understanding by board members of each proposal. Staff ran the show.]

In this environment, it is most important that gTLDs be allocated through a process that is widely perceived as fair, that is based on objective criteria, fair application of those criteria, and open and transparent decision-making. There are many reasons to believe ICANN's first selection process for new gTLDs has been highly flawed.

3. The ICANN Board and governance structure that made the gTLD selection is not appropriately representative of the public interest.

A starting point for evaluating the gTLD decision is asking: Is the group that made this decision appropriately structured and representative? The governance of ICANN itself is an issue of ongoing debate. Despite efforts to make ICANN inclusive, there are many indications that ICANN has failed to be appropriately representative of all the interests affected by its decisions—casting doubt on the legitimacy of the gTLD decision.

ICANN organization underrepresents many interests.

Members of the Internet user community and advocates for user interests have often been under-represented in ICANN. ICANN's physical meetings, where many major decisions are made, occur all over the world, pursuing an admirable goal of global inclusiveness. However, the expenses associated with physical attendance at such meetings place it out of reach for many NGOs and public interest advocates.

CDT's own experience has been that the ICANN community is receptive to thoughtful input and advocacy, but that it requires a concerted and ongoing effort to be effective. In our case, that effort has only been possible through the support of the Markle Foundation, which early on committed to support efforts to improve the public voice in ICANN. We have received further support from the Ford Foundation as well. These grants provided CDT with the ability to attend and follow ICANN activities, which many other potentially interested organizations in the educational, civil liberties, or library communities cannot do.

ICANN's bottom-up structures offer imperfect avenues for public participation. While ICANN explicitly provides representation to a number of commercial interests, it fails to properly represent the millions of individuals that own Internet domain names or have an interest in ICANN's decisions. The main outlet for individual participation-the General Assembly of the Domain Names Supporting Organization-appears increasingly ineffective. Non-commercial organizations have a constituency, the Non-Commercial Constituency, but it is only one of seven groups making up one of the three supporting organizations.

[The General Assembly has literally no voice in ICANN policy making decisions. Recommendations made at the Melbourne meetings were ignored. In addition, the board meeting was called to order a half hour early with no visible notification to the public (I attended via webcast) and important issues were discussed prior to the public's attendance at that meeting. Furthermore, the agenda did not include discussed items and public statements had been made that no decisions would be made regarding the gTLDs. The board then proceeded to resolve that final decisions would be made without further review and contracts would be negotiated and signed as well. At 9:00 am, the Chairman announced that he was leaving early to catch a flight to the US and he left at 10:00 am. In addition, when there was an announcement by a local barrister that legal action had been instituted against ICANN, board members laughed openly and encouraged the audience then in attendance to laugh as well. Professional, open and transparent? No.

As a typical example of ICANN's closed door procedures and exclusion of the majority of stakeholders, the ICANN/Verisign agreement was amended and approved within a twenty-four hour time frame with no allowance for input from the DNSO. As should be expected, this action has not been well-received by stakeholders. The GA, rightfully, feels disenfranchised and ,in fact, is disenfranchised. There was an

inadequate time frame allowed for the entire process. Instead, negotiations were handled without public input for months and Verisign was permitted to dictate revisions to the original agreement and completely avoid the APA. The perception globally is negative. ICANN/DoC could have avoided the negativity with openness and consideration for the Internet's users. It did not.

With regard to new TLDs, if ICANN were to listen to stakeholders more, the resulting TLDs would be more likely to serve the public than those selected.

It should be noted that one of the major objections to IOD's application was that it would run both registry and registrar for a period of time. Hans Kraaijenbrink was adamant in his objection to this stating , "IOD goes against everything we ve worked on the last two years they join registrar and registry, and they have a high price."

An excerpt from a General Assembly post states:
—I still think that to be able to run (and now without time
—constraints and/or other future limitations) the Registry and the
*—Registrar for the major generic TLD *is* giving to VeriSign*
—unfair competitive edge. As I said, the matter may now be moot,
—but IMHO we have just witnessed the formalization of a change in
—policy by ICANN.

I do not see a problem with a registry/registrar model, especially for a start-up registry. Our initial model is one such. It is in the best interests of the registry to bring on registrars, but there should be a "breaking in" period prior to adding such models. IOD's plan was practical and prudent. It allows development cost recovery in the initial months and a phase in of participating registrars. Jumping into an shared registration system (SRS) with no beta testing is detrimental to users. The objection to IOD's price is disingenuous since it is the exact price charged by Verisign.

There was little consistency on the part of the ICANN BoD in the selection of new TLDs. There was obvious bias, Directors participated with definite conflicts of interest and did not recuse themselves until after that participation. In addition, there was not a legal quorum for the final votes. And this is in addition to the entire flawed process leading to the final selections.]

ICANN's Board of Directors fails to adequately represent the public voice.

In the absence of other structures for representation, the main outlet for public input is the nine At-Large Directors of the Board. These nine directors are to be elected from within a broad At-Large membership, but there has been a great deal of debate about the election mechanism and even the existence of the At-Large Directors. To date only five of the nine At-Large directors have been elected (the seats were otherwise filled with appointed directors), and even those five were not seated in time for the gTLD decision in November.

CDT, along with Common Cause and the Carter Center, has strongly advocated for broadly representative and fair mechanisms to fill all nine At-Large seats as quickly as possible. Last March CDT and Common Cause prepared a study of ICANN's election system, concluding that the proposed "indirect election" would not adequately represent the public's voice. ICANN agreed to hold more democratic direct elections (held last October), but only for five of the nine At-Large Directors, to be followed by a study of the election process. CDT is currently engaged in an international research effort, the NGO and Academic ICANN Study (NAIS), examining last year's election, and in June will offer its suggestions to ICANN regarding future selection of Directors.

[ICANN has posted a notice on its website: "At large Membership" with a closed sign. There have been numerous statements and signs that there is no intention of having an "at-large" membership. One board member stated to Karl Auerbach (Melbourne BoD meeting) that board members who where there before him (Mr. Auerbach) saw no need for an at-large membership and were opposed to it. The white paper and MOU are being systematically ignored.]

In the meantime, serious questions remain about adequate public representation on the current board, and the future of the public voice in selecting the Directors who will make decisions about additional gTLDs.

[In my testimony on February 8, I stated that one major change should be the election of the board. Most have been "squatting" for over two years when they should have had an election within two months.]

ICANN has shifted away from bottom-up coordination.

ICANN's founding conceptual documents, the Green and White Papers, called for "private bottom-up coordination" as the governance model for ICANN. Despite early attempts at consensus-based decision-making, authority in ICANN increasingly

rests at the top, with the Corporation's nineteen-member Board of Directors. The Supporting Organizations have proven to have limited roles in policy generation and consensus-building. Increasingly, final ICANN policies are generated by ICANN staff and Board members. As a result the Board has moved away from the consensus-based, bottom-up practices which were originally a critical element of its conception.

[The board is captured by special interests and even the elections for the at-large were tainted by ICANN's selection of candidates rather than completely open nominations by the at-large. community. It is anything but bottom up, open and transparent.]

4. ICANN's process for selecting new gTLDs was flawed.

CDT has not taken a position on the merits of any particular gTLD or registry operator chosen by ICANN. Our focus has been on the process ICANN has used to select these domains and the potential rules it may impose on the use of domains. A different, better process might have yielded very similar results.

[Perhaps it would not have. ICANN should not have accepted applications for existing TLDs. While CDT does not single out any applicant, it also does not take into consideration that many applications were for pre-existing TLDs. This should never have occurred. In addition, there is no reason why existing TLDs should have to be under contract to ICANN in order to be included in the root. Furthermore, the $50,000 fee is outrageous and unnecessary. It was arbitrarily chosen at the last moment and is designed to include litigation that ICANN knew would come as a result of its flawed plans. Why should losers fund ICANN's defense against them and also fund implementation of the winners of this lottery?

In addition, the application questions themselves precluded applications by any entity that did not agree with sunrise or UDRP. ICANN states it was not a criteria, but the intimidation was there and all applicants for gTLDs who were selected had agreed to these terms. Another requirement was no involvement with other roots or having registrations. That also precluded application by all pre-existing TLDs. At first there was concern that .WEB registrants would be cancelled.

We have been criticized for not applying to ICANN. Our response is that application for us would have been a waste of money that could be better spent for customer service, development and infrastructure, for one thing. For another, we feel that our existence as a viable business and registry should be sufficient as proof of concept. As many of the ccTLDs have no contract with ICANN and do not adhere to ICANN policies and rules, we have a viable business and should not be compelled to suddenly contract with ICANN for our existence or inclusion in the USG root. Had ICANN not selected .BIZ for award to a competitor, we would not have been placed in this position. Having done so, ICANN has indicated to the world that co-opting another's business product is okay as is duplication in the name space. One obvious result is New.net's introduction of 17 colliders out of the 20 TLDs they launched. They insist that since no one "owns" a TLD, they have every right to make those business decisions. They are correct, of course. There is nothing to stop them and the precedent has been set by ICANN. Neither New.net nor ICANN is considering the chaos this arbitrary decision is causing in the DNS. As time progresses, it will become more obvious. We are witnessing the tip of the iceberg.

No amount of legislation will prevent the fracture and will certainly not cure it. Only reversing the precedent by preventing DoC from allowing it to occur in the USG root can assist in the global effort to maintain a stable, collision-free name space. It must be the responsibility of the caretaker of the largest market share to set the pace for the rest of the world. That caretaker is the U S government that assigned the task to the Department of Commerce. A wise president once said "The buck stops here." So it does. ICANN's burying it's head in the sand is not the answer. It must take responsibility for the result of its actions and take the initiative to mitigate its stubborn refusal to cooperate. However, in the end, it is the U S Government that has the final authority to mitigate this problem since ICANN has shown it is not inclined to do so.]

We note also that ICANN and its staff undertook this final selection in a very compressed period at the end of a years-long debate about the addition of new gTLDs. They did so in the face of tensions between at least three competing goals: an open, inclusive, and fair process; rapid completion of that process, with less than two months between the submission of proposals and the selection by the Board; and a "proof of concept" goal of a small number of finalists. These often irreconcilable goals led to many of the problems with the process.

[Because both DoC and ICANN have been reluctant for many years to move forward with new gTLDs and because of lack of cooperation with existing entities, scarcity and pubic pressure were factors in ICANN's actions. However, there was no rea-

son to accelerate this process to the detriment of all concerned or to avoid an open and transparent process. Had there been an elected board, a full at-large contingent and cooperation, very little of the controversy would have reared its head. In view of the white paper and MOU, it is more important to have a fair and open process than to meet an unreasonable time constraint.]

ICANN staff made substantial efforts to conduct an open and accountable process in the face of these constraints, including the publication of hundreds of pages of applications and the creation of forums to discuss the proposals. Still, it is important to recognize features of the selection process that were flawed, that had anti-consumer and anti-competitive impacts, and that should not be repeated.

[There was inadequate notification to the public in all areas. Only those who were familiar with the ICANN website could find them. The majority of the public does not even know what ICANN is. It is the duty of ICANN to publicize their processes in order to invite the widest possible discussion. At the very least, all domain name holders should be notified via e-mail. The website should be re-designed to allow the public to find all documents and correspondence easily. Instead, much is buried and requires a sophisticated search to find anything.]

Initial Criteria—ICANN took the helpful step of publishing a set of criteria it would use in judging applications. In general, the substantive areas of the criteria reflected objective goals that had support within much of the ICANN user community. However, the criteria themselves were vaguely worded and their ultimate application was poorly understood. Most importantly, they were not purely technical in nature—reflecting policy goals as much as technical needs—and were not precise enough to be purely objective in their application.

[Again, the application criteria was intimidating at the very least and strayed quite far from technical issues. As for the user community, there was a great deal of concern regarding that criteria and some of it was expressed on the ICANN message boards. It was not objective and some have said it went as far as to restrain trade.]

High Application Fee—ICANN required a $50,000 *non-refundable* application fee for all gTLD applicants. This high fee was a clear barrier to entry for many potential non-commercial applicants and biased the applicant pool in favor of large organizations that could risk the fee. This issue was raised by CDT at the Yokohama ICANN Board meeting, and the Board specifically refused to offer any form of lower application fees for non-profit or non-commercial proposals. Additionally, it appeared that the selection process would weed out applications without sophisticated business plans, legal counsel and technical expertise. These important qualifications for a strong application required access to large resources. Given the very short timeframe of the application period, non-commercial applicants were therefore put at an even greater disadvantage.

[I covered this earlier. The fee excluded not only non-commercial applicants, but small businesses as well. It was also meant to fund ICANN's litigation expenses against the very applicants who paid it, and to fund other ICANN activities. No small business could afford the requirements of the ICANN process. So once again, we are faced with big business ruling the Internet to the detriment and exclusion of the average user and small business.

There is truly no reason to exclude the smallest organization or business from entering the TLD market. The public will determine the success or failure of any registry. While there should be contingencies for failure in place, there is simply no good reason to exclude any entity that can make a TLD "live" and accept registrations. Many ccTLDs do not have sophisticated systems in place, and they are not necessary. Registries will evolve over time.]

Legitimacy of the Board—As noted above, policy-making at ICANN is still hampered by institutional challenges regarding its legitimacy and decision-making mechanisms. ICANN took the unorthodox step of seating newly elected At-Large Directors after the gTLD decision was made (even though in previous years new Board members had been seated at the beginning of meetings.) The argument that new Directors would not be sufficiently up to speed on the new gTLD decision is specious. The entire ICANN community was highly focused on the gTLD debate, the new Board members showed in public appearances that they were highly versed in the issue, and each of them had gone through an intense campaign in the Fall answering numerous questions that likely made them more expert on the nuances of the gTLD issue than many sitting Board members.

[It is true that the public and especially the at-large community was irate at the decision of the board to exclude the elected directors from decision making for the new TLDs. The attitude of the remaining directors toward the newly elected directors at the Melbourne meeting was indicative of the disdain toward the at-large community. The Chairman cut them off almost every time they spoke. I felt it was an embar-

rassing display. There were many comments made on the ICANN forums, the domain-policy mail list maintained by NSI and many other mail list forums. The at-large community was generally incensed that their elected Directors had no input in these decisions. ICANN should have either delayed the selections for the next quarterly meeting or seated the elected Directors prior to the MDR meeting.]

Evaluation of Applicants—The ICANN staff attempted, with the help of outside consultants, to apply its criteria to the 47 applications received. The published Staff Report provided a useful guide to this evaluation, but was published just days before the Marina Del Rey meeting with little opportunity for public comment or debate. There was little time for public presentation by each of the applicants, or for each applicant to answer questions or misconceptions about their submissions. But beyond that, the staff report indicated that about half (23) of the applicants had met their objective criteria for technical competence and economic viability. Having met the objective threshold, the Board was left with only the somewhat arbitrary application of other criteria to narrow the number of applications to the desired low number.

[There was almost no time to deliberate the staff report, which was, itself erroneous and sorely lacking. Each applicant had only three minutes to respond and no face to face meetings to discuss errors or omissions. For $50,000, there should have been a great deal more consideration afforded them. The desired low number was also reached arbitrarily with no legitimate reason for so doing. If 23 applicants met criteria, there should have been no reason to exclude them, other than duplication, of course. However, other choices for TLD strings could have been made.]

Final Selection Arbitrary—With a high number of objectively qualified applicants, and a commitment to a low number of final gTLDs, the final decision by the Board at Marina Del Rey was dominated by the arbitrary application of its remaining criteria as well as other new criteria—many of which had little to do with technical standards. Instead, Directors referenced conceptions about the "sound" of names, the democratic nature of the applicants, or the promotion of free expression—criteria to which CDT is sympathetic, but some of which were highly subjective and unforeseen review criteria.

[After attending the meeting via webcast, I replayed the meeting several times attempting to find some reasonable explanation for the process used to select TLDs. I concluded there was none. It was subjective and unreasonable for the most part. Indeed, the only reasonable decision was concerning not awarding .WEB to Afilias because Vint Cerf felt "discomfort" with awarding it to anyone other than the existing registry (Image Online Design). Of course a new category was pulled out of a hat in order to hold .WEB "in reserve." Director Kraaijenbrink actually raised his voice rather loudly in his opposition to this proposal, making it clear that the board was well aware of the duplication and the existence of registrations. He was insistent that this did not matter, indicating that ICANN was above it all and should award .WEB to Afilias. Of course, the ARNI .BIZ duplication and the existence of its functional registry was ignored. The iii TLD was dismissed because of its "sound." Diebold Inc, a profitable $2 billion public corporation, had their application dismissed in the last round because of "a lack of financial commitment." Bias abounded and arrogance toward the rest of the community was obvious.]

Reporting and Post-selection Accountability—There is currently a lack of any serious objective mechanism for evaluating or appealing the Board's decision. While CDT is not in a position to judge the merits of their arguments, the eight petitions for reconsideration filed by applicants after the Board meeting (see http://www.icann.org/reconsideration) raise concerns. Moreover, the final contractual negotiations between ICANN and the selected applicants are likely to include rules of great interest to the user community—yet are occurring with little transparency.

[With the decision of the board in Melbourne, there is no transparency or further review by the public. At that time, there were still important documents not posted, yet the board empowered itself to complete negotiations and execute the contracts. Again, it had been announced that no decisions regarding the TLDs would be made in Melbourne because there was still a great deal of negotiating to do. It was suddenly reversed in that early unscheduled half hour discussion. The media was taken by surprise, as were the attendees. In addition, recommendations by the Names Council were ignored.]

Taken as a whole, the process for selecting new gTLDs contained serious flaws that at the very least need to be corrected before another round of selections. Importantly, the process shows how the line between a "purely technical coordination body" and a "policy-making body" is easily crossed by ICANN. The selection made by ICANN was not a standards-making process or a technical decision. Even ICANN's "objective" criteria were based on social values like economic viability and diversity (values which CDT supports, but which represent policy choices nonethe-

less.) Once it applied these "objective" criteria, the ICANN Board did not hesitate to engage in other policy-making approaches as well.

5. Moving Forward: Suggestions for Reforming ICANN and the gTLD Process

The flaws in ICANN's process for allocating new gTLDs, as outlined above, are highly troubling. They point to a need for reform in both the ways the ICANN makes decisions about gTLDs, and ICANN's entire structure.

CDT still believes that Internet users have an interest in the vision spelled out in the White Paper—in the creation of a non-governmental, international coordination body, based on bottom-up self-governance, to administer central naming and numbering functions online. Were the Commerce Department to substantially revisit and change ICANN's decisions on the new gTLDs, the global community would likely question the existence and utility of ICANN. We also believe that there is a dominant consumer interest in rapid rollout of new domains, which would be dramatically slowed by an APA-based rule-making on gTLDs by Commerce. Therefore, on balance, we do not support a major effort to roll back ICANN's decision on the initial domains, but rather would favor rapid creation of the new domains followed coupled with an investigation into the processes ICANN used to create gTLDs.

[I disagree that having a rulemaking on questionable practices is not in the best interests of the public. It is the avoidance of the APA that has led to many of the problems we see to date. However, I see no reason for it to be prolonged, nor do I see any substantial reason for retarding the completion of contracts for those TLDs that are not being challenged. I am naturally opposed to DoC entering a duplicate .BIZ into the root and would like to think that the legality and inadvisability of such a move would be considered. Our Petition for Rulemaking stands, of course, and we hope it will be honored by the DoC. I would truly hate to think that our government practice includes taking a business product from a small business and handing it to a competitor for a fee, thus damaging the business. The lack of protection under trademark law does not preclude IP rights in that product. ICANN was wrong in accepting applications for existing TLDs and DoC will be wrong in entering duplicates into the root for any TLD.]

Among our specific suggestions:

- ICANN must reform the method and process it uses for selecting the next round of new gTLDs. A logical step would be to publish an objective and specific set of criteria, and apply it in a more open and transparent way with greater opportunities for public comment. ICANN should stay away from policy-oriented criteria, and attempt to promote criteria based on technical merit and stability. Applicants that meet the criteria should be given the opportunity to participate in new gTLDs.
- Barriers to diversity should be mitigated. In particular, the $50,000 fee should be reduced or waived for non-commercial or non-profit entrants.
- A study of the method of selecting domains should be set in motion. In addition, careful consideration should be given to the potential openness, competitiveness, and free speech implications of creating a large number of "chartered" or restricted domains that establish gatekeepers on access to domain names.

[There is no reason for a $50,000 fee except to fill ICANN's treasury. If applications are limited to basic technical criteria, $1,000 is sufficient. The fees to be paid to ICANN are excessive as well, and should be seriously reviewed. In addition, if ICANN were reasonably structured and salaries reduced to appropriate levels, all fees could be reasonable.

I also see no reason to exclude "chartered" TLDs. There are many areas where "gatekeepers" are advisable, such as .KIDS, .XXX, .MUSEUMS, .CLUB, .UNION, .REALESTATE . . . Others such as .INFO, .WEB, ETC need no gatekeepers. There is room for both. If there is a multitude of TLDs, there will be no barrier to free speech, commercial activity or a pressing need for intrusive IP interference for average users. It is not the nature of the TLDs that is causing the problem. It is the restriction in introduction of TLDs and duplication in the name space that is the problem. It is not difficult to solve these problems, but it will necessitate ICANN reform.]

ICANN's governance itself is implicated in the gTLD process. Among the major structural reforms ICANN should pursue include:

- Limited mission—Steps must be taken to structurally limit the mission of ICANN to technical management and coordination. Clear by-laws and charter limitations should be created to delineate "powers reserved to the users"—much as the Bill of Rights and other constitutional limitations limit the power of the government under the U.S. system.

- Empower the public voice in ICANN—The internal study underway of ICANN's At-Large membership and elections should be a vehicle for ensuring that the public voice finds appropriate ways to be heard in ICANN's decision-making processes.

[It is my hope that the sentiments voiced at the Melbourne meeting will not hold true and that the at-large membership will be restored quickly. Without this input from the Internet community, ICANN will set itself up as a world Internet governing body that is not in the interests of anyone but a very small, select group of special interests. ICANN has done a great deal of harm and must now turn things around to benefit the community. I believe it can be accomplished, but will require continual oversight. In addition, ICANN must be held to a narrow mandate as stated by the CDT.]

- Expanded review process and bottom-up governance—ICANN should build internal review processes that produce faith in the ability to appeal decisions of the Board, and continue to pursue the consensus-based governance model.

While we do not believe the Commerce Department and Congress should intervene in the initial selection decision, they have a role in this reform. Just like any national government, the U.S. has an interest in making sure that the needs of its Internet users and businesses are protected in ICANN. While the U.S. must be sensitive to the global character of ICANN, it cannot ignore that at least for the time being it retains a backstop role of final oversight over the current root system. It should exercise that oversight judiciously, but to the end of improving ICANN for all Internet users. It is only by restoring the public voice in ICANN, limiting its mission, and returning to first principles of bottom-up governance that ICANN will be able fulfill its vision of a new international self-regulatory body that promotes openness and expression online.

[I believe that the Department of Commerce should definitely intervene in the initial selection decision. Not just regarding .BIZ, but others as well. The Sarnoff application for iii and the Diebold application, should not have been discarded and there were other arbitrary decisions as well. If these decisions stand, the precedent for further arbitrary decisions is set. It is important to prevent arbitrary actions by ICANN. I also believe that Congress, in its oversight capacity, should intervene with the Department of Commerce to ensure that the APA is observed and the best interests of the entire Internet community are met. It is especially important, in my opinion to ensure that the terms of the green and white papers and the MOU are adhered to. Thus far, they are being greatly offended. Entities are being harmed and the stability of the Internet is about to be injured. Cooperation among all stakeholders is the most desirable method, of course, and can be accomplished. However, ICANN/DoC must show a willingness to do so.

I think that one critical factor has been overlooked completely. It is the TLDs that are critical to the Domain Name System. Roots are simply the method of bringing those TLDs to the public in a comprehensive manner. TLDs can be accessed by anyone at any time, but would have to constantly change computer settings to do so and would have to know where to "point." This is where the rootzones come into play. Exclusion of TLDs by the DoC simply makes it more difficult for users to access them. It does not mean they will disappear or that they are invalid. It does, however, mean that there should be a concentrated effort to not only include all known operational TLDs, but assist in the effort to cooperate and strive to attempt provide a collision- free name space.

I would invite the participation of ICANN/DoC to participate in the efforts of TLD holders world-wide to cooperate in this effort. To that end the Top Level Domain Association (TLDA) was recently incorporated as a trade association. It is now in its formation stage and an initial board has been seated. Membership will be comprised of TLD holders and will strive toward cooperation on a global scale. ALL TLD holders will be able to join, including the Department of Commerce (which can appoint ICANN as its representative if it so chooses). The association will not be affiliated with any root, and will remain autonomous.]

Thank you again, Representative Pickering for the opportunity to express my views of the current situation regarding ICANN and the introduction of new TLDs to the USG root.

Sincerely,

LEAH GALLEGOS
AtlanticRoot Network, Inc.

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