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ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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September 15, 2009

Mr. Rod Beckstrom
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers
International Square
1875 I Street, NW, Suite 501
Washington, D.C. 20006

Dear Mr. Beckstrom,

Congratulations on your recent appointment as President and Chief Executive Officer of the Internet Corporation for Assigned Names and Numbers (ICANN). You assume responsibility of the principal private sector organization charged with maintaining the security and stability of the global Internet at a critical juncture. The contemporaneous consideration of the rollout of an unrestricted number of generic top level domains (gTLDs) in conjunction with the scheduled expiration of the Joint Project Agreement (JPA) presents historic challenges and turning points in Internet governance.

As senior leaders of the House Committee on the Judiciary, which has jurisdiction over matters that relate to criminal justice, competition and intellectual property rights, we have a longstanding interest in matters that affect the domain name system (DNS). In this capacity, we would like to share with you our concerns regarding the proposed new generic domain name expansion and the expiration of the JPA.

It has come to our attention that the proposed unlimited expansion of gTLDs will likely result in serious negative consequences for U.S. businesses and consumers. As new gTLDs are created, many businesses fear being forced to defensively register trademarks and variations of their marks to block cybersquatters from illegitimately trading on their good will and to protect consumers from increased incidences of fraud. We note that the absence of price caps in the new registry agreements could mean that legitimate businesses with an established consumer base and Internet presence may be discriminated against and compelled to pay a premium for each new domain name they register or renew. We also note that the record concerning the impact this proposed expansion will have on competition is woefully inadequate. To our knowledge, the only economic justification put forth thus far has been an ICANN-commissioned report that has

been widely criticized for failing to include empirical data or analysis in support of its conclusion that the unrestricted expansion of gTLDs will result in net consumer benefits.

We are aware that ICANN has taken some steps to respond to the concerns of intellectual property owners by establishing an Implementation Recommendation Team (IRT) charged with developing specific proposals to protect intellectual property interests. However, we note with disappointment that serious consideration of these interests did not occur in the normal course of ICANN's policy development process, and the IRT was formed only after considerable public outcry arose from the business and intellectual property communities. We further note that decisions regarding the execution of the IRT's recommendations have not been publicly announced as well as our concern that it appears such disclosures are not intended to be made available to the public prior to the scheduled expiration of the JPA. This apparent time-line reinforces the perception that ICANN decision-making processes lack critical transparency and accountability.

Given the late consideration of intellectual property concerns, the lack of a credible independent analysis on competition issues in the context of proposals to expand gTLD's, as well as ICANN's less-than-stellar track record on a variety of other issues (enforcement of registrar obligations, accuracy of publicly available Whois data), we have serious misgivings about the prospect of terminating the formal relationship between the U.S. Government and ICANN that is currently represented by the JPA. In the interests of better understanding ICANN's position on these and related matters, we will appreciate your providing the Committee with answers to the following questions:

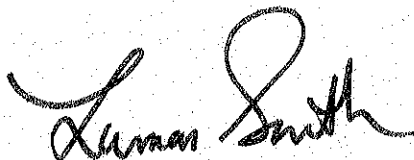
1. Which of the recommendations of the IRT does ICANN plan to implement? What is the justification for not publicly announcing such decisions prior to the September 30, 2009 scheduled expiration of the JPA and instead deferring such public notice and review until the publication of the next version of the Draft Applicant Guidebook? If implemented, how will the recommendations put forth by the IRT serve to reduce or eliminate the need for defensive registrations? Will any of recommendations prevent price gouging by registries or registrars?
2. Does ICANN intend to carry out a comprehensive, empirical economic study to examine the impact on competition that additional gTLDs may have? If not, what confidence can the public have that the expansion of gTLDs will improve, rather than hinder, competition? Assuming the rollout goes forward, what steps will ICANN take to monitor the impact on competition in the future?
3. Do you recognize a need for and support the establishment of a permanent instrument that memorializes the relationship between ICANN and the U.S. Government? If not, what are your current thoughts on an extension of the JPA prior to its expiration on September 30, 2009? What key elements do you think should be incorporated into such a permanent or temporary agreement? What assurances do citizens of the United States have that ICANN will effectively meet the goals set out in the JPA if it or a successor agreement is not formally extended?

As a final matter, we wish to associate ourselves with many of the concerns articulated by the ICANN's Governmental Advisory Committee in their letter of August 18, 2009 (copy enclosed) to the Chairman of ICANN's Board. We would appreciate your assessment and response to the matters detailed in that letter, particularly as they relate to the stability of the Internet and the absence of clear evidence that the introduction of new gTLD's will provide net benefits to consumers.

The effects of policies adopted by ICANN transcends the narrow technical operation of the global Internet. The policy choices made and the manner they are implemented affect the rights, property and security of consumers, companies, non-governmental organizations and governments worldwide. With this enormous impact, ICANN has an obligation to ensure there are inclusive, transparent and accountable processes that consider fully the perspectives of all stakeholders, before rendering significant decisions or implementing substantial policy changes.

We urge you to weigh carefully the concerns expressed by us, the GAC, and other parties before finalizing a course of action and we look forward to receiving your written response by Tuesday, September 22, 2009.

Sincerely,



Lamar Smith
Ranking Member
House Committee on the Judiciary



Howard Coble
Ranking Member
Subcommittee on Courts and Competition
House Committee on the Judiciary

cc: The Honorable Gary Locke
Secretary of Commerce
United States Department of Commerce

The Honorable David Kappos
Undersecretary for Intellectual Property and
Director of the U.S. Patent & Trademark Office

The Honorable Lawrence E. Strickling
Assistant Secretary for Communications and Information
National Telecommunication and Information Association

The Honorable John Conyers
Chairman
House Committee on the Judiciary

The Honorable Hank Johnson
Ranking Member
Subcommittee on Courts and Competition
House Committee on the Judiciary

Enclosure

Mr. Peter Dengate Thrush
Chairman of the Board
ICANN

Paris, 18 August 2009

Dear Peter,

In its Communiqué of the 35th ICANN meeting in Sydney, Australia, the GAC committed itself to provide the comments on the version 2 of the new gTLD Applicant Guidebook (further in the text - DAG2) which are the following:

I. ICANN'S PREPAREDNESS FOR NEW gTLD ROUND

1. Scalability of gTLD Expansion and Stability of the Internet

The GAC is aware that many root server operators have raised concerns about the effect that a major expansion of the gTLD space would have on the stability of the Internet. The GAC considers that a controlled and prudent expansion of the DNS space is of primary importance for safeguarding the stability, security and interoperability of the Internet on which the global economy and social welfare relies so much.

The GAC notes that the SSAC and RSSAC have been asked to prepare a report on the scalability of the root zone and the impact of the potential simultaneous introduction of new gTLDs, DNSSEC, IPv6 glue, and IDNs into the root zone, which will be published in August. The GAC will look to this report to provide reassurance that the scaling up of the root will not impair the stability of the Internet and that the technical safeguards are sufficient. The GAC is hopeful the report will stress the importance of developing an alert or warning system, as well as the need for a process for halting the adoption of new top level domains should the root zone begin to show signs of breach or weakness. It should be noted that although the GAC is encouraged this study is underway there is some concern as to why the proper analysis did not occur earlier.

2. Economic Studies

The GAC had registered its concern at the Mexico City meeting that the two preliminary reports on competition and price caps had not provided appropriate answers to the 2006 Board request for economic studies to be undertaken. Such analysis is needed to take full account of the entire domain name environment. The GAC remains concerned that the threshold question has not been answered whether the introduction of new gTLDs provides potential benefits to consumers that will not be outweighed by the potential harms.

The GAC notes that the economic reports commissioned by ICANN have failed to distinguish adequately between real demand and derived demand arising from widespread concern in the business community about the multiplication of the opportunity for cybersquatting, fraud and malicious conduct generally. The GAC notes that the recent IRT report addresses a number of related intellectual property protection and enforcement issues. However, the GAC believes there is an urgent need for separate empirical research to be undertaken regarding the costs of defensive registrations and the impact on consumers of the availability of new gTLDs. To the extent that the uses of new gTLDs are innovative and respond to registrant demand, the GAC expects there would be benefits to consumers.

The GAC also recommends that any analysis of the gTLD environment encompass fact gathering beyond empirical studies. A thorough analysis would include interviews with and perhaps surveys of a wide cross-section of market participants. As a first step in this process, the GAC recommends that ICANN more systematically conduct outreach and data gathering from the variety of resources represented by the participants in the malicious conduct and e-crimes sessions in Sydney.

3. Competition

The GAC has considered whether there is a risk that the gTLD process could create a multitude of monopolies rather than increasing competition. This rests in part on important, but unanswered questions relating to: (1) whether registrants view gTLDs as reasonable substitutes for one another; and (2) why some registrants purchase the same domain name in multiple TLDs.

Further concerns have arisen regarding the apparent desire to alter existing policy that requires a structural separation between registrars and registries. Change to this policy should be guided primarily by whether and how such a change would benefit consumers and registrants. Studies to date have not fully addressed this aspect of the marketplace, nor have they included an analysis of the potential harm to domain name registrants of permitting registrars to operate as new gTLD registries.

4. Balancing Competing Business Models

Such is the global reach of the Internet that varied business models will arise amongst different commercial parties, especially where the parties operate in different jurisdictions, in different markets and in varying spheres of economic development.

While noting that applicants would be allowed to scale their applications, so that an applicant that intends to compete with large top level domains and have millions of registrations would require infrastructure on a greater scale, while a registry that intends to address a small local community would need infrastructure on a lesser scale, the GAC seeks reassurances that the evaluation of the applicant's business model would be conducted on merit and not rely solely on corporate size and financial criteria.

5. Risk of End User Confusion

It will prove likely that the average Internet user will place greater emphasis on retaining the ease of navigation around the existing DNS. The DAG2 does not specifically address the issue of how the new gTLDs will integrate with the existing gTLDs. The GAC believes therefore that there is a need for more studies to be commissioned which assess the impacts of a radically changed new gTLD regime on end users. Such studies should focus in particular on the extent to which the expected proliferation of domains may cause confusion or may exacerbate the harms from the malicious conduct and criminal activity that consumers experience in the current marketplace, or whether a more measured rollout would be more beneficial and cause less consumer confusion. The GAC wishes to emphasize the point that such fact finding studies as these should have been conducted prior to the decision to introduce new gTLDs.

6. Administrative Resources

Consideration should also to be given to the increase in the required administrative resources available to ICANN for the management of the DNS arising from the expected significant increase in domains, and whether other activities, such as contract compliance, will be impacted by the possible diversion of resources to processing new gTLD applications.

The GAC also notes that potential new registries will come from many countries in the world with different languages and cultures. ICANN will need to address the need for it to adjust as an organization to a more diverse Internet community with the likely appearance of contractors outside the United States working within different legal environments and legal systems.

II. IMPLEMENTATION ISSUES

1. Level of Awareness among Stakeholders and the Business Community

ICANN should address the very low level of awareness of the proposed gTLD round amongst the business community, in particular amongst small and medium sized businesses, outside the Internet industry and the existing registry and registrar communities. The GAC recommends that ICANN more actively promote the opportunity for business in the period prior to the launch of the first and subsequent gTLD rounds.

2. gTLD Categories

The GAC proposes that ICANN should actively consider a more category-based approach to the introduction of new gTLDs. This could allow for different procedures for different types of TLDs, including non-commercial cultural, linguistic and regional gTLDs which would strengthen cultural diversity on the Internet, creation of

local content, and freedom of expression. It would also potentially lessen consumer confusion and provide a structure for a more measured rollout of new gTLDs.

Furthermore the GAC believes that the structure of the gTLD application fee regime should reflect these different categories and the limited financial resources available to applicants for some of them. The GAC also feels that it would be logical and reasonable to apply existing policy principles and processes for ccTLDs (such as those policy provisions outlined in the GAC's ccTLD principles) to any top level domains intended to service a specific community within a specific national jurisdiction.

3. Geographic Names at the Top Level

The GAC has commented on the use of geographic names as gTLDs on various occasions. The GAC principles of 28 March 2007 emphasize that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities" (Article 2.2). In a letter dated 24 April 2009, the ICANN Board received input from the GAC regarding the issue of geographic names as new gTLDs. In this letter the GAC pointed out that the rights of relevant governments or public authorities, as representatives of the sovereign state or territory, cannot be limited as such by ICANN or by any procedures introduced by ICANN for new gTLDs.

The GAC is of the opinion that the DAG2 is a substantial improvement on its predecessor, but that it does not yet fully reflect the GAC position that governments and other public authorities, as representatives of citizens of a sovereign state, territory, province or city, have a legitimate interest in the use of geographical names as new TLDs.

The GAC therefore proposes the following amendments to be incorporated in version 3 of the Draft Applicant Guidebook (further in the text - DAG3):

i. Strings that are a meaningful representation or abbreviation of a country name or territory name should not be allowed in the gTLD space

These strings represent countries or territories and the principle of sovereignty must apply. TLDs in this category should therefore be treated in the same way as ccTLDs.

The use of exhaustive listings (e.g. ISO 3166-1) will not cover all the ccTLD-like applications envisaged by the GAC and ccNSO, in particular in the following categories:

'Commonly referred to as' type strings representing a country or territory but which are not official titles, e.g. .america, .ceylon, .holland;
Common or general names that are often applied to more than one country, e.g. .guinea

ii. gTLDs using strings with geographic names other than country names or territories (so called geoTLDs) should follow specific rules of procedure

The Draft Applicant Guidebook already provides for specific rules of procedure, such as the creation of a Geographic Names Panel or the requirement that an applicant for a geoTLD must document the government's or public authority's support for, or non-objection to, the applicant's application, and must demonstrate the government's or public authority's understanding of the string being requested and its intended use.

However, the gTLD regime as proposed in DAG2 implies that the active involvement of public authorities would be limited to the application and evaluation phase of the new gTLD process. However, the GAC is of the view that the principles of subsidiarity should also apply after delegation. An approval or non-objection from the relevant government or public authority could for example be based on certain obligations on a gTLD registry for which the registry is held accountable (which may include direct legally binding agreement under contract with the relevant public authority). In such cases there could be a need for procedures that allow the relevant governments or public authorities to initiate a re-delegation process, perhaps because of infringement of competition legislation, misuse or breach of contract, or breach of the terms of approval/non-objection.

Furthermore, in cases of a change in the ownership structure of a geoTLD, ICANN should establish a new process of approval or non-objection for that geoTLD by the relevant public authority. The GAC will provide input in this regard in the near future.

4. Objection Procedures and Costs

The GAC considers that the dispute resolution process appears to have the potential to be extremely complex and protracted. The GAC also believes that the cost of pursuing disputes may well prove to be a barrier to legitimate objections by interested parties.

The GAC notes the importance of sensitivities with regard to terms with national, cultural, geographic, and religious significance. The GAC has serious concerns about the practical modalities for addressing objections on these grounds, including ICANN's proposal to establish a panel of three judicial experts which may not fully take account of cultural and other national and differences in legal interpretation as to what is morally offensive or threatening to public order.

Specifically the GAC believes that there is a need for more work to be done regarding the costs and the ability to object, noting that public interest groups may wish to object but may be unable to do so due to the costs involved. The GAC will deliberate further on alternative solutions with respect to how best to deal with applications for new gTLDs that may be considered morally offensive or threatening to public order.

DAG2 appears to require governments to follow the same procedures and pay the same costs as other objectors. In situations where a government or public authority objects to a particular application on the grounds of public policy however, it would be inappropriate for ICANN to require the said public body to incur the costs or subject itself to the limitations associated with a formal objection process primarily designed for non-governmental stakeholders. Moreover, where the government or public authority is a member of the GAC, the ICANN By-laws already provide a more appropriate mechanism for the GAC to provide advice directly to the Board on issues of public policy.

The GAC notes that the public comment section associated with each application may well provide one avenue for governments wishing to make representations should they chose to use it. The proposed Independent Objector might also consider representations from governments at no cost to them. The GAC would therefore invite the ICANN Board to include these existing and potentially new provisions in the procedures foreseen for the DAG3.

The GAC would also point out that in many cases governments might already have to bear the costs associated with industry stakeholder and cross-government consultation, and increase their monitoring of the application process more generally just to make sure they are aware of issues raised by applications for new gTLDs.

5. Application Process

The GAC understands that ICANN intends to hold annual application rounds and that these would be announced at the same time as the current round. However, the GAC is of the view that there is a need for clarity on how often the application process for gTLDs will be run, for how long it will remain open and whether there will be a limit on the number of gTLDs released in each round. There is also a question as to whether translation services will be provided as internationalized gTLDs are introduced. The GAC understands that ICANN will set up a separate organization overseen by a director to process applications.

The GAC seeks clarification on how CANN will promote the new gTLD round so that affected parties are aware of their rights to object.

6. Application Fee and Surpluses

A single fee structure creates limitations, notably by skewing the market in favor of applications from the developed world and those with significant financial resources. The GAC notes that ICANN had stated in its briefings that it was difficult to forecast costs accurately enough to offer different tiers of pricing, including discounts for community-based TLDs. However, the GAC believes that experience gained in the initial round would inform decisions on fee levels, and the scope for discounts and subsidies in subsequent application rounds.

Governmental Advisory Committee
Chairman



The GAC is of the view that clarification is urgently needed to explain the level of the fee for a single application and the costs on which it was based, including historic and legal liability costs. The GAC notes that where governments are involved, as, for example, sponsors of community-based applications, legal liability costs might be less.

The GAC understands that ICANN will set up a separate organization to process applications which would not be heavily staffed and thus not expensive to run. If this is the case, it should allow ICANN to lower the costs or to provide for a more tiered pricing system.

The GAC expects that the gTLD round may well generate substantial surpluses and is of the view that ICANN should make clear how it would use such surpluses. As noted in previous GAC comments, community consensus should be sought on appropriate uses for any surplus revenues.

Yours sincerely

A handwritten signature in black ink, appearing to read "Janis Karklins", written over a horizontal line.

Janis Karklins
Chairman of the Governmental Advisory Committee,
Ambassador of Latvia to France