



February 15, 2008

Suzanne R. Sene
Office of Internal Affairs
National Telecommunications and Information Administration
1401 Constitution Avenue NW, Room 4701
Washington, DC 20230

Re: NTIA Request for Comments on the ICANN Joint Project Agreement.

(File Format: Microsoft Word 2003)

Dear Ms. Sene:

Please include this submission in the collected responses to the NTIA's Notice of Inquiry on the ICANN Joint Project Agreement (JPA).

Background

Since gaining its first ICANN-accreditation in 2000, The Go Daddy Group ("Go Daddy") has grown to become the world's largest group of domain name Registrars, with over 4 million customers, and 27 million domain name registrations under management. In many ways, our achievements exemplify the successful transition toward a market-driven domain name registration environment, and might not have been possible prior to the formation of ICANN. As set forth more fully below, ICANN has made good forward progress toward its goal of fully achieving each of the areas of responsibility set forth in the JPA. Nevertheless, there is still a significant amount of work to be done.

On 9 January 2008, ICANN Chairman Peter Dengate-Thrush indicated in a letter to your office that the JPA had served its stated purpose and was no longer necessary.¹ Mr. Dengate-Thrush recommends that concluding the JPA would be the next objective in the transition to fully-privatized DNS.

Position Summary

It is Go Daddy's position that the objectives of the JPA are incomplete, and releasing ICANN from the JPA would undermine current and future developments in the domain name registration industry.

We support the continued oversight of ICANN by the NTIA, and the renewal of the JPA upon its expiry. Our detailed concerns are discussed below, and

reference certain of NTIA's list of ten areas of responsibilities as outlined in the JPA.²

Accountability

The third area of responsibility states that *"ICANN shall continue to develop, test, maintain, and improve on accountability mechanisms to be responsive to global Internet stakeholders in the consideration and adoption of policies related to the technical coordination of the Internet DNS, including continuing to improve openness and accessibility for enhanced participation in ICANN's bottom-up participatory policy development processes."*

There are currently three so-called accountability mechanisms provided for in ICANN's bylaws. First is the Board Reconsideration Committee, which is actually the Board reviewing itself. The other two are the Office of the Ombudsman and the Independent Review Panel. But again, neither are truly accountability mechanisms as neither are capable of enforcing any of its decisions or recommendations. In addition, to our knowledge, the Independent Review Panel has never been tried by any party and remains an untested process.

Furthermore, there are no procedures available to the community to call for impeachment or a vote of no-confidence in the event of misconduct or misbehavior by individual Board members or the Board as a whole. And there is no transparency into the Conflict of Interest process. For example, the CEO of ICANN is a voting member of the Board. Information regarding his incentives could be relevant to a conflict of interest if the Board is voting on revised registry or registrar agreements. Was the CEO offered incentives to conclude the negotiations? If so, how and why did the Board decide that this did not create a conflict of interest on his or her part? In any situation where a potential conflict of interest could be reasonably assumed by the community, the Board should offer a clear explanation of its decision as why such a conflict did or not exist.

Formal Relationships with Root Server Operators

The fourth area of responsibility reads *"ICANN shall continue to coordinate with the operators of root name servers and other appropriate experts with respect to the operational and security matters, both physical and network, relating to the secure and stable coordination of the root zone; ensure appropriate contingency planning; maintain clear processes in root zone changes. ICANN will work to formalize relationships with root name server operators."*

Currently ICANN has a formal agreement in place with only one of its twelve Root Server Operators.³ These servers are a critical component in the Global DNS system, and securing formal relationships with other Root Server operators must be an ongoing priority for ICANN. It is not realistic to expect that this will be completed for all Root Server Operators when the JPA term concludes in September 2009.

On 6 February 2007, the Root Server system was the target of a distributed denial of service (DDoS) attack. The attack affected six of the 13 servers⁴ with two of the servers seriously affected. Future attacks are likely to be more sophisticated and frequent, representing a clear threat to the stability of the DNS system. However, ICANN's MRA with the F Root Operator is lacking anything akin to a Service Level Agreement or any specific requirements regarding minimal safeguards against attacks and other threats. Perhaps that is why it is also lacking anything with regard to auditing, compliance, and contingency.

TLD Management

The fifth area of responsibility states that: *"ICANN shall maintain and build on processes to ensure that competition, consumer interests, and Internet DNS stability and security issues are identified and considered in TLD management decisions, including the consideration and implementation of new TLDs and the introduction of IDNs. ICANN will continue to develop its policy development processes, and will further develop processes for taking into account recommendations from ICANN's advisory committees and supporting organizations and other relevant expert advisory panels and organizations. ICANN shall continue to enforce existing policy relating to WHOIS, such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing and administrative contact information. ICANN shall continue its efforts to achieve stable agreements with country-code top-level domain (ccTLD) operators."*

Stable Agreements with ccTLD Operators

ICANN's relationships with ccTLD operators consist mainly of accountability framework agreements or an exchange of letters. ccTLD registrations continue to grow, and the most popular (.CN, .DE, .UK) now rival the growth of all but the largest gTLDs.

This is creating a growing competitive disparity with respect to gTLD operators, who are held to more restrictive agreements that require the implementation of consensus policies and non-discrimination of ICANN-accredited registrars. As a result, there is growing indication that some registrants are "forum shopping" among ccTLDs. For example, the WHOIS policies of many ccTLDs allow registrants to opt-out, or require that they opt-in, allowing them to keep their personal contact information private.

This competitive disparity may now be further expanded as ICANN is currently considering policy to introduce so-called IDN ccTLDs. It is unclear whether these IDN ccTLDs will operate under the same restrictions as the gTLDs with whom they compete, or inherit the relaxed agreements of the existing ccTLDs. In the latter case, we believe this will create an even larger competitive disadvantage for those registering domain names in more restrictive TLDs.

It may also create technical issues with the root, regarding IPv6 and DNSSEC for example. A review of many of the ccTLD agreements indicates that there is no formal requirement for ccTLDs to implement IPv6 or DNSSEC.

New gTLD Adoption

In addition to the IDN ccTLD expansion, ICANN is considering a process for the introduction of new gTLDs. The schedule for new gTLDs calls for an RFP by Q4 2008, with selection of new Registry Operators beginning in Q1 2009.

It is unknown how many applications for new gTLDs ICANN will receive. Estimates range from a few dozen to several hundred. Processing these applications, resolving string contention, and monitoring the launch of new gTLDs will be an immense undertaking unlike anything ICANN has attempted to date.

Analyzing this process, reviewing its successes or failures, and making any necessary refinements cannot reasonably be completed prior to the expiration of the JPA in September 2009.

Both the introduction of new gTLDs and the IDN versions of ccTLDs constitute a considerable change in the competitive TLD landscape. It is not yet clear how ICANN plans to manage the proliferation of TLDs, and undertaking these initiatives without the stability and oversight provided by the JPA will jeopardize the success of these programs.

Registrar Compliance and Enforcement

The tenth area of responsibility states that: *"ICANN shall conduct a review of, and shall make necessary changes in, corporate administrative structure to ensure stability, including devoting adequate resources to contract enforcement, taking into account organizational and corporate governance 'best practices.'"*

ICANN has maintained a requirement for Registrar data escrow in the Registrar Accreditation Agreement (RAA) since at least 2001 (possibly earlier), but it is just now being implemented. Also, ICANN is just beginning to develop real efforts to improve its compliance and enforcement capabilities. Although good progress has been made in this area of responsibility, it is too soon to characterize either effort as successfully completed. In fact, RAA and Consensus Policy enforcement had been an all but ignored area up until the first major registrar failure, RegisterFly. The failure of registrars is inevitable and so a coherent and effective plan to deal with such failures is essential on ICANN's part. In fact, no such plan currently exists.

The problems associated with the failure of RegisterFly, for example, were exacerbated by the lack of any plan to deal with registrar failures, the inability of ICANN to enforce its RAA and Consensus Policies, and ICANN's delay in implementing the data escrow requirement of the RAA. As a result, compliance efforts were ineffective and dragged out for over a year. During that time registrants suffered increasing problems ranging from the inability to manage their domain names to the outright loss of thousands of others.

ICANN responsiveness to Registrars with an interest in compliance is also lacking at times. An example of this is our experience in assuming the RegisterFly domain names upon its failure. During the last few months leading up to RegisterFly's loss of its Accreditation, Go Daddy engaged in negotiations with RegisterFly to acquire its portfolio of domain names. An agreement was reached and presented to ICANN with a request for the bulk transfer of the domain names. This was ultimately approved and the transfer took place within a few weeks.

However, almost immediately Go Daddy came under fire for exercising its right under the Inter-Registrar Transfer Policy (IRTP) to deny transfer requests for 60-days after the bulk transfer had been completed. In fact, we were accused of not following policy on ICANN's own blog. We had based our actions on section A.3.9 of the IRTP which allows a registrar to deny a transfer in cases where "a domain name is within 60 days (or a lesser period to be determined) after being transferred (apart from being transferred back to the original Registrar in cases where both Registrars so agree and/or where a decision in the dispute resolution process so directs)." We did this as a precaution due to the state of many of the domain name records we received from RegisterFly and the numerous complaints we were getting about domain name hijackings and inaccurate contacts.

We requested clarification on the policy from ICANN to be sure we were acting in accordance with the policy. To this day, we have not received a response. We did manage to get the editor of ICANN's blog to print a retraction, but it only stated our explanation and the fact that we had requested clarification. We were never defended and no clarification was ever offered. This suggests either an inability or unwillingness on the part of ICANN to engage in simple contract interpretation, let alone "contract enforcement, [which takes] into account organizational and corporate governance 'best practices.'"

There are numerous other instances where we have gone to ICANN in the past eighteen months for enforcement assistance and there was either no procedure in place, or ICANN simply ignored our requests. These instances include a variety of topics from straight forward domain name disputes to domain name transfer disputes to multi-registrar implementation disputes.

For example, we currently have a request in to ICANN to enforce a variety of provisions in Section 3 of the RAA to cause a foreign registrar to implement the decision of a UDRP panel with respect to a domain name that was previously registered at Go Daddy. In this particular case, Go Daddy was attempting to comply with a UDRP ruling, but since the domain name was recently transferred to another registrar, Go Daddy must rely on the gaining registrar to implement the decision. Because the gaining registrar has been entirely uncooperative, we enlisted the assistance of ICANN to enforce the terms of the RAA. After several contacts, ICANN has been unresponsive in enforcing the UDRP ruling with the other registrar. It is unclear to us whether ICANN believes there is nothing they can do due to the lack of enforcement tools, or if ICANN believes there is nothing they should do for other reasons. Therefore it's difficult for us to know what our next steps should be in resolving this dispute. This is not an isolated incident. Again, this suggests either an inability or unwillingness on the part of ICANN to engage in enforcement activities. This is not the response of an entity that has fully achieved its obligations regarding compliance and enforcement.

Future Control of ICANN

We also have concerns about ICANN's future if it is released from the JPA by the NTIA. It is not clear that it can remain independent, or resist attempts to bring it under the control of some other government structure. There is also the possibility that individuals or groups working within ICANN could fundamentally change its nature, structure or purpose to fit their own agendas.

Conclusion

We believe that ICANN has more work to do in reaching its objectives, and evaluating its success as it achieves them, under the current Joint Project Agreement. There are also additional and/or revised objectives that should be considered based on the concerns that we and others have raised. The continued relationship between ICANN and NTIA/DoC is the most effective means to ensure that ICANN reaches those objectives and remains responsive to all Internet stakeholders.

That said, Go Daddy has and continues to believe in ICANN. Our comments here are meant to be constructive and we are committed to working with ICANN to help it reach the objectives of the JPA, and to continuing our full participation within the ICANN community.

Tim Ruiz
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Corp. Development & Policy
The Go Daddy Group, Inc.

1. ICANN Response: Midterm Review of the Joint Project Agreement. Retrieved from: <http://icann.org/correspondence/dengate-thrush-to-sene-09jan08.pdf>
2. NTIA Request for Comment, Retrieved from: http://www.ntia.doc.gov/ntiahome/frnotices/2007/ICANN_JPA_110207.html
3. Agreement Reached Between ICANN and F Root Server Operator, Internet Systems Consortium. Retrieved from: <http://icann.org/announcements/announcement-04jan08.htm>
4. ICANN Factsheet: Root Server Attack of 6 Feb 2007. Retrieved from: http://icann.org/announcements/factsheet-dns-attack-08mar07_v1.1.pdf