Before the
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
Washington, D.C. 20230

In the Matter of	)	
The Continued Transition of the	)	
Technical Coordination and Management	)	Docket No. 060519136-6136-01
of the Internet Domain Name and	)	
Addressing System	)	
	)	
Notice of Inquiry	)	

COMMENTS OF NETWORK SOLUTIONS, LLC

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SUMMARY

The Notice of Inquiry issued by the National Telecommunications and Information Administration ("NTIA") on the Department of Commerce's Memorandum of Understanding ("MoU") with the Internet Corporation for Assigned Names and Numbers ("ICANN") provides a crucial opportunity for NTIA to ensure the successful transition of the management of the Internet Domain Name System ("DNS") to the private sector. To pave the way for the successful completion of this transition, Network Solutions, LLC ("Network Solutions") urges the Department to both renew the MoU and to amend its terms by requiring carefully tailored procedural reforms that will allow ICANN to best fulfill its core values of stability; competition; private, bottom-up coordination; and representation.

The expiration of the MoU on September 30, 2006, as well as the ongoing follow-up policy development to last fall's World Summit on the Information Society ("WSIS"), make this review particularly timely and valuable. Network Solutions thanks the Department and NTIA for addressing key policy issues related to the technical coordination and management of the Internet DNS.

The continuation of the Department's role is necessary to prepare for privatization. A prerequisite for full privatization remains a demonstration of ICANN's long-term sustainability through effective self-governance, driven by an independent Board and meaningful stakeholder input. ICANN's ability to carry out its core values remains central to this endeavor. Unfortunately, the transition at this time to full private sector management would be premature because ICANN has placed its commitments to these core values in serious doubt and has lost a tremendous amount of credibility with the constituencies that must be governed. This failure is exemplified by ICANN's recent approval of a .com Registry Agreement with VeriSign that was strongly opposed by all save one constituency (and that one was neutral), and by the strongest long-term international supporter of ICANN (which has withdrawn its support). ICANN's pursuit of an agreement that would award the .com Registry Agreement to an unregulated monopoly, without sufficient cost-based price controls and under automatic renewal terms, illustrates the extent to which it has been unable to uphold core values, such as competition and representation.

It is generally acknowledged that the choices of a model for conducting business in a manner that serves the best interest of the community are either competition or, with decreasing frequency, a regulated monopoly. The unregulated monopoly model was cast aside as unworkable and abusive in the United States. Thus, public policy requires competition before deregulation of any monopoly. A clear example is the deregulation of the telecommunications system in the United States. In the case of the Internet, competition, in turn, is fostered by the ability of ICANN to uphold all of its core values. To this end, Network Solutions recommends the following amendments to the MoU renewal:

- Establishing goals to ensure that competition is brought to the registry space, in line with the robust competition that has grown up among registrars in the past eight years. This would include a presumption *against* automatic renewal terms in registry contracts that remove ICANN's ability to seek competitive bids at a future date, especially in the face of demonstrated "bad behavior;"
- *Explicitly* requiring review and evaluation of changes to registry agreements by the Department of Justice's Antitrust Division to ensure that competition values are maintained;
- Making ICANN's bottom-up representation structure *meaningful* by improving accountability measures, including timely publication of the minutes of Board meetings;
- Requiring greater transparency in ICANN decisionmaking, including a stipulation that ICANN decisions include an analytical component that explains how feedback from stakeholders was taken into consideration and how and why it was or was not implemented in the final decision;
- Correcting deficiencies in ICANN oversight, including improvements to the existing reconsideration and independent review processes, and enhanced budgetary accountability;
- Proposing changes to the budget process that increase oversight and ensure that ICANN is held accountable to all of its constituencies; and
- Encouraging ICANN to take a proactive role in compliance efforts to limit abuses, particularly in light of the budgetary resources allocated in this area and its claim that with a larger budget it could address these abuses.

The outcome of last fall's WSIS in Tunis underscored the importance of maintaining private sector management of the Internet DNS, but not transitioning to full privatization until ICANN establishes that it has the necessary self-governance tools at its disposal and is using them effectively. The United States successfully argued that the present arms-length, market-based approach to ICANN is working. The "U.S. Principles on the Internet's Domain Name and Addressing System," released in advance of WSIS, emphasized the importance of ICANN carrying out core values such as competition and representation. Recognizing ICANN as the appropriate technical manager of the DNS, the United States pledged that it "will continue to provide oversight so that ICANN maintains its focus and meets its core technical mission."

Finally, Network Solutions encourages the Department to delay a final decision regarding any proposed renewals of or amendments to registry agreements until the important policy issues regarding the underlying MoU have been fully addressed. Otherwise, the Department would be attempting to execute on a strategy when the strategy is yet to be defined.

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COMMENTS OF NETWORK SOLUTIONS, LLC

Network Solutions, LLC ("Network Solutions") respectfully submits comments in response to the National Telecommunications and Information Administration's ("NTIA") Notice of Inquiry on the impending expiration of the Department of Commerce's Memorandum of Understanding ("MoU") with the Internet Corporation for Assigned Names and Numbers ("ICANN"). Network Solutions thanks NTIA for undertaking a comprehensive examination of policy issues connected to the transition of the technical coordination and management of the Internet Domain Name System ("DNS") to the private sector.

The expiration of the MoU on September 30, 2006, affords the Department a timely opportunity to evaluate the effectiveness of ICANN's management of the DNS and to implement procedural reforms necessary to improve ICANN's technical performance and responsiveness to the public and Internet stakeholders.[1] As will be discussed further below, the core values for ICANN remain critical. These values, as set forth in the DNS White Paper,[2] emerged from the consensus-based approach that the United States originally brokered after consulting with other countries, technical experts and the domestic and international business community to develop a non-governmental approach to DNS management.[3]

Continued United States stewardship over the orderly transition to private sector management of the DNS remains the wisest course to ensure the long-term viability of ICANN. This is fully in line with NTIA's consistent recognition of the importance of

[1] Periodic updates of the original MoU have been driven by substantive, and continuing, industry and technical changes with impacts for DNS management. For example, as of July 1998, 1.88 million .com domain names were registered. As of July 2006, the .com registration figure stands at 52 million names.

[2] Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998).

[3] *See* Testimony of J. Beckwith Burr, Wilmer Cutler Pickering Hale and Dorr LLP, before the House Committee on Small Business, June 7, 2006 ("Burr Testimony"), attached as Appendix A.

steering away from any course that would hamper the effective operation of the DNS. NTIA outlined how high the stakes are in correctly balancing this policy equation in the "U.S. Principles on the Internet's Domain Name and Addressing System" released in advance of last fall's World Summit on the Information Society ("WSIS").[4]

At the United Nations' WSIS last November, the United States government persuasively argued that the present arms-length, market-based approach to ICANN is working. The success of this reasoned approach toward Internet governance was critical to continued United States technological leadership and policy interests in the free flow of information. It was also essential to the myriad international constituencies with an interest in healthy development of the world's premier communications medium. As the United States noted, the outcome of WSIS reflected the participants' recognition that "the innovation and creativity of the Internet should not be impeded by a bureaucratic governing structure."[5] Thus, to ensure that this balanced governance solution remains viable, the renewal of the MoU must contain goals for ICANN to evolve into the stable and sustainable organization originally envisioned.

1. Termination of the Department's Oversight of ICANN Is Not Yet Justified

Complete privatization, without direct government oversight, is dependent upon ICANN's faithful commitment to the four core values outlined by the Department.[6] Adherence to these core values—(i) stability, (ii) competition, (iii) private, bottom-up coordination, and (iv) representation—must ensure that the privatization of the technical management of the DNS will be accomplished in a manner that promotes robust competition and that facilitates global participation in the management of the DNS.[7] These four principles remain critical and are consistent with both domestic and international Internet policy objectives.

Sadly, ICANN has placed its commitment to these core values in grave doubt, and it would be premature at this time to end the Department's oversight of ICANN's operations. ICANN's track record to date underscores this point. A necessary precursor for full privatization remains the demonstration of effective self-governance, driven by an accountable staff, an independent and transparent Board, and meaningful stakeholder input.

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[4] *See* "U.S. Principles on the Internet's Domain Name and Addressing System," http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm.

[5] *See* Statement, "No New Oversight for Internet Management, Summit Agrees, U.S. says WSIS conference must focus on bringing Internet to developing world" at http://usinfo.state.gov/gi/Archive/2005/Nov/16-857624.html.

[6] *See* Statement of Policy, 63 Fed. Reg. 31,741, 31,749 (June 10, 1998); MoU art. II, § C.

[7] *See* 63 Fed. Reg. at 31,749.

ICANN's failure to adhere to its core values, particularly in the areas of competition, transparency and representation, is exemplified by its recent approval of a new .com Registry Agreement with VeriSign. The terms of the proposed renewal of VeriSign's 2001 .com Registry Agreement would have far-reaching anticompetitive effects and substantially undermine ICANN's credibility with Internet stakeholders and the international community. ICANN's approval of the highly controversial agreement makes clear that the Department's oversight remains necessary to ensure that the DNS privatization occurs in a manner that increases competition and facilitates the participation of all Internet stakeholders in DNS management.

The Department asks whether new or revised tasks for ICANN should be considered in order for the transition to occur. To this end, Network Solutions proposes several measures to ensure that ICANN remains on a realistic trajectory to reach full corporate maturity through a comprehensive and ongoing implementation of its core values. Furthermore, the Department should delay consideration of any proposed renewals of or amendments to registry agreements until after the issues concerning the underlying MoU have been resolved. To do otherwise, would be to execute on a strategy before the strategy is developed.

2. ICANN's Core Principles Remain Relevant and Must Be Fully Implemented

The Department asks whether the core principles are still necessary and relevant for guiding the transition to private sector management of the DNS. As the Department itself has consistently recognized, these principles remain critical to realizing this successful transition. In congressional testimony in 2004, Acting Assistant Secretary of Commerce for Communications and Information John M.R. Kneuer noted that by 2006, "ICANN must execute the remaining tasks in the MoU and reach full corporate maturity to assure the Department and the Internet community that it is able to effectively carry out its important core technical missions - in a stable and sustainable manner - into the future."[8]

Thus, as when the Department first articulated these principles, a commitment to stability remains necessary to ensure that adequate technological safeguards are in place to prevent disruption of DNS operations. Over the past eight years, the increased complexity and scale of Internet operations has been accompanied by ever-more sophisticated and diverse security threats. Indeed, Network Solutions has played an integral role in helping our customers fend off such threats by providing substantial service offerings to help protect customers against threats such as viruses, spyware, spam, and unauthorized transfers of domain name registrations.

[8] *See* Testimony of John M.R. Kneuer, Deputy Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the Senate Commerce Committee's Subcommittee on Communications, September 30, 2004, http://commerce.senate.gov/hearings/testimony.cfm?id=1324&wit_id=3863.

Along with stability, competition is equally integral to the Internet's future because it is essential to the continued viability of the Internet as a decentralized system. The checks and balances of a competitive marketplace are the only workable alternative to the heavy hand of government regulation. Competition encourages innovation, maximizes individual freedom, promotes lower costs and prices, and enhances user choice and satisfaction. Similarly, the bottom-up governance that has characterized the development of the Internet enables DNS management to be flexible and responsive to the needs of the Internet and Internet users. Finally, a representative governance structure is necessary to ensure that the DNS is managed in a manner that reflects the global and functional diversity of Internet users.

When taken together, these four core values are mutually reinforcing. Ensuring stability, fostering competition, managing from the bottom up, and responding to input from geographically and functionally diverse Internet users will result in the type of robust competition and global participation that the United States intended when it decided to privatize the management of the DNS. Because the Internet functions most effectively when all four principles are followed, no one value should be allowed to trump the others.

It is well-understood in the United States and, indeed, among the global Internet community, that competition and transparency are the only acceptable substitutes for government regulation in a fully privatized environment. In the case of ICANN, this means following a trajectory desired by all stakeholders, including the United States government, to an independent, fully accountable ICANN.

The trend toward deregulation worldwide in the communications sector is illustrative. Administrations have established independent regulators as part of their commitments under the World Trade Organization's Basic Telecommunications Agreement. A key factor in the ability of many countries to meet these commitments has been a demonstration that regulators are independent from dominant, former monopolies and can manage relationships with other government entities, industry and consumers.[9] "Not only does the regulator have an interest in its own independence, but also each of these three groups also has a long term interest in the regulator's independence as well. Three indicators of regulatory independence are the stability of its leadership, scope of its authority, and the independence of its funding."

3. Some Important Areas of Competition Have Seriously Lagged Under the Current MoU

ICANN has lost sight of the core values articulated in the MoU and the DNS White Paper. For example, although ICANN has been successful in fostering competition among registrars (there are now more than 700), the same cannot be said for

[9] *See* FCC International Bureau Working Paper Series, "Traits of an Independent Communications Regulator: A Search for Indicators," June 2004, Irene Wu, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248467A1.pdf.

domain name registries, which remain dominated by .com and its registry operator, VeriSign. In fact, .com now accounts for over 75 percent of U.S. registered domain names.[10] The proposed .com Registry Agreement between ICANN and VeriSign would exacerbate these existing anticompetitive conditions by granting VeriSign an effectively permanent monopoly and authorizing it to implement price increases that are unjustified by any cost increases. Michael M. Roberts, the first President and Chief Executive Officer of ICANN, testified before the U.S. House of Representatives Committee on Small Business recently that "ICANN has failed to make any significant effort to subject VeriSign to competition for renewal of its dot com agreement; marking a retrenchment from ICANN's obligation to foster competition in the registry marketplace, for which behavior ICANN has offered no explanation."[11]

The MoU does not authorize ICANN to disregard one or more of its core principles in order to maximize another. Nor are the principles in conflict. ICANN itself saw the benefits of competition when it conducted a competitive rebid for the .net domain name registry in 2005. The process compelled VeriSign—the eventual winner—to install additional system capabilities to compete with other bidders, as well as to implement a price reduction. Importantly, a key impetus behind U.S. telecommunications deregulation, starting with the breakup of AT&T in 1984, was the recognition that competition in the private sector increases, rather than decreases, incentives to invest in new technology and infrastructure, including in security improvements, and that greater stability is thus one of the benefits of competition. There is no basis for ICANN to justify such a blatant disregard of its core values of competition. As a factual matter, ICANN has not demonstrated any connection between a guaranteed monopoly and stability. Under the existing .com agreement, in which renewal is not assured and price increases must be cost-justified, VeriSign has made substantial improvements in infrastructure and development without higher fees.

In fact, Senator Orrin Hatch (R-Utah), chairman of the House Judiciary Committee's Intellectual Property Subcommittee, concluded in a recent letter to U.S. Attorney General Alberto Gonzales that the virtually non-existent opportunity that the proposed .com agreement provides for future rebids is difficult to reconcile "with a strong commitment to open competition or, arguably, with the Memorandum of Understanding between ICANN and the DoC, which obligates both the DoC and ICANN to abide by competitive principles."[12]

The specter of such potentially anticompetitive behavior as is now raised by the proposed .com agreement was first implicated in 1998 when NTIA solicited comments

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[10] *See* WebHosting.info data, current as of July 7, 2006, http://www.webhosting.info/registries/country_stats/US.

[11] *See* Testimony of Michael M. Roberts, Principal, The Darwin Group, Inc., Before the House Committee on Small Business, June 7, 2006, attached as Appendix B.

[12] *See* Letter from Senator Orrin Hatch (R-Utah) to U.S. Attorney General Alberto Gonzales, May 24, 2006, attached as Appendix C.

on the original proposal to privatize the DNS. Federal Trade Commission staff noted that "purchasers of domain name registration services might be subject to supracompetitive prices in the future if they become 'locked-in' to a particular vendor of those services."[13]

ICANN's Options Limited By Automatic Renewal: As the Notice points out, the MoU establishes a series of core tasks for ICANN, including "establishing appropriate relationships with the organizations that form the technical underpinnings of the Internet DNS." Thus, upholding competition as a core value in registry agreements is a central aspect of ICANN's mission from both a policy *and* a technical perspective. Automatic renewal provisions alter the contractual checks and balances that otherwise help to ensure that ICANN retains a minimum baseline of registry oversight. Registry operators should justify their renewal and meet certain continuing qualifications and standards, a process the .aero, .coop, and .museum registry operators have recently undergone.

This is a key concern of the proposed .com Registry Agreement, but unfortunately this trend is not limited to the .com proposal. Recent developments show that the proposed .com Registry Agreement has galvanized other registry operators to seek similar automatic renewal terms. ICANN recently has posted for public information proposed renewal agreements for the .biz, .org and .info domain registries, all of which contain automatic renewal provisions similar to those in the .com agreement.[14] In fact, the .tel Registry Agreement that ICANN recently finalized in May provides that Telnic Limited will operate the registry for a ten-year term, and includes an "automatic renewal" provision virtually guaranteeing that it will be renewed after the ten-year period.[15] The only limitation on renewal in these provisions is if there is a material breach of one of just three sections of the agreement, and then only if an arbitrator has ruled that the registry operator has breached and it has not cured the breach within a reasonable time after the arbitrator's award. Therefore, the registry operators' control over the registry is of a potentially infinite duration, a highly questionable condition from any standpoint.

Given the absence of robust registry competition, guidance under the renewed MoU concerning ICANN's responsibilities for facilitating competition is critical to the transition to full privatization. As former NTIA Associate Administrator Becky Burr has noted, "'Competition' is at the heart of the ICANN mission, and it is a highly complex

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[13] *See* In the Matter of Improvement of Technical Management of Internet Names and Addresses, Comment of the Staffs of the Bureaus of Economics and Competition of the Federal Trade Commission, March 23, 1998, http://www.ftc.gov/os/1998/03/ntia.fin.htm.

[14] *See* Draft Proposed Registry Agreement by NeuStar for the .biz Domain at www.icann.org/tlds/biz/biz-proposed-agreement-27jun06.pdf; Proposed Registry Agreement by Afilias for the .info Domain at http://www.icann.org/tlds/info/info-proposed-agreement-27jun06.pdf; and Proposed Registry Agreement by Public Interest Registry for the .org Domain at http://www.icann.org/tlds/org/org-proposed-agreement-27jun06.pdf ("Draft Proposed Registry Agreements").

[15] *See* .tel Registry Agreement, May 30,2006, http://www.icann.org/tlds/agreements/tel/tel-agreement-07apr06.htm.

issue, but the community is clearly not satisfied with the 'leave it to the anti-trust authorities to intervene if they don't like it' approach."[16]

Sound public policy requires competition before deregulation. Further, sound public policy requires effective regulation of a monopolist, in situations in which competition does not discipline pricing. The lifting of cost-based requirements for price increases under the proposed .com Registry Agreement would not retain a meaningful role for ICANN over the registry operator as a regulated monopoly. Representative Rick Boucher (D-Va.) noted in a letter to Assistant Attorney General for Antitrust Thomas Barnett, "Management of a TLD registry is a natural monopoly. Periodic market testing in the form of competitive bidding through which other companies seek to operate the TLD is an effective way to assure reasonable pricing of .com domain names."[17]

Telecommunications policy in the United States and in other countries has not followed this flawed model of attempting to deregulate a monopolist such as the .com registry operator before competition has been established. Congress has not deregulated first and then hoped that competition would emerge. Similarly, ICANN was created to administer the DNS in a manner that advances competition. Renewal terms that set objectives for ICANN regarding competition milestones are critical to ensure that the transition to privatization follows – rather than precedes – the realization of robust registry competition.

Recommendations: The MoU renewal process should set goals that would ensure competition is brought to the registry space, in line with the core value articulated in ICANN's Bylaws of "introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."[18] These objectives should include a presumption against automatic terms that remove ICANN's ability to seek competitive bids at a future date at its discretion.

In order to assure that ICANN properly considers competition in performing its responsibilities – in particular when dealing with VeriSign, the dominant registry operator – the Department should *explicitly* require review and evaluation of changes to registry agreements by the Department of Justice's Antitrust Division. Both ICANN and NTIA have acknowledged their need for expert advice on competition issues, but ICANN has felt free not to solicit or to even ignore DOJ's views. Further demonstrating the importance of such external expertise on competition issues, ICANN's new Registry service approval process requires input from a competition authority if there are

[16] *See* Burr Testimony.

[17] *See* Letter from Representative Rick Boucher (D-Va.) to Assistant Attorney General for Antitrust Thomas Barnett, February 17, 2006, attached as Appendix D.

[18] *See* Bylaws for Internet Corporation for Assigned Names and Numbers, as amended effective 28 February 2006, Section 2 (6), http://www.icann.org/general/bylaws.htm.

outstanding competition issues.[19] Giving the expert competition agency an express role under the terms of the MoU will better ensure that competition values are maintained.

Congress has recognized that the Antitrust Division should expressly be included in competition review, so that these vital issues are not left to agencies that can be captured by the industries – and in particular, the dominant companies – they regulate. For example, in Section 271 of the Telecommunications Act of 1996, Congress required the FCC to notify the Attorney General of Bell operating company applications to provide interLATA service, consult with the Attorney General, and "give substantial weight to the Attorney General's evaluation."[20] Similarly, Congress has required the federal banking agencies to seek the advice of the Antitrust Division before approving bank mergers,[21] and further requires the banking agencies to notify the Attorney General of its actions on bank merger applications, and generally allow the Attorney General 30 days to challenge the transaction.[22]

4. ICANN's Transition to Private Self-Governance Should Be Based on Effective Bottom-Up Policy Generation, Representation, and Transparency

Before the transition to private governance can take place, ICANN also must demonstrate its commitment to managing the DNS in a responsive manner that considers the input of all Internet stakeholders. The MoU demands nothing less, by stipulating that it "is intended to result in the design, development, and testing of a private coordinating process that is flexible and able to move rapidly enough to meet the changing needs of the Internet and of Internet users."[23]

The White Paper emphasized that the new entity's processes "should be fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders." The White Paper also indicated that this meant "decision-making processes should be sound and transparent," the basis for decisions should be recorded and made publicly available, and that "super-majority or even consensus requirements may be useful to protect against capture by a self-interested faction."

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[19] See "Procedure for use by ICANN in considering requests for consent and related contractual amendments to allow changes in the architecture or operation of a gTLD registry," Final Report, June 30, 2005, http://gnso.icann.org/issues/registry-services/final-rpt-registry-approval-10july05.htm**. "**In the event ICANN reasonably determines during the 15 calendar day 'preliminary determination' period that the change might raise significant competition issues, ICANN shall refer the issue to the appropriate governmental competition authority or authorities with jurisdiction over the matter within five business days of making its determination, or two business days following the expiration of such 15 day period, whichever is earlier, with notice to Registry Operator."

[20] 47 U.S.C. § 271(d)(2)(A).

[21] 12 U.S.C. § 1828(c)(4).

[22] 12 U.S.C. § 1828(c)(6).

[23] *See* Memorandum of Understanding, Section C (3).

To fulfill its commitment to representative participation, ICANN must be responsive to the comments and concerns of all Internet stakeholders and consistently engage in transparent decision-making. This can only be achieved by ensuring that ICANN remains committed to maintaining its accountability to Internet stakeholders. Records of ICANN Board votes indicate that Board members rarely dissent and, in the vast majority of instances, approve staff positions unanimously.

Transparent decision-making is not an option for ICANN: The ICANN Bylaws require it to "operate to the maximum extent feasible in an open and transparent manner . . . ." Article III (Transparency), Section 1. Notwithstanding this transparency obligation, it is often difficult to determine what information ICANN Board members considered in making a decision. The Board's decision-making process is more transparent at the front end, than the back end. Public comments are often posted in a timely manner on ICANN's Web site.

ICANN has departed from its commitment to conduct honest dialogue with, and be accountable to, all Internet stakeholders, as exemplified in how it arrived at the proposed .com Registry Agreement, in its attempt to depart from financial accountability, and it disregard of constituency organizations. ICANN's disregard of constituency concerns regarding key decisions is symptomatic of more deeply seated governance weaknesses.

Contrary to the MoU's expectations for stakeholder involvement, ICANN has consistently demonstrated a lack of regard for feedback offered by the Internet community. A review of more than 100,000 postings by members of the Internet user community to online ICANN public forums and e-mail lists demonstrated that "public commentary for or against a given proposal before the Board does not correlate strongly to an outcome either for or against that proposal."[24] The analysis of this data indicated that the ICANN Board "has been more likely to rely heavily upon staff recommendations . . . than on the broad-based input from the Internet user community."[25] Such a failure by ICANN to consider input from the diverse community of Internet stakeholders is not only at odds with ICANN's required commitment to representation and bottom-up coordination, but also inadequately addresses the task outlined in Section V.C(6) of the MoU, which requires ICANN to "collaborate on the design, development and testing of a process for affected parties to participate in the formulation of policies and procedures that address the technical management of the Internet."

As a case in point, the approval by ICANN's Board of the settlement agreement with VeriSign by barely a majority vote is flatly inconsistent with that commitment to representation, and has only further fueled the arguments against ICANN's and the United States' role in Internet governance. For example, in an Open Letter to ICANN,

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[24] John Palfrey et al., Public Participation in ICANN, A Preliminary Study, *at* http://cyber.law.harvard.edu/icann/publicparticipation/.

[25] *Id.*

the Canadian Internet Registration Authority ("CIRA") objected to the lack of transparency and accountability in the process through which ICANN renewed the .com Registry Agreement.[26] In protest, CIRA withdrew all financial and logistical support for ICANN and suggested several structural and procedural changes. CIRA emphasized that "ICANN's accountability to its stakeholders, including to the global Internet community is critical because ICANN's legitimacy is premised on stakeholder trust. When ICANN is seen to be unaccountable it loses stakeholder trust and therefore its legitimacy."[27] CIRA's position is particularly striking given that CIRA had previously provided extensive support for ICANN—including voluntary financial contributions and sponsorship of ICANN meetings—and that Canada strongly supported the United States' effort to retain leadership in Internet governance at the WSIS meetings.

Effective involvement of all Internet stakeholders requires not only that their comments be solicited, but also that ICANN consider those comments as part of a transparent decision-making process. ICANN's approval of the proposed .com Agreement also demonstrates its disregard in practice of this bottom-up approach. All of ICANN's constituencies, with the exception of the gTLD Registries Constituency, to which VeriSign belongs, voiced concerns about the proposed renewal of the .com Registry Agreement with VeriSign. Those constituencies that voiced concerns about the proposal represent all aspects of the Internet user community, including the Commercial and Business Constituency, the At Large Advisory Committee, registrars, the Country Code Names Supporting Organization, the Generic Names Supporting Organization, the ISP Constituency, and the Non-Commercial Constituency. As Board Member Susan Crawford, who dissented on the .com vote, asserted in a separate statement: "ICANN has often appropriately claimed that its legitimacy is founded on its bottom-up private policy generation. To sidetrack this experiment in private rule-making by allowing a single litigious registry to get a better deal than others undermines ICANN's core mission."[28]

The ICANN Board members who voted to approve the proposed .com Registry Agreement essentially abdicated ICANN's responsibility to uphold the core value of bottom-up coordination. Moreover, although ICANN solicited public comments regarding the proposed agreement, its deliberations were non-public, it did not disclose the details of staff's advice to the ICANN Board, and it refused to consider advice from the Department of Justice after learning that the DOJ was investigating the ramifications of the proposal. While ICANN published Board statements explaining the approval of

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[26] Letter from Canadian Internet Registration Authority to ICANN (Mar. 17, 2006) http://www.cira.ca/news-releases/171.html.

[27] *Id.* CIRA noted that "ICANN must change its structures, formally and publicly (including its by-laws), to ensure that ICANN and its Board are accountable to stakeholders, and that Board decisions are subject to formal checks and balances. A veto of Board decisions by a super-majority of Supporting Organisations would be an acceptable change."

[28] *See* Individual Statements from Board Members, Separate Statement by Susan Crawford, March 2, 2006, http://www.icann.org/topics/vrsn-settlement/board-statements-section2.html.

the agreement, it did not release a decision document that is backed by *legal* and *economic* analysis to explain how and whether specific comments were addressed.

The principle of representation requires that ICANN be responsive to the input of the functionally and geographically diverse group of Internet stakeholders. Indeed, the United States' leadership in Internet governance through oversight of ICANN has recently drawn criticism from organizations eager to establish international control over the Internet at the WSIS and in other forums. Attempts to establish multilateral oversight of the Internet were averted when the United States convinced WSIS participants that its oversight of ICANN is preferable to a complex multinational governance structure. Department oversight, and concentration of DNS management in ICANN, is clearly preferable to multinational control of the Internet DNS. The United States can only retain its position of leadership in Internet governance, however, if ICANN is committed to soliciting and responding to a multitude of opinions.

Recommendations: ICANN should be held accountable for meaningful compliance with certain basic decision-making procedures, including public deliberations, the disclosure of staff advice to the ICANN Board and timely publication of minutes of Board meetings.

The Department should require that ICANN's decisions include an analytical component that explains how comments were factored into a final decision. This is a routine practice within United States federal agencies, which typically evaluate comments received as a result of the Notice of Proposed Rulemaking and incorporate the evaluation of those comments into the final decision document. Consultation, coupled with reasoned feedback and transparent decisions, is also increasingly the norm in analogous regulatory and policy oversight circumstances worldwide. Although ICANN may not be subject to the U.S. Administrative Procedure Act, principles contained in the MoU, including transparency, bottom-up decision-making, and accountability, demand a similar level of explanation to make public comment periods meaningful.

Consideration should be given to several CIRA recommendations, including a proposal for a veto of Board decisions by a super-majority of Supporting Organizations and a required justification for holding non-public meetings.

Other examples in which ICANN has fallen far short of upholding the values of bottom-up policy generation, transparency, and representation include:

Public Review of Proposed Contracts: The ICANN Board approved the final .net Registry Agreement without soliciting public feedback, in violation of ICANN's Bylaws. To address these concerns, the ICANN Generic Names Supporting Organization ("GNSO") in September 2005 recommended that the Board adopt a proposed ICANN Bylaw change that would specifically require public comment prior to ICANN approval of a material contract. For the past 10 months, however, the ICANN Board has not acted on this proposed change.

GNSO Task Force on Contract Issues: Another example of ICANN's processes not working is its disregard to date of the GNSO policy making process regarding contract issues. The GNSO has a Task Force on contract issues for registry renewals. As noted, ICANN recently has posted for public information proposed renewal agreements for the .biz, .org and .info domain registries, all of which contain automatic renewal provisions similar to those in the .com agreement.[29] Thus, instead of waiting for the outcome of the GNSO policy recommendations, ICANN staff has moved forward to try to reach agreement on the same issues being considered by the GNSO, thereby effectively circumventing that process. This raises particular concern with regard to the .org Registry Agreement, which does not expire until 2009.

Recommendation: ICANN should be required to publish all material contracts for comment before approval. ICANN also should be prohibited from using contracts, including renewals of registry agreements, to effectuate policy changes that would circumvent ongoing review by the GNSO, which is specifically tasked to promote the development of ICANN policy.

5. Effective Oversight of ICANN Is Necessary to Ensure Stability, Self-Sufficiency

The effective involvement of all Internet stakeholders requires that ICANN be held accountable to its constituencies, in regard to both its governance activities and budgetary responsibilities. To this end, reforms are needed in ICANN's procedures and governance structure to ensure that the organization remains a credible and fully accountable overseer of the Internet DNS.

Deficiencies in ICANN Board Oversight: The ICANN Board's voting record, and lack of dissenting votes, calls into question the effectiveness of its role to provide independent review of staff decisions. Among the options that could be considered to provide an effective counterweight to the substantial deference typically given by the Board to staff decisions would be avenues for reconsideration of Board decision that focused on substance, as well as process. For example, under the current approach, a Board decision may only be taken up on reconsideration if a petitioning party demonstrates that the decision was made in violation of ICANN policies or without consideration of material information.[30] Such concerns are long-standing. In a 2002 study, researchers from the Center for Information Technology and Dispute Resolution found that of 31 requests for reconsideration of Board decisions made between 1999 and 2002, ICANN responded to 26 cases and only one petitioner received a favorable response.[31] "If there are problems with the process, the problem is more with ICANN than with any users of the process," the study found.

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[29] *See* Draft Proposed Registry Agreements.

[30] *See* ICANN Bylaws, Article IV, Section 2(2)(b).

[31] *See* "Three Years of Experience: A Report on ICANN's "Request for Reconsideration" Policy, Professor Ethan Katsh, Co-Director of the Center for Information Technology and Dispute Resolution, University of

Similarly, ICANN's Bylaws authorize "a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws."[32] Such requests are to be referred to an Independent Review Panel ("IRP") operated by an international arbitration provider appointed by ICANN. Importantly, the IRP's decision is simply a recommendation for the Board to stay an action or decision or to take an interim action; the IRP's decision is *not* binding on ICANN's Board. Declarations of the IRP, "where feasible," are to be considered at the next meeting of the Board.[33]

To date, however, there is no evidence that this Independent Review procedure is effective at all inasmuch as this mechanism does not appear to have been allowed to work by ICANN, essentially obviating its value as a realistic tool for any challenge of a Board decision. For example, travel expert Ed Hasbrouck initiated an Independent Review in April 2005 to challenge the ICANN Board's approval of the .aero and .travel Top Level Domains ("TLDs"), the registry operators' acceptable use policy and ICANN's general lack of transparency concerning these TLDs.[34] ICANN did not act on Hasbrouck's Independent Review request for 8 months. In a January 2006 letter, ICANN General Counsel John Jeffrey stated that earlier e-mail communications from Mr. Hasbrouck did not "meet the guidelines" for a formal IRP as required by International Centre for Dispute Resolution ("ICDR") procedures.[35]

Budgetary Accountability is Critical: Stability and accountability in ICANN's budgetary procedures – including through external reviews – is critical to its future self-sufficiency. Such budgetary accountability has, until now, been limited to registrar approval of fees that they pay to ICANN. Registrars have exercised this review responsibly and have always approved the fees. Unfortunately, ICANN now seeks to eliminate the registrar funding approval process under the proposed .com Registry Agreement, which would remove any ICANN budgetary oversight. Specifically, the .com proposal would let ICANN and VeriSign agree on higher fees, thus increasing both of their revenues without broader review. Budgetary oversight should be increasing, not decreasing, and the budgetary oversight function should be shared with more members of the community, not just registrars. The elimination of any external review of ICANN's budget or funding gives ICANN an overwhelming self-interest in perpetuating VeriSign's monopoly and in bolstering VeriSign's profitability, compromising ICANN's

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Massachusetts at Amherst, and Dr. Alan Gaitenby, Assistant Director, Center for Information Technology and Dispute Resolution, http://www.ombuds.org/reconsideration/.

[32] See ICANN Bylaws, Article IV, Section 3.

[33] *Id.*

[34] See Request for Independent Review of .travel, http://hasbrouck.org/blog/archives/000554.html.

[35] See letter from ICANN General Counsel and Secretary John Jeffrey to Edward Hasbrouck concerning IRP request, January 17, 2006, http://hasbrouck.org/icann/E-mail_to_Edward_Hasbrouck_17_January_2006.pdf.

responsiveness to its constituencies. Basically, under the proposed .com agreement, ICANN and VeriSign will enter into a self-interested arrangement, in which VeriSign, with ICANN's explicit authorization, will be able to extract unjustified monopoly profits, which will then be shared with ICANN. Such self-dealing is a betrayal of the public trust the Department placed in ICANN.

More broadly, the lack of oversight over ICANN's budget is particularly distressing given its enormous revenue growth. Between 1999 and 2006, ICANN's revenue has risen from $5.9 million to $34.2 million. By comparison, this is nearly twice the Administration's proposed annual budget for NTIA of $18 million for fiscal year 2007. In the past four years alone, ICANN's budget has nearly *quadrupled*, without adequate changes in oversight and accountability that reflect these vastly expanded resources. The consistent increases in ICANN's budgetary resources have drawn concerns from Internet stakeholders over how ICANN accounts for increased expenditures and the lack of justification for these expanded funds.[36] Stakeholders also are concerned that the ICANN Budget Advisory Group, comprised of various constituency representatives, purportedly to provide input to ICANN on its budget, has no power and has not been called to a meeting in over a year. Adequate budget oversight is a critical component to ICANN's self-governance capabilities.

Compliance Measures Needed: Troublingly, to date, ICANN has often chosen not to effectuate its compliance role to limit abuses, despite being given the budgetary means to do so. ICANN must play a critical role in policing bad actors and predatory practices. In fact, ICANN has been moving toward a limitation of its termination and renewal rights in registry agreements, thereby reducing its leverage to require compliance. For example, under the terms of the .tel Registry Agreement, ICANN may only terminate the Agreement if Telnic is found by an arbitration panel to have been "repeatedly and willfully in fundamental and material breach" of one of just three sections (Sections 3.1, 5.2, and 7.2) and the arbitrators "repeatedly have found Registry Operator to have been in fundamental and material breach of this agreement, including in at least three separate awards." Importantly, ICANN gave up certain termination rights that are contained in the .jobs and .travel Registry Agreements,[37] in which ICANN may terminate the agreements if:

> "There was a material misrepresentation, material inaccuracy, or materially misleading statement, made with knowledge of its falsity, inaccuracy, or misleading nature or without reasonable cause to believe it was true, accurate, and not misleading, of then-existing fact or of Registry Operator's intention in

[36] See "How Much Does It Cost to Oversee the Internet," Kieren McCarthy, The Register, March 17, 2003, http://www.theregister.co.uk/2003/03/17/how_much_does_it_cost/. "Considering that last year, we pointed out that ICANN's budget made it comparatively more expensive than every other similar organisation by around a third, this new double-budget appears to be unsupportable."

[37] *See* .jobs Registry Agreement, May 5, 2005, http://www.icann.org/tlds/agreements/jobs/jobs-agreement.htm, and .travel Registry Agreement, May 5, 2005, http://www.icann.org/tlds/agreements/travel/travel-agreement-12apr06.htm.

its application for the Registry TLD or any written material provided to or disclosed to ICANN by the Registry Operator in connection with the application."

Similarly, in recent registry agreements, ICANN has removed termination provisions that focused on financial improprieties by the Registry Operator. For example, until the recent round of registry agreements, ICANN has had the right to terminate the contracts if the registry operator is convicted of a felony or other serious financial offense; is disciplined by the government for dishonesty or misuse of others' funds; or if any officer or director is convicted of a felony or misdemeanor related to financial activities, is judged by a court to have committed fraud or breach of fiduciary duty or is the subject of a judicial determination that ICANN deems as the substantive equivalent of any of these.[38] No such language appears in the recent registry agreements.

This inexplicable relinquishment of such leverage in contracts with registry operators handcuffs ICANN, essentially enabling "bad actors" to proceed unchecked.

This also has even been the case with registrars, whom ICANN accredits and against whom it can use the leverage of contractual obligations to mitigate abusive behavior. Such abuses include "domain hijacking," failure to follow Whois requirements, cybersquatting and other fraudulent activities. ICANN lacks a compliance mechanism in its contracts with registrars other than de-accreditation, which is a "nuclear option" that ICANN has not yet opted to use, even among the worst actors. Despite provisions in accreditation agreements that guard against predatory practices, lack of compliance efforts have meant that enforcement has lagged, and the bad behavior is, in effect, encouraged.

Recommendations: The MoU should prevent ICANN from entering into the kinds of self-dealing arrangements that have surfaced with regard to the proposed .com Registry Agreement. The MoU also should require ICANN and its constituencies to develop a transparent, broad-based approach to future ICANN funding. To increase accountability and transparency regarding ICANN's management of its financial resources, ICANN should be required to conduct and release the results of audited financial reports. Finally, the MoU renewal terms also should require the reformation of a constituency-based Budget Working Group, which would have more than advisory power and could replace the current system of registrar fee approval.

Because the Independent Review process has not been utilized as a mechanism to successfully challenge Board decisions, ICANN has failed to demonstrate that its IPR process is viable. Thus, the amended MoU should include terms that require a re-

[38] *See e.g.*, .com Registry Agreement, May, 25, 2001, Section 16.C, http://www.icann.org/tlds/agreements/verisign/registry-agmt-com-25may01.htm; .biz Registry Agreement, May 11, 2001, Section 5, http://www.icann.org/tlds/agreements/biz/; and .info Registry Agreement, May 11, 2001, Section 5, http://www.icann.org/tlds/agreements/info/.

evaluation of this process and objectives for changing it in a way that provides an actual venue for challenging Board decisions. ICANN should be required to institute a formal, user-friendly process for seeking an IPR. These changes should include enforceable timelines by which ICANN will respond to and provide a decision on an IPR request.

Finally, given that enforcement mechanisms become even more critical in privatized and fully competitive markets, the MoU should ensure that ICANN takes steps to incorporate compliance mechanisms into its contracts with registrars and registries.

6. Conclusion

It is critical that the Department renew and amend the MoU with ICANN in a manner that establishes a path for successful privatization of this corporation by ensuring full implementation of its core principles. Then Assistant Secretary of Commerce Nancy Victory told Congress in 2003, when testifying regarding the last MoU renewal process, that "the Department desires to see ICANN evolve into a stable and sustainable organization that is well equipped to weather a crisis."[39] ICANN is not there yet.

Therefore, the Department is obligated to renew and amend the MoU. The Department faces a tension between refining a blueprint for the advanced stages of ICANN's evolution toward privatization and doing so in a manner that hones ICANN's corporate governance structure for long-term self-governance. In a post-MoU environment, ICANN's success in implementing its core values to the protection and advancement of all Internet community interests will provide the most potent safeguard that the Department's current arms length arrangement will not be replaced in the future with a more hands-on approach by multinational stakeholders. This consideration is particularly critical in light of the ongoing follow-up work to last fall's WSIS meeting.

The limited United States oversight role over ICANN in the short-term is better than more bureaucratic, long-term alternatives proposed at the recent WSIS and must be allowed to continue to work to see through to completion the transition of ICANN to private sector management. But, to resist future challenges and, most importantly, to ensure continued development of the Internet as the world's premier communications and information network, a careful transition to the next step of ICANN autonomy must be defined through this NTIA proceeding. Key adjustments must be made to the terms of the current MoU and to the way that it has been implemented by ICANN over this current MoU's lifecycle.

When drafting the terms of the renewed MoU, the Department must give serious consideration to *all* reasonable alternatives for ensuring that ICANN abides by, and

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[39] *See* Testimony of Nancy J. Victory, Assistant Secretary for Communications and Information, Before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, U.S. Senate, On the Internet Corporation for Assigned Names and Numbers, July 31, 2003, http://www.ntia.doc.gov/ntiahome/congress/2003/nvicann_07312003.htm.

facilitates, the principles of stability, competition, bottom-up coordination, and representation.

We thank the Department for initiating this proceeding to review and, as needed, to improve Internet governance structures and procedures. Network Solutions looks forward to working with the Department of Commerce and NTIA to this end.

Network Solutions, LLC Comments
Appendix A

Testimony of J. Beckwith Burr
Wilmer Cutler Pickering Hale and Dorr LLP
House Small Business Committee
Wednesday, June 7, 2006

Mr. Chairman, and Members of the Committee:

It is a pleasure to appear before you to provide some background on the origins and purpose of the Department of Commerce approval provisions in the Registry Agreement between ICANN and Verisign. Prior to returning to private practice in October of 2000, I was an Associate Administrator of NTIA and director of its Office of International Affairs. I do not represent Network Solutions or any members of the registrar community. Neither do I represent Verisign, though most of my ICANN-related work in the past five years has been for members - and prospective members - of the registry constituency, of which Verisign is a member. Most recently I represented the successful applicants for the .mobi sTLD, and less successfully to date, ICM Registry. I appear before this Committee not as an advocate for any client, however, but as a long time supporter of private sector management of the Internet domain name system (DNS) and a long-standing member of the ICANN community.

DNS Management Before the White Paper

In the spring of 1992, the non-military "Internet" was still largely a creature of the academy. There was no "world wide web" or user-friendly browser. Network Solutions Inc. (NSI) operated registries for the non-military Internet top-level domains, and provided end-user registrations services for those registries under a cooperative agreement (the Cooperative Agreement) with the National Science Foundation (NSF). (In the hopes of avoiding unnecessary confusion, I will refer hereafter to the successor to NSI's registry services business - Verisign.[40]) But by the time the Cooperative Agreement was scheduled to expire in 1998, that situation had changed radically. Given its research orientation, NSF determined to end its role in management of the Domain Name System (DNS) by simply permitting NSI to "carry on" after the contract expired. Had everything proceeded as expected, the Cooperative Agreement might have expired without anyone noticing. Instead, of course, the growing global commercial importance of the Internet produced a commensurate increase in Internet related IPOs and put "e-commerce" on the front page of every newspaper. Along with this increased commercial

[40] The functions and activities are now split between Verisign and Network Solutions. After the NSI/ICANN registry agreement was entered into, Verisign acquired NSI. Following that acquisition, Verisign spun off the registrar (retail) elements of the former NSI business. Currently, Verisign performs registry services for .com and .net. Network Solutions, on the other hand, provides registrar services for a variety of top-level domains (TLDs).

activity came increased commercial conflict, and investors, businesses, and policy makers around the world noticed.

As the Cooperative Agreement's final expiration date - September 30, 1998 - approached, it became clear that the structures in place to manage the DNS were not going to scale.

- Policy authority resided, in significant part, with a single - albeit revered – human being. Dr. Jon Postel's consensus building skills - legendary in the technical community - were less suited to a litigious commercial setting. Complicating matters, Dr. Postel provided a variety of DNS related services, not only as a government contractor, but also as a member of the global, private sector Internet engineering community. This combined role made the source of Dr. Postel's authority unclear - was it DARPA, the Internet Architecture Board/Internet Engineering Task Force (IAB/IETF), the "Internet community," something else, or all of the above? The answer to that question inevitably depended on who was asked.

- Meanwhile, a publicly traded U.S. company - VeriSign - appeared to control the most valuable commercial assets associated with the public Internet - the .com, .net, and .org top-level domains (TLDs). Some objected to the company' s trademark dispute resolution procedures; some to the amount of money it was making from a government granted monopoly; and still others to the commercial dominance of the generic TLDs it managed, especially compared to the then much smaller country code TLDs (ccTLDs), such as .uk; .fr; .ca; .jp, .nz, .au.

- A number of governments found themselves in the midst of ccTLD disputes - generally involving ccTLDs for their territories. For example, the British government was concerned about management of .pn (Pitcairn Island) and demanded redelegation.[41] And no one was sure why someone in Florida was marketing the ccTLD for Moldova - .md - to members of the medical professions in North America.

On the one hand, it seemed an inopportune moment for the U.S. government to walk away from the DNS management problem. On the other hand, it was clear that a U.S. mandated solution was likely to backfire. The U.S. government stepped in to develop a consensus among key players around the world in support of a non-governmental approach to DNS management.

After extensive consultation with other governments, the U.S. and international business community, the engineering community, and others - including quite a few members of this body - the Commerce Department codified the emerging consensus in a document

[41] Her Majesty' s government quickly grasped the situation and resolved the conflict by submitting a petition signed by 45 of the 47 adult residents of Pitcairn.

commonly referred to as the "White Paper." Using existing statutory authority, NSF transferred the Cooperative Agreement to the Department of Commerce, which the Administration then charged with overseeing an orderly transition to private sector management of the DNS.

The Orderly Transition

Arranging an "orderly transition" turned out to be a bit of a challenge. Verisign, having fiduciary obligations to its shareholders, was not enthusiastic about relinquishing its profitable role as the exclusive registry and registrar for the generic TLDs. The allocation of rights and responsibilities under the Cooperative Agreement was as murky as the sources and limits of Dr. Postel's authority for the collection of activities that came to be known as the "Internet Assigned Number Authority" (IANA). Ultimately, the Cooperative Agreement was a less than fully satisfactory vehicle, from many perspectives, for managing the explosive, global growth of the commercial Internet that took place only a few years later. The Commerce Department used Amendment 11, which extended the Cooperative Agreement for two years, to tidy up a bit. Verisign agreed to get on board the privatization train, and gave the Commerce Department effective control over the authoritative root.[42]

In the months that followed, the Commerce Department "recognized" ICANN, and began what might best be called the transition back to private sector management of the Internet. The agreement between Verisign and ICANN was a critical piece of this transition. And the Commerce Department was at the table in those negotiations for several reasons:

- First, any agreement between ICANN and Verisign would necessarily involve some termination or suspension of Verisign's obligations to the government under the Cooperative Agreement.

- Second, the US government had an interest in ensuring on behalf of **all** of the stakeholders - including our international partners in the transition - that the agreement between ICANN and Verisign did not undermine any of the contractual concessions obtained in Amendment 11.

[42] This is an important point, which is often overlooked in the debate. At the time it was in VeriSign' s strategic interest to let the Cooperative Agreement expire - a move that would have left NSI in (at least temporary) possession of the gTLD registration system, as well as the Internet' s authoritative root, while creating a great deal of uncertainty about legal authority over the DNS, the resolution of which would take years of litigation. I am not suggesting that VeriSign " gave up" anything, but simply recalling that in the summer of 1998, litigation would have left NSI in control of .com, .net, and .org for a good long while. As it happened, however, VeriSign was simultaneously facing a trial in a high stakes anti-trust lawsuit. The company elected not to play its strong hand in the negotiations in order to preserve its best antitrust defense - its status as a government contractor.

- Third, the U.S. government had an interest in making sure that something was in place in the event that the agreement between VeriSign and ICANN fell apart.[43]
- Fourth, the Commerce Department was at the table in the role of an honest broker. These negotiations proceeded as ICANN was being organized, and suffice it to say, by the time every one got to the negotiating table, VeriSign did not trust ICANN and ICANN did not trust VeriSign.[44]

For all of these reasons it made sense at the time to give the Commerce Department an approval right in the registry agreement during the transition period. The Department's role was twofold: First, it was necessary to protect the newly achieved legal clarity about the registry operator's lack of authority with respect to the A root; and second, both VeriSign and ICANN felt that the Commerce Department could facilitate the VeriSign/ICANN relationship by playing the "honest broker" role. In both of these roles, the Commerce Department would serve as a trustee for the interests of the global Internet community in a successful transition to private sector management of the DNS, based on implementation of the principles set forth in the White Paper - preservation of stability, promotion of competition, and bottom-up policy development by an organization reflecting the global and functional diversity of Internet users and their needs.

It may help to consider the approval role of the Department of Commerce in the VeriSign/ICANN agreement in comparison to the Department's residual control over the authoritative root. Recall that when ICANN and VeriSign negotiated the registry agreement in 1999, the Commerce Department had only recently eliminated the registry operator's ability to manipulate the transition through its possession of the A Root. Commerce was appropriately reluctant to hand that kind of leverage to ICANN until it demonstrated some capacity to accomplish the goals outlined in the White Paper. Even so, the role of the United States government was as a trustee for the transition outlined in the White Paper: the retained authority over the root was (a) temporary, and (b) only to be used on behalf of the global community to facilitate the transition.

Having leveled the playing field by circumscribing VeriSign's ability to control the root, the parameters of justified intervention remained to be determined. Some things were immediately clear. As a trustee, any use of this authority had to be consistent with the White Paper principles. Given that the transition to private sector management was - as it so clearly remains today - dependent on the support of the global Internet community, the retained authority should not be used in ways that would be objectionable to stakeholders - including our governmental partners - in this transition. And finally, any use of that authority had to be faithful to the first principle of Internet "regulation" articulated nearly a decade ago - recognizing that any government's regulation of the Internet could have

[43] This explains the " springing" nature of VeriSign' s obligations under Part II of the Cooperative Agreement.

[44] Anyone who attended early ICANN meetings, including the meetings in Singapore, Berlin, and Santiago will recall the level of tension between ICANN and VeriSign.

global consequences, individual governments should generally avoid regulatory intervention in favor of letting the market, industry self-regulation, and bottom-up consensus policy development work.

Over time, a general consensus emerged that the United States government should unilaterally exercise its retained authority over the A Root only to respond to a true threat to the stability of the Internet or DNS requiring immediate action. Any other use of that retained authority, as we have seen, undermines ICANN and jeopardizes the transition to private sector management, and the United States has - with some notable exceptions - confined its role accordingly.

The contract approval clause has a slightly different pedigree. There, the role of the Commerce Department was primarily that of the trustee and honest broker - in the event that one party thought the other was abusing its power or contravening the White Paper principles it could appeal to the Commerce Department, which could, in turn, attempt to facilitate a sensible outcome consistent with White Paper blueprint.

The question of how this approval authority might be appropriately exercised has not been the subject of much debate in the community. But ultimately, the contract approval clause must serve to facilitate private sector management of the DNS in accordance with the principles articulated in the White Paper. So two questions become relevant: First, is the proposed contract inconsistent with the White Paper principles, particularly if that inconsistency reflects some imbalance in bargaining positions. Second, where the answer to the first question is yes, will intervention further - and not undermine - the success of the ICANN experiment? This question must be addressed on both a substantive and a procedural level.

It is worth noting that the approval authority we are discussing today is not the only avenue for government input. Competition authorities with jurisdiction over this agreement - both in the United States and elsewhere - are entitled to determine whether the agreement complies with applicable law. Individual governments are always entitled to take positions on ICANN matters, so long as their input is transparent and, of course, consistent with any applicable limits on government activities. Within the four corners of the ICANN Bylaws, the ICANN governmental advisory committee (GAC) also serves as a mechanism through which governments may express their concerns about and/or support of this agreement. With respect to the GAC, two important caveats must be made: First, that participation must be subject to reasonable procedures and timelines established with community input. Second, it is a matter of great concern to ICANN watchers in the United States and abroad that the U.S. appears to be increasingly willing to use its unique authority - whether with respect to the root, contract approval, and/or the independence and autonomy of ICANN to elicit, stifle, or direct GAC input for purposes unrelated to the success of the ICANN process.

No matter where one comes out on the merits or deficiencies of the .com agreement and the appropriate use of the Commerce Department’ s contract approval authority, I know of no one who admires the process used to get here. Like other ICANN decisions, a

relatively short list of deficiencies generates a fairly large amount of frustration in the community. The following changes are needed to improve the ICANN process and preserve private sector management of the DNS:

- The ICANN community must articulate and enforce agreed-upon roles assigned to various constituencies in its deliberative process.

- The ICANN community must clarify and articulate ICANN's responsibilities with respect to competition. "Competition" is at the heart of the ICANN mission, and it is a highly complex issue, but the community is clearly not satisfied with the "leave it to the anti-trust authorities to intervene if they don't like it" approach.

- The ICANN community must clarify and articulate the role of governments in its processes. Governments are a part of the process, but they should not be permitted to derail innovative approaches on vaguely articulated "public policy" grounds. ICANN has no ability to diminish sovereign authority, so there is no reason to exempt governments from rules regarding participation adopted by the ICANN community.

- ICANN must be more forthcoming about explaining its controversial decisions. The ICANN community, including those most directly affected by the Verisign settlement, received very confusing information about how this negotiation was conducted, who insisted on what provisions, and how these negotiations related to the policy development underway within ICANN' s Generic Names Supporting Organization. This kind of confusion breeds mistrust among both governments and members of the broader ICANN community, and undermines ICANN in the eyes of the community.

I appreciate the Committee's time, and am happy to answer any questions you may have.

Network Solutions, LLC Comments
Appendix B

Testimony Submitted for the Record

Michael M. Roberts*

Before the Committee on Small Business
United States House of Representatives
June 7, 2006

"Contracting the Internet: Does ICANN create a barrier to small business?"

Mr. Chairman and Members of the Committee:

Having been closely involved with ICANN since its inception in 1998, I welcome an opportunity to share my views on contracting by ICANN and its impact on small businesses. My testimony will focus on the proposed contract between ICANN and VeriSign regarding renewal of the .com registry agreement. My testimony is submitted for the record and addresses key areas where I believe that small businesses are harmed by the contractual conditions in the present agreement.

One of the key principles articulated by the Department of Commerce in its 1998 White Paper on technical coordination and administration of the domain name system and related Internet functions was that the process of privatization should result in enhanced opportunities for competition in the DNS marketplace, including an emphasis on innovation of Internet products and services.

Subsequent to its formation, ICANN worked with the Department of Commerce in accordance with the terms of the MOU to take several steps to improve competition and lower barriers to market entry. These included: separation of registry and registrar functions in dot com, dot net, and certain other top level domains under ICANN's jurisdiction; the creation of an accreditation process for new name registration companies that permitted many small companies to qualify to enter the domain name registrar market [e.g. through creation of competitive registrars]; the creation of a dispute resolution process that resolved many outstanding trademark infringement/cyber-squatting problems associated with generic top level domain names, thus reducing the litigation burden on small companies with trademarked names and on the small registrars themselves; and the competitive creation of new top level domain name registries to respond to market interest and need through the introduction of the first round of new gTLDS, such as .info; .biz, .museum, .name, etc.

In general, many results of these actions on the users and providers of domain names, both nationally and internationally, have been overwhelmingly positive. The user experience in registration of names has been enhanced, and the cost of annual domain name registration fees has declined substantially.

Unfortunately, the positive aspects of the operation of the domain name system enumerated above do not extend to the relationship between ICANN and VeriSign, and VeriSign and the Department of Commerce.

Going back to the original cooperative agreement between VeriSign's predecessor corporation, Network Solutions, and the National Science Foundation, the company now known as VeriSign has enjoyed a monopoly as the registry operator for dot com and other top level domains. It still enjoys that monopoly today, accounting for more than half of all domain names in use worldwide, inclusive of country code names and over 85% of the gTLD names under management. Through this entire period, VeriSign and its predecessor have aggressively defended their view of their commercial rights to operate the registry and derive a profit there from. Having inherited a government granted monopoly, VeriSign has pushed its monopoly through a variety of actions designed to maintain that position, despite modifications to its agreements with the government and with ICANN.

It is indisputably both the right and the obligation of a corporation in our economic system to maximize profits. However, when such corporate behavior crosses over into anti-trust territory, remedial measures are required under U.S. law. VeriSign has successfully evaded anti-trust scrutiny for many years by virtue of its agreements with the Department of Commerce, and its agreements with ICANN, which were directed by ICANN's own agreements with the Department of Commerce.

Therefore, special attention must be paid to any registry agreement, or renewal terms of a registry agreement, between ICANN and VeriSign, since normal anti-trust protections do not apply.

There are, I believe, four major issues with the proposed contract regarding the re-award of dot com that warrant the Committee's attention prior to any Department of Commerce approval of the agreement. For the sake of brevity, I omit a wealth of detail on the contract and the process leading to it in this testimony.

1. No price competition. No one disputes that VeriSign is well qualified to operate the dot com registry. But whether it should do so under permanent price protection from ICANN and the Department of Commerce is very much an issue. The technical services which VeriSign uses in operating dot com are readily available on a competitive basis within the Internet Registry services industry. Many of the registry services players possess the size, technical expertise and financial resources of the type needed for management of dot net, and dot com.

In spite of the strong urging of the Internet community that ICANN's bylaws require, ICANN has failed to make any significant effort to subject VeriSign to competition for renewal of its dot com agreement; marking a retrenchment from ICANN's obligation to foster competition in the registry marketplace for which behavior ICANN has offered no explanation.

Further, the proposed new agreement awards annual price increases for which no need is shown, and in a situation where both the growth in registration of dot com names and the continuing decline in the underlying costs of technology related to operation of the registry is resulting in substantial unit price declines. The agreement creates a situation where the supplier, VeriSign, need not even offer an explanation to those who pay the increased fees of the rationale for the price increase.

2. Commercialization of rights in data. The proposed agreement grants new rights in data associated with registry information that effectively opens new lines of business to VeriSign while closing such opportunities to others, especially small enterprises that might employ innovative techniques to establish value added user services.

3. Permanent renewal. The preferential renewal language in the previous registry agreement has been expanded and strengthened to the point where VeriSign will no longer face any competition for operation of the dot com registry. This is an unprecedented anti-competitive action, especially for an enterprise that has already adroitly leveraged its market position into control of more than 85% of the generic TLD (gTLD) registry business segment.

4. Packaging of registry agreement with litigation agreement. During the course of ICANN's open forum discussions with its constituencies about the proposed registry agreement with VeriSign, various statements have been made by ICANN and by VeriSign that wrapping settlement of pending litigation into a single package along with the registry agreement was advantageous to ICANN and to the community. Extensive and widespread public comment disagreed with this. Unfortunately, because of the confidentiality of the details of any litigation settlement, and because the ICANN staff extend confidentiality to an extreme degree even when litigation is not the issue, no impartial and arms length assessment of the validity of these assertions is possible. However, this lack of transparency is inimical to the basic commitment to community consultation which is a foundation stone of ICANN's mission. Judged not only from the perspective of American standards of fairness, but in this case from international standards as well because of ICANN's global reach, the appearance of abuse of process is obvious.

In closing, I would like to refer to an argument being made both publicly and privately to the effect that the United States must award this contract to VeriSign for national security reasons. Having myself worked with top secret materials for many years as a Captain in the U.S. Naval Reserve, I am very much aware of the need to maintain the security and integrity of the domain name system against attacks from any source. However, the government has employed for many years, through the height of the Cold War, competitively awarded contracts with companies that are qualified to work in a security environment. Security is not inconsistent with competition. If competition is allowed to work in the registry business, security concerns are easily manageable.

Thank you for the opportunity to provide this perspective to the committee. I welcome receiving any questions regarding my statement.

Michael M. Roberts
Principal, The Darwin Group, Inc.
339 La Cuesta Drive
Portola Valley, CA 94028
650-854-2108

• President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers
1998-2001

Network Solutions, LLC Comments
Appendix C

ORRIN G. HATCH
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JOINT COMMITTEE ON TAXATION

May 24, 2006

The Honorable Alberto R. Gonzales
Attorney General
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

I know that you share my deep concern for the proper enforcement of the antitrust laws and the encouragement of open competition. With those goals in mind, I am writing to request that you carefully review the proposed Settlement Agreement between the Internet Corporation for Assigned Names and Numbers (ICANN) and VeriSign, Inc. The agreement is currently pending before the Department of Commerce (DOC) for approval, and I understand the Antitrust Division at the Department of Justice (DOJ) will be advising the DOC regarding the agreement's implications with respect to competition policy.

As you know, VeriSign currently administers the .com domain name registry pursuant to a contract with ICANN that is due to expire in 2007. Not only does the proposed agreement extend VeriSign's control of the .com registry for an additional six years, it grants VeriSign a right of renewal absent a serious breach of its contractual obligations. These terms appear to offer little realistic prospect of the .com registry agreement being competitively bid in the future. It is difficult to reconcile this type of arrangement with a strong commitment to open competition or, arguably, with the Memorandum of Understanding between ICANN and the DOC, which obligates both the DOC and ICANN to abide by competitive principles.

Additionally, the agreement appears to authorize VeriSign to increase the fee that it currently charges for registry services by seven percent in four of the next six years, without any cost justification or significant oversight. Some have argued that, assuming growth continues at its current rate, VeriSign stands to obtain $1.3 billion from this provision. The ultimate burden of these price increases undoubtedly will be passed along to consumers. This seems particularly troubling in light of the fact that VeriSign lowered its fee from $6.00 to $3.50 when the .net registry agreement underwent a competitive bid process, presumably in response to potential competition.

It is, of course, absolutely essential to our national interest that we safeguard the security and stability of the Internet. However, it appears that the ICANN-VeriSign agreement's terms could be questioned on these grounds. My understanding is that VeriSign has made substantial infrastructure investments under its current .com registry agreement, the terms of which require a cost justification for price increases. Moreover, when ICANN competitively rebid the .net registry in 2005, VeriSign voluntarily implemented significant structural

improvements and a price reduction in order to retain control of the registry. Therefore, it appears that a renewal agreement retaining the current requirement for cost-justified price increases would afford VeriSign sufficient flexibility to fund infrastructure improvements, while providing the type of oversight that is typically necessary to restrain unwarranted price increases. If the .com registry is not subject to competitive bidding, then substantial oversight of other aspects of VeriSign's performance may be appropriate as well.

It appears the agreement may raise legitimate questions concerning competition, without any clear offsetting public benefit, for this reason, I urge you to carefully review to the agreement. The DOC may well be deferential to the guidance it receives from the Antitrust Division on the potential anticompetitive consequences of the ICANN-Verisign agreement. Accordingly, I would urge you to speak forcefully and clearly against any potentially anticompetitive provisions contained in the agreement.

I look forward to hearing from you concerning this matter.

Sincerely,

Orrin G. Hatch
United States Senator

Network Solutions, LLC Comments
Appendix D

RICK BOUCHER
9TH DISTRICT, VIRGINIA

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February 17, 2006

The Honorable Thomas O. Barnett
Assistant Attorney General for Antitrust
U.S. Department of Justice
901 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Secretary Barnett:

I am writing to express my concern about the anticompetitive implications of the new proposed settlement between VeriSign and the Internet Corporation for Assigned Names and Numbers (ICANN), which would extend VeriSign's contract as operator of the .com top level domain (TLD) registry. It is my understanding that ICANN's Board of Directors will be meeting soon to approve the proposed settlement and move that certain sections of it be submitted to the Department of Commerce and the Department of Justice for review and approval.

Specifically, I am concerned that the agreement would assure VeriSign the perpetual right to manage the .com TLD, regardless of the maximum price it charges for initial and renewal registrations. Article IV of the settlement states that the "agreement shall be renewed upon the expiration of the term" unless VeriSign fundamentally and materially breaches the agreement and fails to cure. This clause would effectively allow VeriSign to manage the .com TLD in perpetuity, without respect to the fees it assesses for registrations. It removes the checks and balances in the current agreement with respect to contract renewal, which provide that the contract be rebid if VeriSign increases the price of registrations above the amount set in the agreement.

The proposed perpetual control in the revised settlement agreement raises serious anticompetitive concerns with wide-ranging global implications. Management of a TLD registry is a natural monopoly. Periodic market testing in the form of competitive bidding through which other companies seek to operate the TLD is an effective way to assure reasonable pricing of .com domain names. The .net process offers a perfect example. When the .net contract was rebid last year, competition and market forces reduced the final registration price by one-third. To allow market forces to work, the settlement agreement for the .com registry should include a competitive bidding process for renewal at an early time.

I urge your careful review of what appear to me to be the serious anti-competitive implications of the proposed settlement.

Thank you for your attention to this important matter.

Sincerely,

Rick Boucher
Member of Congress