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Ms. Fiona M. Alexander
Associate Administrator
Office of International Affairs
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Room 4701
Washington, DC 20230

Re: Docket No. 090420688-9689-01
Assessment of the Transition of the Technical Coordination and Management of the Internet's Domain Name and Addressing System

Dear Ms. Alexander:

This comment letter is submitted by the Internet Commerce Association (ICA) in regard to NTIA's April 24th Federal Register Notice of Inquiry regarding the above referenced Docket matter.

ICA is a not-for-profit trade association representing the direct search industry. Its membership is composed of domain name registrants that invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support ICANN-accredited registrars and registries as well as ICANN itself. The ICA is an International Member of ICANN's Business Constituency and presently has more than 120 members located in the United States and thirteen other nations.

Executive Summary

The ICA believes that the four guiding principles originally set out in the 1998 DNS White Paper – stability; competition; private, bottom-up coordination; and

representation - remain an appropriate basis for ICANN's processes and structures. The ICA also believes that the goal of the Joint Project Agreement (JPA) process – the transition of the coordination of Domain Name System (DNS) responsibilities to the private sector – remains the most appropriate model for increasing competition and facilitating international participation in DNS coordination and management in a manner that is consistent with maintaining the security and stability of the DNS.

It is our view that ICANN has made some limited progress in implementing the four guiding principles since the submission to NTIA of our Midterm Review comment letter of February 15, 2008. However, as discussed below, a review of the concerns that we articulated in that 2008 correspondence indicates that ICANN still has considerable work to do in multiple areas to satisfactorily bring its policies and procedures into conformance with those principles. In addition, we believe that that the U.S. government and other parties need to take appropriate steps, in concert with ICANN, to better assure that ICANN will remain fully accountable and maintain a limited technical role following the termination of its relationship with the NTIA and its transition to a post-JPA environment. Further, specific understandings must be reached, and associated protections implemented, to prevent "capture" of ICANN, whether by external or internal parties, including any consortium of governments or an intergovernmental organization.

Given our belief that ICANN has yet to fully implement the four guiding principles and that additional understandings and protections need to be developed and set in place, we do not support termination of the unique U.S.-ICANN relationship on September 30, 2009. Rather, we recommend that ICANN and the Department of Commerce (DOC) enter into a new agreement commencing on October 1, 2009 for a sufficient period of years to realistically permit full implementation, and that such agreement should better specify the goals that ICANN must reach as well as the understandings and protections that must be put in place to permit a final severance of that unique relationship.

Discussion

The "Light Touch" Nature of the ICANN-DOC Relationship Argues for JPA Extension

As you noted in your June 4, 2009 testimony before the House Subcommittee on Communications, Technology and the Internet, the original memorandum of understanding (MOU) entered into between ICANN and DOC "did not simply turn over management of the DNS to ICANN" but had as its purpose the design, development and testing of mechanisms, methods, and procedures "to ensure that the private sector has the capability and resources to assume important responsibilities related to the technical coordination and management of the DNS". You also correctly noted that the current JPA, the successor agreement to the preceding MOUs, "does not give the Department of Commerce the ability to exercise oversight in the traditional context of regulation, and the Department of Commerce plays no role in the internal governance or day-to-day operations of ICANN." Likewise, in his statement before the same hearing, ICANN CEO

Paul Twomey agreed that "one thing the JPA is not and never has been is an oversight mechanism", while conceding that "the JPA/MOU process has been a major stabilizer for the organization".

We believe that the "light touch" nature of the relationship between ICANN and the DOC argues for its limited extension. While DOC does not exercise traditional regulatory oversight and has no role in ICANN's daily operations the relationship is nonetheless an aid to organizational stability and, more importantly, serves as a backstop against actions that would be inconsistent with the guiding principles as well as a protective shield against capture by forces that could seek to more directly intervene in ICANN's activities and assert operational or political control over them.

Further, while your testimony noted that in a post-JPA environment the U.S. would retain a voice in the Governmental Advisory Committee and an ability to participate in ICANN's own comment process, we do not view such options as in any way equivalent to the special relationship now enjoyed by the U.S. due to its creation of both the Internet and ICANN. Nor do we view them as sufficient to address ICANN's continuing shortcomings at this time.

Some Progress Made – But Much Remains Undone

As we prepared this comment letter we found that the best way to measure ICANN's progress since our Midterm Review submission of February 2008 was to reproduce its Executive Summary and to then add additional comments updating them to the present moment--

- **ICANN has failed to assure domain name (DN) registrants that the pricing and performance of generic Top Level Domain (gTLD) registries will be optimized. To the contrary, it has entered into near-perpetual, above-competitive rate contracts with these registry operators.**

This situation remains unchanged and, in fact, the outlook has worsened.

The secretly negotiated, sweetheart, no-bid contract for the operation of the .com registry entered into by ICANN with VeriSign in 2005 as a means of extricating itself from litigation brought against it to prevent competitive rebid of the contract continues to extract from our members and all registrants registry fees for .com domains that are approximately double what they would have been had ICANN put the Internet community's interests ahead of its own. That contract also permits VeriSign to raise these fees by seven percent in four out of the six contract years without providing any justification whatsoever, and VeriSign has taken advantage of that clause twice to raise those fees and may well do so again at the next opportunity notwithstanding the distressing state of the global economy. That contract also contains a "presumptive renewal" clause that is in fact a perpetual renewal clause, given that it is nearly impossible to trigger a bidding competition in which other parties could seek to operate the largest and most important gTLD. All of these ill

effects result from ICANN's abandonment of the competition principle as it relates to this registry contract and its taking of actions that were at complete odds with community sentiment. The broad outcry against the adoption of the .com contract continues to reverberate within ICANN today and is one of the major reasons why so many ICANN constituencies question its commitment to the four guiding principles and oppose termination of the JPA at this time.

We note in particular that on June 5, 2009 the U.S. Court of Appeals issued a decision that reversed the District Court's dismissal of the case of Coalition for Internet Transparency (CFIT) v. ICANN. The ICA submitted an amicus brief in this case that the Appeals Court found persuasive on a key issue. The Appeals Court held that CFIT's allegations of improper and predatory conduct by VeriSign, designed to compel ICANN to award a renewal of the .com registry contract to it on extremely favorable terms will, if substantiated at trial, permit a finding of actions taken in violation of Section 1 of the Sherman Antitrust Act. The discovery process that will now be permitted in this case can shed light on ICANN actions that will illuminate whether and to what extent it has operated in a past manner that is not consistent with the guiding principles and its asserted commitment to transparency and accountability.

Likewise, the .biz, .org and .info gTLDs continue to operate under registry contracts approved in 2007 that were adopted notwithstanding that the public comments submitted in regard to them ran 200 to 1 against such adoption. The only improvement made as a result of the public comment process was the inclusion of a provision prohibiting differential pricing by which a registry operator could effectively tax the economic success of domains within its gTLD. These contracts contain presumptive renewal clauses that are essentially identical to that of the .com contract and that likewise create perpetual monopolies for these registry operators that deny registrants and registrars the quality assurance and pricing benefits of periodic competitive rebids.

Finally, ICANN is now engaged in a controversial project permitting the submission of applications for an unlimited number of new gTLDs. Despite strong comments filed by the ICA and other parties the draft registry contract for these new gTLDs still contains no language regarding limitations on initial pricing or subsequent increases and would in fact appear to permit the very differential pricing eliminated from the registry contracts approved in 2007. Operators of incumbent gTLDs have already put ICANN on notice that, if such contracts are approved for new gTLDs, they will seek to exercise "equitable treatment" provisions of their own contracts that would permit them to operate free of current price controls. Such action would be extremely damaging to current registrants given that there are significant adverse marketplace consequences associated with switching to a new domain address on another gTLD. That is, once online businesses are established there are severe real world switching costs associated with domain relocation.

- **ICANN failed to protect registrant interests or adequately respond to registrant requests for assistance during the initial collapse of RegisterFly in 2006-7. While ICANN has taken some ameliorative steps since then it is still unclear when a strengthened Registrar Accreditation Agreement (RAA) will be finalized, much less when it will be implemented, whether such implementation will be on a uniform basis, and whether enforcement will be adequate to protect registrant interests and rights.**

This is one area in which ICANN has made substantial positive progress. It has just adopted numerous amendments to the Registrar Accreditation Agreement that should help avoid any repetition of the Registerfly fiasco. While not all appropriate strengthening were included, and while we remain concerned that registrants will lack uniform protections for some time due to the fact that the revised agreement only takes effect as each registrar is re-accredited, their adoption nonetheless represent substantial progress. Further, the GNSO has initiated a successor process aimed at considering additional amendments as well as establishing a formal charter of registrant rights and responsibilities. ICA is leading the Business Constituency's initial efforts regarding such an affirmative charter and will remain engaged as this effort moves forward within the full GNSO. Of course, effective enforcement of the revised RAA by ICANN is critical to its ability to better protect registrants.

- **ICANN has under consideration a proposal for "improvements" of its Generic Names Supporting Organization (GNSO) that would substantially downgrade the role of all business interests, including the domain monetization industry, in shaping ICANN policies.**

The implementation of GNSO reform being undertaken by ICANN is substantially behind schedule. We remain concerned that the transformation of the GNSO into a bicameral body, with one house for contract parties and the other for remaining constituencies, will institutionalize conflicts rather than help bridge them. The transition to this new system is now projected to occur in fall 2009. Given that the GNSO is supposed to be the key policymaking group within ICANN and that its effective operation is crucial for the continued achievement of private sector leadership, it would be grossly premature to terminate the JPA until the new system has been operational for some decent period of time so as to be able to evaluate whether its functioning has in any way moved ICANN toward achieving improved private sector-led bottom-up coordination.

- **ICANN's Governmental Advisory Committee (GAC) has grown substantially in membership and has become increasingly influential in ICANN policymaking. Yet the GAC continues to close all its meetings to the public and the press in complete contravention of ICANN's commitment to greater transparency and accountability. The ICA must oppose any suggestion that U.S. oversight of ICANN be terminated until such closed sessions become the rare exception rather than the general rule.**

We are pleased that over the past year the majority of GAC activities have been opened to public observation.

We are disturbed, however, that the GAC continues to assert authority that goes beyond mere advisement. This is illustrated by its relentless quest for governmental controls over geographic and other names of national significance at both the first and second levels of new gTLDs. Such controls have no basis in existing law as there are no trademark rights in map names, and any acquiescence to this demand by ICANN would effectively constitute an assumption of legislative functions that is wholly inconsistent with its narrow technical function. ICANN has, in our view, already conceded too much to the GAC in regard to a requirement for governmental endorsement or non-objection to new gTLDs incorporating geo-names and, in so doing, ICANN staff have deliberately overturned the recommendations of the GNSO as to governmental rights against new gTLDs. This is but one more example of ICANN operating in a non-accountable manner that is at odds with bottom-up policymaking as well as its limited technical management role.

- **ICANN recently considered a proposed dispute resolution policy (DRP) for new gTLDs that is substantially less protective of DN investments than the current Uniform Dispute Resolution Policy (UDRP) and would abet reverse hijacking of DNs presently controlled by ICA members. Further, it has been proposed that this DRP should eventually be applied retroactively to existing gTLDs, including .Com.**

This situation has worsened substantially. While trademark owners have valid concerns about the potential costs accruing to them due to a rapid proliferation of new gTLDs, ICANN has permitted them to engage in an opaque and one-sided process resulting in recommendations for "solutions" that would substantially displace the UDRP at new gTLDs and that would also create rights that have no basis in trademark law.

Without any advance notice, ICANN's Board announced during its March 2009 meeting in Mexico City that it would authorize the Intellectual Property Constituency (IPC) to constitute a hand-picked Implementation Recommendation Team (IRT). Despite its clear status as a "constituent body" of ICANN the IRT's composition did not include fair representation of affected entities and it decided at its first meeting to operate in a non-transparent manner. Notwithstanding these actions in contravention of ICANN Bylaws, the IRT still received substantial ICANN staff and funding support. The IRT has just produced a Final Report that recommends adoption of a Uniform Rapid Suspension (URS) policy that would essentially displace the UDRP at new gTLDs (and there is little doubt that the IRT would like to see this same policy applied retroactively to incumbent gTLDs). The proposed URS policy combines extremely low complainant filing fees with a lack of any effective sanctions for abuse so as to encourage mass filings against registrants in a process that affords them inadequate response time and due process. While the URS clearly constitutes a major new policy initiative it appears to us that ICANN may well attempt to bypass the proper venue for all such consequential policy

decisions, the GNSO. Should this occur, it will be but one more blatant example of ICANN engaging in unaccountable actions that subvert bottom-up policymaking.

The IRT has also recommended measures such as a preemptive Global Protected Marks List (GPML) that has no foundation in trademark law. Were ICANN to adopt such a recommendation it would be assuming legislative powers that go far beyond its limited technical management role.

Given our concerns regarding the IRT's failure to comply with ICANN Bylaws, we filed a formal complaint with the ICANN Ombudsman asking for an investigation and corrective action. The Ombudsman delayed his response until after the IRT had completed its work. Not only was the response delivered too late to have any effect on the operation of the IRT, it did not even engage to the central point of our complaint – that the IRT was a "constituent body" bound by ICANN Bylaws. We now, like others before us, have found that ICANN's Ombudsman process cannot be relied upon to assure any meaningful accountability for ICANN actions.

Finally, on the general subject of new gTLDs, we have repeatedly questioned whether ICANN has the organizational capacity to responsibly review and decide upon the five hundred applications it has estimated will be submitted in the first round of this process. Observing ICANN's handling of that application process, and the effect of this inundation upon its management resources and overall performance, argues strongly for maintaining a renewed version of the JPA for some time past the opening of the application period, which is now estimated to occur in the first quarter of 2010.

- **ICANN has failed to exercise adequate oversight over the presently approved providers of UDRP arbitration services and, as a result, has allowed a growing degree of non-uniformity that encourages complainant forum-shopping that is disadvantageous and fundamentally unfair to DN registrants. Further, ICANN has failed to consider additional procedural safeguards to assure adequate due process in UDRP proceedings, and has just approved a new UDRP arbitrator that is viewed by many in the DN community as biased in its administration and decision-making.**

Our concerns about in the UDRP process continue to mount. Registrants face a system that remains unpredictable and expensive, that turns stated presumptions on their heads, and that provides no binding precedents or internal appeals process. Arbitrators continue to compete for complainants' favor at the expense of registrants; WIPO, for example, recently adopted a "class action" procedure mimicking that of the recently approved Czech Arbitration Court.

The UDRP has strayed far from its original purpose and scope - this point was conceded in a May 6th comment on the draft IRT recommendations by the National Arbitration Forum, stating "Complainants have pushed, and Panelists have taken the opportunity, over time, to broaden the scope of the UDRP, but it started out as a mechanism only for clear cut cases of cybersquatting."

What is clearly needed is the undertaking of comprehensive UDRP reform process that is open, transparent, and inclusive of all interested and affected parties – and not the opaque and unbalanced IRT process that ICANN has permitted to go forward in its haste to placate trademark owners so that it may open the application window for new gTLDs as quickly as possible.

- **ICANN's policy development process remains deficient insofar as ICANN often fails to articulate the rationale for a particular proposal or recognize and elaborate upon its long-term implications.**

Unfortunately, this continues to be the case. The most glaring example is the fact that ICANN continues to proceed with its new gTLD project despite the fact that it has never produced a credible independent economic study substantiating market demand for an unlimited number of new gTLDs or addressing the risks that may result from subsequent failure of some of these new registries, or the manner in which such failure would be dealt with to minimize the harmful economic effects upon registrants and ICANN itself. To the contrary, ICANN has just released two "Final Reports" by the same author whose brief economic opinion papers were so broadly criticized in their initial form. The unsurprising conclusion of these two new papers is that his critics were wrong and he is right. Wasting funds derived from registrants on such unpersuasive publications constitutes a transparently self-serving exercise that further diminishes ICANN's own credibility.

In addition to the above reasons...we believe that the U.S. should only consider termination of oversight over ICANN after ICANN provides firm and enforceable assurances that it will maintain a physical headquarters and organizational form that assures that aggrieved parties will have adequate recourse, by litigation or other means, to take issue with ICANN decisions. Further, any decision to terminate oversight must be preceded by receipt of a clear and credible transition plan that contains a detailed description of how a post-JPA ICANN will operate in a manner that preserves the private sector orientation envisioned for ICANN at the time of its creation.

While ICANN continues to stress that it will maintain its headquarters in California, it has separately indicated that it might move substantial operations outside the U.S. once the JPA is concluded. As ICANN is a private sector organization operating by means of contract rather than regulation there must be assurance that accessible and reliable court processes can be accessed as a last resort by aggrieved parties.

Further, ongoing developments have made clear that the threat of post-JPA capture is real. A member of the European Commission recently suggested that the termination of the JPA should not result in full independence for ICANN but in the imposition of more intrusive oversight by a multi-national "G-12 for the Internet". Likewise, the head of the International Telecommunications Union (ITU) continues to make public statements

evidencing its interest in exerting control over ICANN; this would impose a regulatory model that is entirely inappropriate and could result in such undesirable consequences as Internet taxation and content controls. There is also the threat that the GAC might seek to formally exchange its advisory role for one of greater control over a post-JPA ICANN.

The U.S. should engage with relevant parties to assure a post-JPA accountability mechanism that avoids such potential politicization and unnecessary regulation. There must be frank discussions leading to firm protections in advance of full ICANN independence.

It appears to us that there are three potential alternatives for ICANN's future development:

1. **Realization of the goal of full privatization in a manner that maintains ICANN as a private sector enterprise operating in a bottom-up, consensus-driven manner encompassing all affected and interested constituencies.**
2. **The effective transformation of ICANN into something akin to a trade association for contractual parties (registries and registrars).**
3. **The de facto transformation of ICANN into an intergovernmental organization (IGO) similar in operation and mindset to an UN-affiliated entity and under the primary influence of its Government Affairs Committee (GAC).**

Only the achievement of alternative 1 would be consistent with the original vision of ICANN's creators, while a detour toward alternatives 2 or 3 (or some combination thereof) would be a most unfortunate outcome.

The ICA is fully committed to supporting and realizing the goal of ICANN's full privatization at the earliest feasible time. But we believe that the issues raised in this letter must be fully addressed and resolved in advance of U.S. oversight termination if our members' existing DN investments are to be protected and if an environment is to be maintained that encourages further capital investment inflows. In short, DN owners and investors must know that ICANN's future evolution maintains acceptable levels of risk.

Finally, as our members are based around the globe, we do not view the U.S. as inherently superior to other nations in the ability to exercise ICANN oversight. However, continued U.S. oversight is favored at this point in time because the U.S. was the source of the concept of spinning off DNS management from the government sector to the private and is most likely to press for successful completion of this transition in a manner that maintains an adequate role and a positive environment for entrepreneurial business sector investments related to Internet DNs.

We reaffirm the above views originally expressed in our Midterm Review comment letter. In addition to being best positioned to assure that ICANN improves its

performance so as to fully implement the guiding principles, the U.S. government also appears to provide the best defense against political or regulatory capture of ICANN that would subvert its status as a private sector-led technical management organization and lead to its becoming a politicized body exercising quasi-governmental powers.

Conclusion

We hope that DOC will find our comments useful and informative as it considers what action to take in regard to the upcoming termination of the current JPA. We realize that the JPA is an agreement that takes two willing parties to enter into. There has been some speculation that ICANN would refuse to sign a new agreement if the U.S. determines that some reasonable extension of its unique relationship with ICANN is required to assure full achievement of the guiding principles as well as to prevent capture and assure adequate security of the DNS. We do hope that matters do not reach such an impasse, as an ICANN confrontation with the U.S. in this regard could have severely destabilizing effects on the DNS going forward. Notwithstanding that potential confrontation, we urge the U.S. to strongly assert the need for a renewal and extension of the JPA.

Thank you for your consideration of our views.

Sincerely,
Philip S. Corwin
Counsel, Internet Commerce Association