The Amateur Computerist

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ISOC Silencing the Press To Create a Cone of Silence

This special issue of the *Amateur Computerist* was planned to be available in time for this year's Internet Society's (ISOC) annual meeting INET'99 which was being held in San Jose, California in June 1999. As we have done 2 years in the past, editors of the *Amateur Computerist* applied for press passes to attend to be able to report on the meeting for those online and for readers of the *Amateur Computerist.* Just as last year we had a special issue of our newsletter to make available, so this year we planned to have a special issue including the article "Cone of Silence" by John Horvath, which had been published recently in *TELEPOLIS.*

In applying for a press pass, we were told we had to send a print copy of our newsletter to those at the Internet Society who decide on press credentials. In the past years, 1996 and 1998, when we attended INET meetings and covered them, it was adequate to send an online issue for press credentials to be issued. This year, after we sent the issue we waited quite a while. There was no response. Finally we wrote and asked what was happening. It was only then that we got an e-mail saying our Press Credentials were Refused.

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The supposed purpose of ISOC is to educate the public about the Internet. The real purpose, of several members of the organization who seem to be able to use the organization for their own purposes, however, is to put blinders over the eyes of the public about what ISOC is helping U.S. government officials do with regard to the Internet. For example, at the INET98 there was a concerted effort to mislead the public, by way of misleading the press, about important changes being planned for the Internet by the U.S. government, other governments and the Internet Society itself. These changes are to give control and ownership over certain essential functions of the Internet to a small number of behind the scenes players who are unknown and hidden. At the press conference held at INET'98, officials from ISOC stressed to the press that there was no reason to be concerned about these changes being planned for the Internet.

The public has been keep deliberately in the dark about this plan and the players who are creating the plan. And the press has been kept deliberately in the dark as well. We made an effort to uncover what is happening, so ISOC denied the *Amateur Computerist* the right to attend any further functions as press.

This is very serious as the Internet is a significant new scientific and technical development. It is particularly important to educate the public and the press on issues involving science and technology because these are hard issues to understand. Thus there is a special need for those computer scientists and technical people who have some understanding the issues to be open and welcoming of public interest and public concern. And just as in the development of the Internet, it was learned that users had to have an ability to participate in creating their side of the interface to the network, so in important issues it is crucial that the views of users be welcomed. It is not that these issues can be left to

experts, just as the development of the Internet could not be left to a dictatorial process. Instead there was a scientific process involving grassroots participation. This is the kind of process that made it possible to give birth to and develop the Internet and this is the kind of process needed to continue its growth and development today.

This issue of the *Amateur Computerist* features John Horvath's article "Cone of Silence". Horvath's articles is one of the first analyses written to alert the public of the effort to hide the efforts to privatize the Internet via ICANN.

The last issue of the *Amateur Computerist* vol 9 no 1, contains letters written by U.S. Congressman Bliley to the U.S. Department of Commerce and to Ira Magaziner, then Senior Advisor on Internet affairs to the U.S. President. In this issue we include the response to those letters from Ira Magaziner and from the U.S. Department of Commerce. These letters help to show the behind the scenes secret activity that the U.S. government and other governments have been party to to create what is claimed to be a "private" corporation to own and control essential functions of the Internet.

Congressman Bliley, Chairman of the Commerce Committee in the U.S. House of Representatives, has since issued new letters and questions to the U.S. Department of Commerce and to the head of the Interim Board of Directors of ICANN. A future issue will contain those letters and excerpts from the answers.

This issue also contains a U.S. government General Accounting Office (GAO) decision in a similar situation where the Executive branch of the U.S. government illegally tried to create a private corporation to carry out government functions. The decision shows why such activity has been made illegal in the U.S. Now, however, the U.S. government is again trying to do so, involving other governments and in so doing is setting an even more harmful precedent and the basis for serious harm to come to the Internet and its users. Most recently a U.S. Senate Committee has directed the GAO to issue an opinion about ICANN.

Though this issue of the *Amateur Computerist* could not be circulated at INET99, we hope those in the Internet community who care about the Internet and its future will help to circulate it to people both online and off to inform them of the problem represented by secret government activity creating private corporations that control essential functions of the Internet. Moreover there is the need to stop this secret activity and to open up the dialogue to be able to find an appropriate institutional form to make it possible to protect the integrity of the Internet for its millions of users around the world.

[Editor's Note: The following analysis of ICANN is reprinted with permission from *TELEPOLIS* (http://www.heise.de/tp/)]

Cone of Silence

ICANN or Internet Democracy is Failing

by John Horvath

We take for granted a lot of the inventions of the late 20th century. We are naturally under the assumption that things we use every day which are so handy and so useful will always be the way they are, and that the technological improvements underway will only make them better. Even the Internet, which has become so much a part of modern life for many people, has fallen prey to such assumptions.

Unfortunately, the assumption is dead wrong. There's a battle being waged behind the scenes that many of us don't know about — even those whose lives have now become dependent on computer mediated communication systems like the Internet. The process to hand over government control of the Internet to a private body — a process which was formulated last summer and initiated toward the end of that same year — has been rife with problems that various sides are continually struggling to deal with.

While many people who use the Internet will have heard about this process and the organisation involved — ICANN , to which the whole process has become synonymous - the truth of the matter is that for the vast majority it is something relatively unknown. Indeed, there's been a "cone of silence" over the issue, and for those involved that's just the way they like it.

In order to try and break this cone of silence and to better understand what is really at stake, what will be looked at is the origin and evolution of the process

and the organisation it has created, ICANN. Its first moves and the corresponding negative reaction that gave the whole process a stillborn start will be examined, along with ways in which attempts have been made to rescue the process. This will be followed by a more in-depth look at those for and against ICANN and the process, along with some observations as to how and why the silent complicity that surrounds the issue exists.

In the end, it will be shown how the issue is not just one involving the transformation of the Internet from a government body to a private one, but strikes at the very heart of democracy in the digital age. It also affects the emergence of a new form of civic discourse, one that transcends the limits of physical space. In fact, it's something which will profoundly change our lives, and unless more attention is paid to what is actually going on behind the scenes, a future will be built for us that will run counter to many of our hopes and expectations.

The origin and evolution of ICANN

For many, ICANN (the Internet Corporation for Assigned Names and Numbers) was established in the most mysterious of ways. What is more, they see a grand disaster being set up by an organisation with tenuous legitimacy and experience in Internet-related matters. In order to understand what exactly is at stake, we have to go to the very beginning — not merely the birth of ICANN, but the structural framework upon which it was conceived.

ICANN is an organisation, established in the form of a private non-profit corporation and supposedly managed by an international board, that was expressly formed to take over the responsibility for duties now performed under U.S. government contract by the Internet Assigned Numbers Authority (IANA) and other entities. The transition is expected to last about a year, during which time the Initial Board of ICANN will create a permanent governance structure with members and member-elected directors. In addition to overseeing technical standards, the group is supposed to devise and administer a new plan for managing the top-level domains: .com, .org., and .net. At issue is the Domain Name System (DNS) which governs the routing of World Wide Web pages, electronic mail and other communications over the Internet. (The DNS is a hierarchical architecture to keep the number of root level lookups for the Internet at a minimum.) The ownership/control and allocation of the IP numbers of the Internet, the port numbers, the protocol process, and the scaling of these systems are all issues that are to be dealt with by the new organisation.

The supposed need for a transition was formulated by the U.S. government last year through what has come to be known as the International Forum on the White Paper (IFWP). The Commerce Department's Green Paper/White Paper process was initiated with primary purpose of turning to e-commerce as the policy for the Internet. However, so to make it appear more broad-based, it was also announced that the "need" for a transition was because "broad segments" of Internet users were deeply unsatisfied with the process conducted by the IANA, which was subsequently criticised as being closed and unfair. Also, conflicts between Network Solutions (NSI), the company which had been in charge of administering the DNS, and the on-line community had given rise to what many have termed the "DNS wars".

It was on the basis of this that the a new, more responsible organisation was to be established. Some observers see ICANN as the brainchild of just one man: Jon Postel, the director of the IANA. The irony of the situation, it has been argued, is that some of the most critical network functions done by Postel actually had no authority in law. Moreover, the IANA functions had no institutional basis. Thus, as the argument goes, what Postel did was on the basis of nothing more than informally agreed upon custom. Despite this supposed lack of legitimacy, Postel worked on articles of incorporation for the new organisation. Although reactions to some of his drafts were largely negative[1] , Postel still continued to enjoy support of a wide spectrum of the Internet community, especially the technical insiders. Shortly before his untimely death, he hammered out the final framework for what was to be called ICANN.

There is some debate, however, about this interpretation of events. Although Postel did much of the work to bring about ICANN, some counter that Postel was not the sole author and may not have had that much to do with the authoring of the ICANN proposal. According to one source, a lawyer named Joe Sims claims to have written some of the Postal

drafts. When a reporter tried in Geneva to ask Postel about some of the details of the draft and its consequences he was not willing to answer them. "It is unlikely that so important a document would have been left to Postel especially when his experience was not in the by-laws or corporate field and when so much was at stake," remarked Jay Hauben, an editor of the *Amateur Computerist.* He goes on to mention that the only clue given by Esther Dyson, who eventually became chairperson of the new organisation, about the origins of ICANN is that she was contacted by a person from IBM before she spoke with Postel about it.

"What is ironic is that a story about ICANN being a one person creation occurred only after that person had died," adds Hauben. "Moreover everything Postel did, he did under contracts with the U.S. government subject to U.S. government oversight and direction. Postel was mainly under contract to ARPA." Jake Feinler, who worked at the NIC, relates: "Jon and I were both government contractors, so of course followed the directions of our contracting officers. He was mainly under contract to ARPA, whereas the NIC was mainly under contract to DCA. BBN was another key contractor. For the most part we all worked as a team... ."[2]

Therefore, contrary to those who see the birth of ICANN as a one man affair, Postel actually had authority from the U.S. government to do what he was doing with regard to carrying out the functions of IANA. However, a question can be raised as to whether Postel was under the impression the U.S. government had the right to and was directing him to create ICANN.[3]

Whether or not Postel was the sole creator of ICANN and had the authority to do whatever he did, one thing is for certain: ICANN is being portrayed as the first legally-constituted, international governing body for the Internet. Indeed, at the outset, some considered that ICANN would be nothing more than a process designed to provide a formalised mechanism for the execution of the IANA functions. In retrospect, this was mere wishful thinking. Many have since speculated how history might have been different if Postel had not died so unexpectedly.[4]

First Moves

All during the Fall of 1998 controversy raged over the future of the IANA. Proposals were made by Ronda Hauben, by the Boston Working Group, the Open Source Root Consortium and by the IANA itself. The IANA's proposal to create ICANN was particularly controversial because the two U.S. government contractors – the IANA and NSI – had split over it. It began to appear as if the U.S. Congress was going to investigate Postel himself because of this split and the method of choosing the ICANN interim board. Then Postel suddenly died.

No sooner had Postel been buried and eulogies about him circulated throughout the Internet, controversy over ICANN re-erupted. The problem right away had to do with the different views of what ICANN represented: for some it was to privatise" key aspects of the Internet, the DNS and control of the root server of the Internet; for others, it was to establish a new regime whereby social-technical issues such as scalability were to be resolved; and still others continued to fight against any private entity being created.

For members of the interim board of ICANN, they see their work as a clear mandate for privatising the Internet. The optimism with which the chairperson of ICANN, Esther Dyson, approaches the privatisation of the Internet is akin to the supposed benefits of telecom liberalisation, most of which are unfounded. According to Dyson, "in every market I know where telecom has been privatised and rendered competitive, prices have gone down. And generally, service has even improved!" As far as she is concerned, this goes not only for the U.S. but for the UK, Germany, the Czech Republic, Hungary, and Russia.[5]

The assumption that "competition" and so-called "market forces" bring better service is a grand myth of telecom liberalisation, second to that of cheaper prices. As Ronda Hauben, co-author of *Netizens: On the History and Impact of Usenet and the Internet* points out, it is basic research which is responsible for advanced communications technology. In the US, for instance, basic research was funded by government setting the rates to provide for the research that went on at Bell Labs. Conversely, private companies have repeatedly demonstrated a lack of vision and even aversion to new technology unless it has somehow already proven itself to be a worthwhile and

profitable investment. As a result, most companies won't support basic research unless profits are high and immediate. Meanwhile, old technology is kept in place for as long as possible at high prices.

This process can be clearly seen in the evolution of the Internet itself. In its early days, big business was approached with the idea of funding its development but they refused, for it was not considered to be a worthwhile (i.e., profitable) project. Likewise, in 1977, DEC was convinced that PCs would never become a mainstream consumer item. Apart from stifling technological innovations, what many people fear is the real meaning behind the privatisation of the Internet: an offer to private sector corporations competition in selling root level gTLDs. To this extent, they see ICANN embroiled in a conflict of interest. One of the primary purposes of ICANN is to make policy and recommendations for how to increase the number of gTLDs. Those presently proposing this structure have a commercial self-interest in the issues, and thus a conflict of interest in being involved in proposing or setting public policy regarding the future of the Internet.

"The history of the Domain Name System (DNS) reform controversy is repeating itself," notes one commentator. "The Commerce Department must make sure that this second occurrence is not a tragedy." What he and many others feel is that the problem with the NSI is now being repeated under ICANN. What is especially worrying is that profits are being made on a government contract for what should have been a simple administrative function — giving out domain names, like giving out license plates for cars. In the case of ICANN, not only is the profit motive lingering in the background, but so too is the potential to grab the central points of control of the Internet from a legitimate and responsible entity (i.e., a public governmental entity with responsibility and obligations and means of punishing abuses) and putting them into the hands of an entity with no means of accountability, no means of knowing who is doing what, and no means of punishing criminal activity.

In debating the legitimacy of ICANN, supporters often point to the fact that the Internet community has been attempting for years to terminate NSI's commercial monopoly on .com, .net and, .org registrations. Consequently, through ICANN the community has been attempting to establish new sorts of DNS oversight.

Opponents of ICANN see the situation in another light. They see ICANN as merely a replacement for the NSI — with the exception that it has a much broader base of technical and economic power. Thus, rather than the Internet community attempting to initiate some sort of change, they see the whole process as being hijacked by a small group of people who, at the instigation of the U.S. government, have been trying to get themselves a piece of the NSI pie. In other words, ICANN is not particularly interested in identifying or solving any of the problems that exist, such as the scalability of the Internet.

"The real problem that the DNS wars show is that is that the U.S. government doesn't seem to be supporting the needed scientific research about how to provide for the scaling of the Internet," explains Hauben. "The U.S. government has initiated and is directing this process with no regard for the concerns and interests of the people on-line or not yet on-line."

Action, Reaction

People are still debating on what exactly ICANN is, whether it is an interest group or a regulatory body. One thing is clear: Many feel that ICANN should be nothing more than a body that sets policy for the development and use of domain name space, the assignment of IP numbers, and the assignment of port numbers to new protocols. These are considerable powers in itself, especially when we recall that the first allocations of IPv6 numbers are expected this year.

With the growing criticism surrounding ICANN, along with numerous lawsuits related to domain name disputes already launched against the new organisation, not to mention complaints that reform plans were drafted behind closed doors without public input, the White House quickly halted its operations and ordered the group to realign its membership structure, hold open meetings, publish minutes, and set up a process for appealing decisions. Accordingly, ICANN came out with a number of "by-laws" designed to satisfy specific structural concerns noted by the government. These changes included financial accountability; a fully transparent

decision-making process, with minutes of each ICANN Board, Supporting Organisation or committee meeting to be publicly posted within 21 days following every meeting; the creation of a Conflicts of Interest policy of all ICANN institutions, including the Supporting Organisations; a globally representative governance structure; and respect for a nation's sovereign control over its individual Top Level Domain.

While some see this as an effort on the part of the U.S. government to keep the process as fair and transparent as possible, others see this move as mere whitewash. They argue that the U.S. government still went ahead with its de facto recognition of ICANN anyway, only asking it to clean up its act a bit. Furthermore, the memorandum of understanding between the U.S. government and ICANN calls for a period of "design and testing" with a 50-50 split of responsibility, but in subsequent events the U.S. government did not play any obvious or helpful role.

Thus, although ICANN has been officially receiving parental supervision from the National Telecommunications and Information Administration (NTIA), pending a show of its ability to muster strong enough consensus support from the Internet Community, dissatisfaction with the organisation is still strong. According to Jim Dixon, telecommunications director of EuroISPA, a European ISP trade group based in Brussels, "there is widespread mistrust of ICANN's board."

This mistrust is based on a number of factors. Many feel that ICANN is rushing through the process without any ethical considerations or social obligations, squelching discussion and dissent along the way. As far as the Computer Professionals for Social Responsibility (CPSR) is concerned, the problem as much more rudimentary: simply, the approach of ICANN is unilateral, unaccountable, and non-consensus. The foremost complaint against ICANN is its lack of transparency. Furthermore, the fact that many decisions are made in secret has many worried. Indeed, since its inception late last year, ICANN has been widely criticised for being secretive and unaccountable.

In a way, this kind of behaviour is nothing new, and is something that preceded ICANN. Postel's creation of the organisation was, for the most part, unilateral. Similarly, ICANN-nominated interim Board members were never discussed nor confirmed by any public process whatsoever. What is more, ICANN was incorporated in California at the unilateral direction of the IANA.

ICANN itself, meanwhile, has defended their policy of closed meetings by saying they are more like a corporate than a government board, and that corporations typically hold board meetings in private. Moreover, ICANN's interim president and chief executive, Mike Roberts, said his group is responsive to criticism and that important policy proposals are submitted for public scrutiny and comment. "We are incredibly open for a private, non-profit organisation," claims Roberts.

Dyson went further, stressing that ICANN will be a public entity — and not just the U.S. public. To this extent, the board had announced a series of "open" meetings throughout the world where members of the Internet community and others can speak directly to ICANN's interim board and management. "We have an international board, we will have an international membership, and we are an international organisation," says Dyson.

Hauben disagrees. "ICANN is not in any way an International [sic!] but something created by the U.S. government to empower those obligations that the U.S. government currently holds." What is more, she argues that the activities of a small set of people who can afford to globe trot around the world to participate in trying to grab what belongs to the public and claim they have the right to make decisions for the Internet community is no way representative of a global and public entity. On this point, even the European Commission is in agreement.[6] Indeed, concern has also been raised by an observer from Namimbia about the U.S. government giving away the authority to administer country code domains to a private entity.

Closely related to the lack of transparency is what many have come to regard as the abandonment of open structures. For most, the establishment and early operation of ICANN has been done in a way that is totally antithetical to the time honoured open and democratic processes of IETF working groups. Not surprisingly, this was one of the first criticisms of ICANN that Dyson had to face.

Consequently, in the letter transmitting the bylaws as formally adopted by ICANN to the

Commerce Department, Dyson acknowledged that the bylaws "will have to be changed to reflect the work of the Initial Board and to create the permanent governance structure of ICANN. We will carefully consider any and all suggestions for improvement as we move forward in this process. Nobody should operate under the illusion that any issue has been resolved 'once and for all.' Similarly, nobody should feel that issues that are important to them and have not been addressed to their satisfaction cannot be revisited. The process is just beginning."

Despite this pronouncement, critics like Hauben have complained that issues important to her have not been addressed to her satisfaction. She points out that while the Harvard Berkman Institute conducts serious discussions about how to "vote" for "membership" in the new ICANN organisation, other issues, such as increasing the say of those online in what is happening with regard to what the U.S. government is mandating, are not being discussed. "Instead, there is a cherade [sic!] of how the Internet should be 'governed' by this U.S. created and run private corporation staffed by people 'voted for' by some form of 'membership' that has come from the Internet." "This is the very opposite of not only the grassroots process that has given birth to and helped to build the Internet," adds Hauben, "but also to the kind of grassroots democracy that is needed to continue to make it possible for the Internet to grow and flourish."

Along with the abandonment of open structures, ICANN is often seen as over-extending their authority in a number of areas. This was clearly apparent at the very beginning when Dyson had indicated that aside from the issues ICANN was mandated for there were many others, including e-commerce and privacy, with which she would find it attractive to become involved.

The ways in which ICANN goes about over-extending their authority, however, is not always so obvious. For example, while ICANN claims to be a membership organisation of a non-profit corporate entity, the membership list is based at an isi.edu domain. This is a site at the University of Southern California, despite the fact that ICANN is not an "edu" (i.e., educational) entity. What this clearly demonstrates is that ICANN is moving to take over and make private all that has been publicly held as part of the IANA - which includes the isi.edu domain as well as other aspects. Again, this all has a lot to do with not only the attitudes of individual board members but the structure and theoretical framework upon which ICANN was conceived. In essence, the form being created for ICANN was fundamentally inappropriate for the task that it was being created for.

In addition to this, it must be remembered that the U.S. government is keen on maintaining a certain amount of control. This not only has to do with technology, but has been an integral part of U.S. foreign policy since the end of the Cold War. This is a view not only shared by observers like Hauben, who is convinced that "the U.S. government, despite its disclaimers will maintain both control and ultimately liability for whatever mess it is planning," but also by certain governments as well. For the European Union especially, this is an important factor, for "there are certain issues [...] still not fully dealt with [by ICANN], such as the improvement of safeguards against extra-territorial application of U.S. law and public policies."[7]

As with the other complaints it has received, ICANN has been made aware of this public displeasure over the way it over-extends its authority. And like the way in which it responded to other complaints, when the board had not simply turned a deaf ear to criticism, it exhibited behaviour which proves old habits not only die hard, they are innately ingrained.

A case in point was the recent ICANN board meeting in Singapore, which was to lay foundations for its own operation as well as domain name policy. At this meeting general issues included membership criteria, a call for open board meetings, and ensuring a fair international balance. In the area of domain names, the board moved forward toward creating a subordinate group called the Domain Name Supporting Organisation (DNSO). Strangely, it also made policy rulings that one would expect would have been left open until the DNSO could meet and handle the matters itself. In the end, what this shows is how very little has changed in the way ICANN does things. One reason why ICANN feels comfortable in over-extending its authority in such a way is because it feels it's not accountable to anyone. This lack of accountability is still prevalent among board members even after ICANN came under NTIA

supervision in November.

Meanwhile, what draws criticism from many quarters is that a business-based "self governance" model or "private self regulation model" as a modus operandi for ICANN is essentially setting up a system for abuse. "The fundamental problem is that they are not engaged in two-way communication," observes Gordon Cook, author and publisher of *The Cook Report on Internet* . As a result, a line of responsibility that hitherto existed between the IANA and the online community is being severed.

The need to ensure such a line of responsibility continues to exist was brought up during the Berkman Institute meeting at the end of January. A person from China noted that if ICANN was to balance the distribution of scarce resources, then checks and balances would be needed, much like the present political system in the U.S. where there is a President (the executive branch), Congress (the legislative branch), and a Supreme Court (the judicial branch). Indeed, although the American regulatory framework which has tried to keep corporate behaviour in line has been effectively shattered by the onslaught of a neo-liberalist political agenda, checks and balances still do exist. For example, the FBI checks on government officials who are responsible for administering regulatory bodies and if they abuse their obligations they can be subject to criminal prosecution. How this translates into practice, of course, is another story. Nevertheless, with the Internet a trail of responsibility of sorts did exist. The IANA was under DARPA; thus, DARPA was responsible for what went on in the IANA.[8] Hence, there was a line of responsibility backed up by penalties for abuse. "This is all the opposite of what is happening with the privatizing of the DNS," notes Hauben, "and throwing it to the corporate interests who are the so called 'market forces'."

While all these arguments and observations pertaining to the secretive, undemocratic, and even unconstitutional behaviour of ICANN and its members have been made repeatedly, what irks most people is the smug attitude of ICANN board members and their blatant disregard for public opinion. For instance, on the issue of transparency and secrecy, board members still meet in private despite protests. A classic example of the contempt board members hold toward the public is the following from ICANN president Mike Roberts: "some of those people think the management should check with the public every time they make a decision, which is crazy. That's flat-out crazy."[9]

But what about what Dyson said previously, that ICANN "will carefully consider any and all suggestions for improvement" and that "nobody should feel that issues that are important to them and have not been addressed to their satisfaction cannot be revisited."? Obviously, such contradictions doesn't deter Roberts: "I'm not very warm and fuzzy about the opinions of a bunch of self-appointed critics out there," he adds. "They create a context of their own, they create their own standards and then criticize us against those standards.... I am responsive to criticisms that we don't live up to the standards set out in the White Paper [that mandated ICANN]."

Some agree with this. "Regardless of my own desire for more openness in ICANN's processes, I think he and others at the Berkman Center have behaved in an honest and forthright manner, trying to include as many people in the discussions as possible," admitted one observer on the Netizen mailing list. "I've listened to the Real Audio feed from at least three fora where Ronda Hauben has participated (two hosted by BCIS), and in each instance she was given ample time to state her case. She has been treated fairly, but she is not fair enough to admit it."

In this particular case, however, those defending Hauben see the whole debate differently. They maintain that the silencing of critics has nothing to do with the time allotted nor the styles of the speeches made at the various meetings. Rather, it has to do with blurring the focus of some of the more critical attacks. Hence, at the Berkman Center meeting at the end of January, where the content of what Hauben was presenting was the case for a public and scientific oversight of the Internet, the ultimate purpose was not to deprive her of the right to speak, but to somehow penalize her so others would be cowed and wouldn't make the same criticism.

In face of such accusations and growing criticism, ICANN has had to rely on the services of a professional spin doctor, mostly to address charges of secrecy and inaccessibility. This in itself was a cause for severe criticism. "I think it's a bad idea and silly waste of money," said Dixon. "They should open up their [board] meetings and hold them in public rather

than hire a PR firm to spin their decisions." Cook was more scathing: "this is the normal PR approach to putting a friendly face on a dictator or a carcinogen."

Roberts defended the move, stating that ICANN is a world-wide organisation that gets world-wide press coverage and thus needs professional help. Yet critics say the move is merely cosmetic and that the corporation should institute democratic decision-making processes. "The PR firm now stands between them and the Internet community," notes Dixon. "It polishes their pronouncements and puts them out. It's just a familiar means of continuing the same kind of failed, bankrupt effort at communication that's not a meaningful two-way dialog, but merely a series of pronouncements."

While a professional spin doctor has been busy taking care of ICANN's defensive strategy, lately there seems to have appeared what can be referred to as an offensive strategy in support of ICANN. This strategy comes as ICANN teeters on the brink of legitimacy.

This offensive strategy has taken the form of scare tactics based on an increased fear of "cyber terrorism". In the beginning of March a top Pentagon official cautioned the U.S. Congress about the "very real threat" of cyber-terrorists who are more likely to hit commercial targets than military ones. This followed an unconfirmed report by Reuters about hackers seizing control of a UK military satellite.

By ushering in a fear of cyber terrorists, ICANN's role is already being semi-legitamised. Also, a sense of urgency has been added, in where public opinion is coerced into believing that some form of control over the Internet is needed - and needed quickly. Secrecy is likewise justified; consequently, the open structures of the Internet is no longer being regarded as an advantage, and should thus be discarded.

The blatant contempt of ICANN board members, coupled with their lack of transparency and the over-extension of their authority, has many wondering what the ulterior motives for the organisation really is. For many, the problem with Dyson as Chairperson of the Interim Board of Directors of ICANN is that she personifies the U.S. government's effort to create a private corporate entity that they control which, in turn, controls the Internet. Subsequently, the communication that the Internet makes possible among people is under attack by the likes of Dyson and ICANN who want to convert the new media into a place for buying and selling, and for safe "transactions". In conjunction with this, is concern over the problem of scaling the Internet. According to the Office of Inspector General's Report for February 7, 1997, the Internet needs to have its scaling overseen by those with the kind of scientific knowledge that built the Internet.

Yet, instead of solving the problem of scaling the Internet, ICANN has been more concerned with determining who gains control of its various functions. What is more, they are involving themselves with such issues as the transfer of valuable and controlling assets of the Internet to a private entity, despite the fact that the Memorandum of Understanding with the NTIA in November 1998 didn't provide any authority to transfer any such assets (it only provided authority of the U.S. Department of Commerce to make contracts).

Many believe the hidden agenda behind ICANN to be not just as a means for the administration of critical technical functions, but as a vantage point from which interested parties can determine how the Internet should be governed by using it to make the rules under which the Internet would operate. This includes the DNS and other Internet functions.

Within this context, it seems ICANN is more concerned with first grabbing the functions needed to scale the Internet rather than solve the problems at hand. For Cook, the question is not what ICANN is up to; for him, that much is already clear and quite obvious. Rather, it comes down to simply this: "The Golden Egg – Will ICANN Kill the Goose or Just Steal It?"

Saving the process

With widespread discontent over the formation of ICANN, the policies it has thus far pursued, and the attitudes of its members, attempts have been made to keep the transition under some sort of control. At the recent meeting in Singapore, ways to save the process were explored. What has come to be known the CENTR proposal (or document) was one of the outcomes of this attempt to save and even realign the process.

Shortly before the March meeting in Singapore, critics of ICANN had coalesced around a proposal called the Paris Draft, with the Open Root Source Consortium (ORSC) being one of the main drafters of this proposal. Meanwhile, large commercial interests rallied around a proposal called the BMW (not to be confused with a famous trademark). In the end, members of both sides met and reached a sort of compromise, creating "consensus principles" which was later called the CENTR document. Supporters of the CENTR document argue that it's a common document, agreed by all participants in the previous day's DNSO meeting. In fact, they go so far as to regard the document as the "Singapore Draft". Whatever name is applied to it, the ultimate aim of the document was to confront some of the grievances shared by many over the way ICANN has been conducting its business.

Foremost among them was a call for open meetings. As Dixon aptly observed, ICANN is "making some very important decisions and have a great public trust.... The only thing they can do to make the people trust them is to conduct their meetings in public." Although ICANN responded to this by considering an open membership model, some opponents grumble that this is still not enough, for all the important decisions will be locked up before the membership would even have a chance to meet.

In addition to this, opponents see other problems. For some, what started out as a presentation of the CENTR compromise proposal at the Singapore meeting quickly devolved into an attempt to accept the BMW draft as the basis for the DNSO. For others, the CENTR compromise is structurally flawed, for it's just as elitist as ICANN. They argue that most Internet users have not been able to (or could not afford to) participate in the meetings taking place, so the CENTR document is, in effect, a document of a very small and privileged set of people.

Along these lines, criticism has been leveled at the DNSO itself. Many feel the structure of DNSO ensures heavy representation for narrow, corporate interests. As a result, by their representation in the leadership of the DNSO, these interests would outweigh the interests of ordinary domain-name holders and non-profits. As if adding fuel to the fire, proposals put forward by the World Intellectual Property Organisation (WIPO) to restructure the way Internet domain names in .com, .net, and .org are assigned and adjudicated have been brought to the fore. As one observer put it, "it is like having an auto dealer be the regulatory agent for the automobile manufactures. He can only make decisions in his own self interest."

It quickly became obvious that small businesses, non-profit organisations, and individuals would derive no benefit from the WIPO proposal because they simply can't go through the expense of registering their name as a trademark. But more importantly, however, are some deeply embedded flaws within the proposal which A. Michael Froomkin, law professor at the University of Miami, points out in a detailed report . These flaws include bias in favour of trademark holders, a failure to protect fundamental free-speech interests including parody and criticism of corporations, and zero privacy.

According to Froomkin, the only way in which the whole process can be saved is through a simpler reform plan. This would include compulsory advance payment before registration of a domain name in order to reduce speculative registration; penalties for false contact details, including de-registering domains with fake contact information; special rules to penalise large-scale domain speculation; trust courts to continue to clarify relevant law; an understanding that rapid changes in technology may make domain names less important; and, finally, create differentiated commercial and non-commercial top-level domains.

The campaign for and against ICANN

With battles lines drawn, it's time to take a more in-depth look at those who support ICANN and those who not only oppose it, but the privatization of the Internet in general.

The campaign in support for ICANN is, by and large, more low-key than those protesting against the organisation. Their main point of focus is that there is actually nothing wrong with ICANN or the transition process. Accordingly, several people from the ISOC see nothing basically at stake in what ICANN is doing. As far as they are concerned, the issues the organisation are dealing with are just boring technical functions. Hence, there's no reason

for anyone to be concerned with what is being done with ICANN.

ICANN has received heavy backing from important representatives of the founding Internet technical community, as well as from some large corporations such as IBM and MCI WorldCom. Upon taking a closer look at some of this latter support going to ICANN, the picture of a corporate power play becomes evident. For instance, according to ICANN's own web site, the following have "contributed" financial resources to the organisation:

Compaq Computer Corporation, $25,000
IBM, $25,000
MCI WorldCom, $25,000
Netscape Communications Corporation, $15,000
Paul D. Stauffer, $1,000
Symantec, $15,000
UUNET, $25,000

While this may seem harmless enough, closer inspection reveals some startling facts. For instance, UUNET is owned by, and part of, MCI WorldCom. Thus, the figure for MCI WorldCom is actually $50,000 and not $25,000. Moreover, IBM people have been on MCI WorldCom's Board of directors. What is more, in the privatisation of the NSF Backbone, IBM and MCI worked together on the project, with MCI ending up with a great benefit as a result. Taking this into account, the MCIWorldCom/IBM investment in ICANN comes out to be $75,000.

It would be wrong at this point to conclude that those who oppose ICANN are simply the opposite, that is, anti-corporatist activists and people with a deep social conscious who see the organisation as nothing more than the latest example of intransigent neo-liberalism. Indeed, ICANN has faced opposition from all sectors, including a large numbers of experts who had been debating the domain-name question for over a year. This includes many Internet Service Providers and companies in the business of registering domain names.

At the same time, however, it's easy to blame the likes of Dyson et al. for the way ICANN has been acting and the pro-business agenda it has been pushing. It must be remembered that often people in such positions are not actually the ones pulling the strings, but are tangled-up puppets themselves. One just has to look at the conceptual foundations for creating ICANN in the first place, the White Paper issued by the U.S. government (IFWP). It begins: "On July 1, 1997, as part of the Clinton Administration's 'Framework for Global Electronic Commerce' the President directed the Secretary of Commerce to privatise the Domain Name System (DNS) in a manner that increases competition...."[author's emphasis].

Thus, the political objectives of ICANN are quite clear. The political rationale for ICANN and the privatisation of the Internet has nothing to do with technology or communications. Rather, it has to do with fulfilling neo-liberalism's political agenda of providing economic growth and low unemployment at all costs. The objectives that have been put forth by Magaziner and others are consistent with what Clinton and Gore's objectives are for stimulating the U.S. (and world) economy by "opening up" markets and "creating competition". From this point of view, with the euphoric promises associated with e-commerce coupled with the phenomenal expansion of the Internet's user base, turning over the Internet to corporate control seems like a logical step. Naturally, whether or not those who voted for Clinton wanted the Internet to be the vehicle for this is debatable. Unfortunately, neo-liberalism's dewy-eyed optimism, much like that of the digerati, often isolates from the real world those that espouse its virtues.

But as the row over ICANN has shown, not everyone is so dewy-eyed and optimistic. At the Berkman Institute meeting at the end of January, it was commonly felt that ICANN was getting the "crown jewels" of the Internet. Even John Zittrain[10], director of Harvard University's Berkman Center for Internet and Society, admitted as much.

For many, ICANN has become the latest, and perhaps, biggest government give-away in terms of corporate welfare. Basically, central points of control of the Internet is being handed over to a private entity — one that it's creating. In turn, this private entity is being given control over IP numbers (at present, around 4.3 billion, of which 2 billion are allocated).[11] Meanwhile, control over the root server system and other aspects of the network gives it additional power.

In order to try and expand the level of discourse

over these and other issues involving ICANN, attempts have been made to broadcast the debate to those not already involved. A formal and broad-based protest has been called against ICANN, the purpose of which is to "bring ICANN out of the shadows" and to end its policy of conducting board meetings behind closed doors. Known as "the grey ribbon protest", supporters have been encouraged to display a grey ribbon on their web sites in order to draw public attention to the issue. This protest wasn't limited to just electronic media: grey ribbons were worn by some participants during the recent ICANN meeting in Singapore.

Of all the individuals involved in the campaign against ICANN, none has been more vociferous than Ronda Hauben. Having done in-depth research on the history and impact of the Internet, she is well aware of the stakes involved. As she sees it, the Internet was developed and has grown and flourished through opposing procedures. It is a democratic process where all are welcomed to speak, where those who disagree are invited to participate, and to voice their concerns along with those who agree, where those who can make a single contribution are as welcome as those with the time to continually contribute.[12] Moreover, the processes for discussion on key issues regarding the development of the Internet have been historically carried out online. Hence, the Internet as a medium of online communication — as opposed to a new marketing medium — is at the very heart of what was being built. Consequently, she is vehemently opposed to what she regards as the shameless commercial exploitation of the Internet. What is more, she holds the U.S. government directly responsible for the faulty process.

Hauben's main bone of contention is with the corporate status of the new organisation. As far as she is concerned, its board of directors will have power of an unimaginable kind over all of the Internet. In addition to this, the present structure is open to abuse. To illustrate this point, she uses the recent scandal involving the Salt Lake City bid to host the Olympic games. The Olympics Committee scandal clearly reveals the dangers of non-transparent organisations that act as if they are unaccountable to the general public, and the kind of criminal activity that can come as a result. The difference between the Olympic Committee and ICANN is that with the latter the essential functions of the Internet are at stake.

"The whole concept of ICANN is contrary to any public interest concerns and even to most commercial interest concerns," warns Hauben. The entire process involving ICANN, therefore, is one in which self interest is totally dominant, which runs counter the spirit and energy that gave birth to the Internet.

Some might argue that this may be going a little too far, that the process is not as corrupt as Hauben and others make it out to be. For instance wasn't the U.S. government, through the NTIA late last year, looking out for the public interest by putting ICANN under its supervision?

It's undeniable that the NTIA responded swiftly to growing discontent over ICANN. On the other hand, it wasn't so much a matter of genuine concern as of political expediency. Neo-liberalism differs from other political philosophies in that it attempts to co-opt opposition – whether by hook or by crook – so as to give the impression of true democracy based on civic discourse. However, as the CDA and NTM (the New Transatlantic Marketplace) issues demonstrated, when faced with growing opposition political leaders will adhere to the rule of law or public pressure, only to push through their agenda in a reconstituted form (e.g., CDA II and TEP respectively) – one that is more palatable for public consumption.

It's this fraudulent use of public opinion that substantiates Hauben's claim that what ICANN, and hence the U.S. government, is doing through the process is actually illegitimate and in some cases outright illegal. In effect, this explains why ICANN has been so secretive: "Obviously this is an important battle," Hauben observes, "and that the forces behind the creation and development of ICANN hide so carefully shows the illegitimacy of what they are doing."

Not only has Hauben been active in trying to make people aware of what she sees are the illegal actions of ICANN, but she has taken an active part in the process itself, raising issues and pointing out inconstancies to the board. In addition to this, she has even formulated a counter-proposal to ICANN which was submitted to Magaziner and the NTIA. In her words, "it was for a different kind of form, than the corporate form." She adds that "a corporate member-

ship form is not appropriate[...] with regard to giving control over vital controlling functions of the Internet [...] It's a set up for illegitimate activity, to put the problem mildly."

Aside from Hauben, another prominent critic of ICANN and its policies is Gordon Cook of *The Cook Report*. Unlike Hauben, who opposes the privatization of the Internet[13] in principle, arguing that there is a continuing need for scientific direction and research to make the Internet scale and grow, and that that this requires government support of science and continuing government role in Internet matters, Cook doesn't actually oppose the privatization of the Internet per se. Rather, he is more concerned about how it is being done and for what reason.

While making the same observations as Hauben over how and what the "morally bankrupt ICANN" has been doing, Cook has gone a bit further and delved into the tricky question of why. What he ends up concluding is that ICANN is not so much the creation of something new as much as the preservation of something old. It's a reaction to what he terms the "IP insurgency".

The IP insurgency is, basically, the advance of Internet technology to the point of upsetting the balance of power in the world of telecommunications. This is a profound threat not only to business interests that seek monopoly market power, but also those whose livelihood depends on social and political control of the masses.

As computing power increases and bandwidth restraints are overcome, coupled with the innovations made in the field of mobile and insular technology, fixed line digital infrastructure has been relegated to the background. So much so, observes Cooks, that "suddenly in 1998, with the impact of the TCP/IP insurgency about to change the face of a multi-trillion dollar world wide telecommunications industry, the stakes were very real."

Consequently, what seems to lie at the crux of the privatisation of the Internet is not the use of the technology as a new communications medium. Instead, the U.S. government appears more interested in using Internet technology as a means to promote the spread of deregulated U.S. phone companies. In essence, the Internet is seen as a cheap way of making money off voice telephony, despite the fact that it will destroy the Internet as a new communications medium. "Thus, the old is trying to resurrect itself and take over the new," writes Cook.

The ultimate purpose of ICANN, therefore, is a means by which large, American based (or owned) telecoms can forestall their demise in the face of the IP insurgency. In the process of institutionalising the IANA functions they are trying to form ICANN into an international regulatory governing body for the Internet — one that they can indeed use to protect their own interests. As Cook surmises, "if they can't win on technical merit, ICANN may be the vehicle for their self-preservation."

Yet even if major telecom interests are unable to gain absolute control of ICANN, the way in which they would be able to attain a certain amount of influence to forestall or even short-circuit progress is being done by way of a stratagem that is purely American in character: not through the use of pen or sword, but the gavel. As Cook eloquently puts it: "letting the lawyers in the door would be giving them carte blanche to destroy IETF culture." As a result, as the process moves along its present course, "nothing would suit the agenda of the huge legacy telecom empires better than a world in which their lawyers are able to tell the engineers of the Internet what they can and cannot do."

This goes a long way to explain not only the battles being waged with ICANN, but why Central and Eastern European telecom giants (such as MATÁV in Hungary, which is part owned by Ameritech and Deutsche Telekom) pursue policies which implicitly restrict access and stunt the development of on-line communities. What we are witnessing, in effect, is a reactionary, "counter insurgency" movement by established telecom interests.

What Cook and many others realise, however, is that this IP counter-insurgency is bound to fail in the long run. The reason for this — even if ICANN would triumph in pushing through its hidden agenda — is because unlike traditional telecommunications technology, there is no central point of location for the Internet.[14]

Still, this doesn't mean there's nothing to worry about. Although a telecom-led counter-insurgency is doomed to failure, what is at stake is the ability of making the Internet a means by which to "level the playing field" so to speak. It's quite apparent that at

present the Internet is not a level playing field: the high cost of access (especially in regions like Central and Eastern Europe), coupled with the educational background and financial resources needed to be able to use the technology effectively, has rendered the use of computer mediated communications an elitist, First World activity. Nonetheless, many of these problems can be overcome in due course; however, if ICANN pushes through its agenda, the present barriers that exist between the haves and have-nots will become solidified.

Silent Complicity

While controversy rages over ICANN's very existence, it's difficult to decipher who exactly is to blame. Some argue that the five IANA advisory council folks (Roberts, Farber, Cerf, Bradner, and Landweber), people who epitomise the Internet community, have actually failed in their ethical obligation they have as computer scientists. Indeed, they have helped to form ICANN and forged alliances with the large corporate forces. Dyson, meanwhile, who has been put at the head of it all (that is, to privatise the Internet essential functions), has been singled out as the one pushing forth a globalist, corporate agenda, since she is also out to help certain venture capitalists privatise public assets in Central and Eastern Europe.

Yet the whole transition process is a complex issue, not one simply between "good" and "evil". An implacable rancour remains between ICANN supporters and Network Solutions, the company that holds the (soon to end) monopoly on the .com domain and that was hitherto the nemesis of the small-business forces. Thus, the controversy over ICANN can't be leveled to simply a split between corporatists and anarchists. Because the whole situation is rather complex, with no clear demarcation of "good" and "bad" guys (don't forget, Postel was highly respected right up to the time of his death even though some felt he was the one personally responsible for the creation of ICANN), it's hard for people not involved to focus on the issue at hand when so many contradictions abound. Some have even argued that it's exactly this lack of clear-cut divisions which is being exploited by those favouring ICANN. In this way, silent complicity among the majority of users and non-users alike is being cultivated. Thus, while the debate rages over the heads of ordinary people, a form of self-censorship protects many from the burden of having to sift through truths, half-truths, and lies.

For this reason, it can be seen why the issues at stake are purposely being muddled by the powers that be. At the Berkman Institute in January, the meeting was fraught with contradictions and inconsistencies, namely that of doing government functions outside of any accountability by government. This issue had been repeatedly brought up by those from the audience and even a speaker on the final panel. Hauben summed up the meeting in this way: "In general of what these respondents said was that there was nothing at issue in the transfer to ICANN of Internet essential functions, assets, policy making etc. That these were just boring tasks. In this way they threw up confusing examples to spread sand in the eyes of anyone trying to figure out what the issues were."

As a result, there is almost no public discourse. The lack of public debate compares starkly to when the U.S. government attempted to push through the CDA in its original form. Then, everyone, including big business was against it; however, now that big business is a part of the problem, discourse has suddenly dwindled. "There is a battle being waged today," observes Hauben, "one that is of great importance to the future of society, but most people have no idea it is taking place."

This suits governments and other interests just fine. In Europe, the European Commission's (E.C.) request for action on the new IANA calls for "the need for the attention of the private sector to be drawn to this matter."[15]

There is distinctly no mention of the public sector. Likewise, "the European Commission has called a number of consultative meetings. As a result of one of these meetings, the E.C. Panel of Participants (E.C.-PoP) was established, consisting of a European group of stakeholder representatives." In this case, the term "stakeholder" is deliberately vague. Hence, it seems in Europe governments are just as secretive as ICANN, leaving little room for public input. This is a totally different approach to how the Commission searched out public input on its Green Paper on Convergence in the telecom sector last year. In conjunction with this, there is the feeling

that the process must be rushed through as soon as possible. According to the E.C., their panel of "experts" have concluded that "delays in incorporating the new IANA could create lasting imbalances with respect to the required international and competitive equilibrium."

Others, see this rush in a different light. As far as Cook is concerned, the IP Insurgency is now so close to total triumph in undermining the old telecom order that immediate action must be taken in order to forestall the demise of the large telecoms. This goes a long way to explaining why governments and telecom interests alike are so concerned with rushing through the process as fast as possible. Either way, the apparent rush is at odds with the intended aim of establishing ICANN through a public consultancy process, which takes time to elicit a wide range of responses.

Not only is discourse limited in the public sphere, but within the realms of the Internet as well. Surprisingly, little mention has been made about ICANN's activities, despite the fact that it involves the future of the Internet. Even on some of the mailing lists where Dyson throws in her two cents worth along with promoting *digerati* corporate philosophy, there has been little mention of ICANN. On the online Europe list, for example, the only significant amount of information provided was when she forwarded an article entitled "ICANN asks Commerce Department to begin DNS transition" to which she simply added "what I've been up to lately...."[16]

Ironically, it seems the closer ICANN comes toward legitimacy and as the debates become more heated, mailing lists are swamped by other information deflecting the topic away from ICANN. Naturally, the war in Yugoslavia has exasperated this condition. In the case of On-line Europe, there has been a substantial increase in traffic on myriad issues, yet there was no mention at all about NSI's recent courtroom triumph, this despite the fact that previously disgruntled users wrote frequently about the DNS wars.

Not only is it odd that there has been little on-line debate about the issue, but even conspiracy theorists seem to have faded to the background in spite of the fact that there is ample material available, such as the sudden death of John Postel right after the creation of ICANN. The only one that has thus far come close is the following from Bob Allisat:

"The Big Boys unleash their once upon a time free wheeling cyber anarchist cowboys now erstwhile lap dog shareholders and Vice Presidents of same corporations (emphasis on vice) who also become alarmed at the potential loss of revenue and power they all face should the rambunctious, raucous and revolutionary New Guard become successful. Said a-hole net heavy shills of THE BOARD OF DIRECTORS begin pinching previously unsullied dear oldbie bearded friends cyber-ass ever more painfully into silence and abeyance, subsequently forcing teams of hitman attorneys, high priced lobby call boys and girls upon their ancient buddy and, once the guy croaks from all the massive pressure thereafter wheel free forcing enyone [sic!] they were ever even remotely affiliated with to adopt their rather unsettling plans for world re-domination despite their own better anarcho-intellectual instincts."[17]

In the end, what both the on-line and off-line worlds are suffering from is information overload and overkill. With the issues not clearly understood and the lines dividing various interests blurred, it's hard for people to become passionate about what is going on. Furthermore, it seems to be something over which they have no control over anyway. With so many other problems before them, such as the war in Yugoslavia and economic hardships lurking around the corner, the best that most people can do is lend a passing interest to what is going on.

Conclusion

The entire transition process involving ICANN is in many ways a reflection of Internet democracy. Sadly, the circumstances in which ICANN was created, coupled with the attitudes and reactions of its board members, shows that democratic processes exist in name only. Lack of openness and transparency are the major hurdles the new organisation will need to overcome if it is somehow to emerge from the process with a shred of dignity and — above all — true legitimacy.

The fact that some form of opposition does exist is an indication that all is not lost — at least not yet. Some form of discourse has appeared that questions the true motives of ICANN's board members and the

process in general. The discontent people have expressed was enough for the U.S. government to step in to make sure the transition is as smooth and fair as possible.

Unfortunately, this has not gone far enough. What is more, there are many more people —- both online and off-line — who are either unaware of what is going on or, because of the sheer complexity of the issues before them, are unable or even unwilling to take part.

As a result, it is here that Internet democracy ultimately fails. What should have been the glorious birth of online democracy and civic discourse on a truly global scale has been wasted. The need to rush through the process quickly, along with the fact that only an elite minority of both on-line and off-line communities are making decisions about the future of the Internet, is antithesis to the actual spirit of democracy. Simply voting online and obtaining statistical information has not much to do with democracy; rather, thorough consultation and wide participation is the key.

Because of the silent complicity of the majority which, in some ways, has been cultivated by those wanting to push the process forward quickly, democracy will have suffered a severe setback no matter what the eventual outcome of the transition process will be. To be sure, if ICANN is able to maintain the present course that its board members hope to establish, it could very well mean the end to the Internet as we know it.

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1) <http://www.thestandard.com/articles/article_print/0,1454,1718,00.html>
<http://www.techweb.com/wire/story/domnam/TWB19981001S0014?ls=twb_text>
<http://www.egroups.com/list/noframes/rre/ 936.html>

2) <http://www.ietf.org/rfc2555.txt> Hauben also points to the NSF Office of Inspector General's Report of 1997 which states that the U.S. government via its development of the Internet and of the public funding of the Internet development had - and still has - the authority to administer the essential functions of the Internet. cf.
<http://www.columbia.edu/~jrh29/geneva/NSF.inspector.general.txt>

3) As one observer noted: "Postel did whatever he wanted. It worked. And because it worked, nobody messed with him. There was no need for an institutional basis and there is none. It's not broken, so why fix it? The answer of course is obvious, there is money to be made, obscene amounts in fact, for doing virtually nothing." At the same time, many critics see the whole idea of questioning Postel's authority in forming ICANN as an attempt to bury the real issue - the privatization of the Internet - under a miasma of polemics. They argue that the U.S. government did and does have the authority to administer IANA in a way that supports cooperative processes and public benefit. However, this same government is now trying to give IANA to the so called "private sector", which really means giving it to a small group for the benefit of the small group and those associated with it. The NSF Office of Inspector General Report <http://www.columbia.edu/~jrh29/geneva/NSF.inspector.general.txt> makes the point that the Internet has been developed with a great deal of public funding and by government, and that the government doesn't have the authority to give the Internet Names and Numbers away to anyone. Indeed, they have the obligation to protect it so that people receive the benefit of the Internet.

4) As Jay Hauben mentions, before Postel died the Commerce Committee Chairman at the House of Representatives had sent a letter to the Secretary of Commerce asking for a series of documents so as to investigate what was happening in setting up ICANN and choosing the Interim Board of Directors. A copy of this letter can be found in the most recent issue of the *Amateur Computerist*. <http://www.ais.org/~jrh/acn/acn9-1.articles/>

5) For those involved with telecom issues both in Europe and North America, this is clearly false. Despite the promises of cheaper phone services due to competition, individual consumers (as opposed to corporate entities) have seen prices go up for basic, local phone services in the U.S., Canada, and throughout Europe. Indeed, in Central and Eastern Europe telecom charges have gone up 25% annually in countries like Hungary and in some cases doubled, as in Russia. In addition to higher prices, there are a host of other problems. There have been reports about the corrupt processes of telecoms in the U.S. transferring people to their services without the people's permission. Also there has been a marked increase in the number of junk phone calls. cf. <http://www.consunion.org/other/0406atdc499.htm> see also <http:// www.consunion.org/other/ tele2sw299.htm>

6) According to a statement released by the European Commission in mid-October, "the E.C.-PoP [the European Commission's representatives for the transition process] also underlined the need to ensure a more balanced international representation." From: Significant progress made on the new Internet Assigned Numbers Authority. European Commission, 15 October 1998. <http://www.cordis.lu> RCN: 11372

7) A sample of its header: >From membership-owner@ISI.EDU Tue Feb 16 11:59:55 1999 Hauben, Ronda - "[Membership] Why not ISOC?" posting to the Netizen list, 16 February 1999.

8) The history of DARPA is as intriguing as that of ICANN. In response to Sputnik, President Eisenhower agreed with recommendations that there be a civilian agency that would be able to

support scientific and technological research, and that would be part of the Department of Defense. Originally created to support research in space, its responsibilities changed for various reasons, so that NASA was created as a result instead. DARPA remained, however, and was soon put under the Director of Defense Research and Engineering (DDR&E;) who it would seem reported to the Secretary of Defense, who is directly under the President of the US. But that Congress provides the funding, the agency also has the obligation to report to Congress and is in that way overseen by Congress as well. Hence, the line of responsibility from DARPA is, admittedly, not so clear and concise but nevertheless exists. According to a 1975 study of DARPA/IPTO (the Information Processing Techniques Office which existed from the early 1960's until 1986), the line of responsibility went from the head of DARPA to the DDR&E;, then most probably the Secretary of Defense and then Congress, with support from the President of the U.S. being an important component of overall support for DARPA.
The study adds, however, that at times there has been more and at times less support from the President of the U.S. for DARPA. What is of interest is that from the interviews of those who worked as part of DARPA which were cited in the study, one describes how there were various government agencies that would come to oversee the financial transactions and to make sure they were appropriate and provided for by law. The irony of it all is that DARPA was originally set up in opposition to "vested interests" whereas ICANN seems to be being set up to be in the control of "vested interests".

9) Wired News: 2/4/99

10) In a recent Forbes digital article, the opposition of Zittrain to the apparent direction in which ICANN is heading was made clear: "ICANN's possible ascendance to the Internet throne has some parties up in arms because of the crucial role domain names play in the economic success of any web venture. "There is an intrinsic value of these names far beyond what it costs to register them," says Jonathan Zittrain, director of Harvard University's Berkman Center for Internet and Society. He cites the example of a sex site that grabbed the domain white-house.com before the U.S. government could and enjoys a lot of accidental traffic as a result.
"ICANN is careful to say they're just assigning names and numbers," says Zittrain, "but that's like saying you have the narrow scope of running the printing presses that happen to print money. It's a lot of power."

11) The possible economic implications of this is obvious. If ICANN would decide to charge a nominal amount for IP numbers, say $50 a year charge for only those allocated, this would lead to an income of $100 billion alone (NSI had a gross income of $900 million just from selling domain names).

12) cf. "Lessons from the early MsgGroup Mailing List as a Foundation for Identifying the Principles for Future Internet Governance" by Ronda Hauben, INET '98.

13) Noam Chomsky, in an interview he did on April 5, 1999 for the Boston Phoenix ("Who Runs America?", interview with Noam Chomsky by Adrian Zupp for Weekly Wire), similarly opposes the privatization of the Internet, and not just who benefits from it. In essence, he opposes the public harm that the privatization of the Internet represents to the average citizen.

14) This is another area where Cook and Hauben disagree. While Cook sees that there is no central point of location for the Internet, Hauben regards IP numbers as a central point of control, as one must have an IP number to communicate on the Internet. Similarly, she argues that the other functions that ICANN is taking over are crucial for communication on the Internet and so it will give them power and assets that belong to the public and to cooperative processes. "They do represent something fundamentally different and are trying to take ownership and control over actual means of controlling the Internet," notes Hauben.

15) see "Commission coordinates action on the new Internet Assigned Numbers Authority". European Commission, 30 July 1998.< http://www.cordis.lu> RCN: 10823

16) Dyson, Ester - "ICANN asks Commerce Department to begin DNS transition" posting to the Online Europe list, November 7, 1998.

17) Allisat, Bob - "Sister Corruption & Brother Big", accessed from Netizens, 18 February 1999. see also: Free Community Network <http://fcn.net_http://fcn.net/allisat> and <http://robin.fcn.net>

Additional Links

(1) *The Amateur Computerist* web site is at: <http://www.ais.org/~jrh/acn/> In particular, the July 1998 Supplement entitled "Controversy Over the Internet" available at: <http://www.ais.org/~jrh/acn/dns-supplement.txt>

(2) *The Amateur Computerist* Vol 9 No 1 Winter 1998-99 entitled "Battle over the Future of the Internet" is available at: <http://www.ais.org/~jrh/acn/ACN9-1.txt>

(3) *The Cook Report on Internet:* <http://www.cookreport.com/>

(4) The Computer Professionals for Social Responsibility (CPSR): <http://www.cpsr.org/cpsr/nii/cyber-rights/web/dns-ntia-newcorp.html>

(5) David J. Farber's homepage: <http://www.cis.upenn.edu/~farber>

(6) The Domain Name Handbook: <http://www.domainhandbook.com/>

(7) The EuroISPA homepage: <http://www.euroispa.org/>

(8) Froomkin, A. Michael - "Major Flaws in the WIPO Domain Name Proposal - A Quick Guide":

<http://www.law.miami.edu/~amf /quickguide.htm>

(9) A draft of Hauben's book *Netizens: On the History and Impact of Usenet and the Internet:*
<http://www.columbia.edu/~rh120/>

(10) Ronda Hauben's paper distributed at the January 23, 1999 Berkman Center meeting "The Internet: A New Communications Paradigm", documents the discussion recently on Usenet about this problem in the U.S. of the American government destroying basic research and attacking important entities like Bell Labs.:
<http://www.ais.org/~ronda/new.papers/internet.txt>
see also a discussion about Bell Labs at:
<http://www.ais.org/~ronda/new.papers /discussion.txt>

(11) Hauben's account about the Names Council meeting in Geneva at the IFWP:
<http://www.columbia.edu/~rh120/other/ ifwp_july25.txt>

(12) Hoedeman, Olivier - TEP of the Iceberg. Toward Freedom, Winter 1998/99, Vol. 47, Nos. 7 & 8.:
<www.towardfreedom.com>

(13) ICANN's Homepage: <http://www.icann.org/>

(14) The request from the Chairman of the Commerce Committee of the U.S. House of Representatives for information on the process of formation of ICANN is at:
<http://www.ais.org/-jrh/acn/acn9-1.articles /acn9-1.1.txt>

(15) Statement of Gene Kimmelman In Response to AT&T;'s Announced $3.00 per month Charge for Basic Schedule Long Distance Customers:
<http://www.consunion.org/other/0406atdc499.htm>

(16) McKay, Niall - "ICANN Gets a the Green Light", *Wired News*, 24.11.98.
<http://redirect.wired.com/redir/10025/>
<http://www.wired .com/news/news/politics/story/16469.html>

(17) McWilliams, Brian - "ICANN Critics Call for Protest" InternetNews.com Correspondent Business News Archives, February 23, 1999:
<http://www.internetnews.com/bus-news/article/0,1087,3_72161,00.html>

(18) NTIA: the National Telecommunications and Information Administration:
<http://www.ntia.doc.gov> see also
<http://www.ntia.doc.gov/ntiahome/domainname/icann-memorandum.htm>

(19) Ogilvy PR Public affairs:
<http://www.ogilvypr.com/public_affairs /pubaffrs.html> see also <http://www.alexanderogilvy.com/>

(20) Survey: Deregulation of local phone service results in higher prices, virtually no competition in Texas:
<http://www.consunion.org /other/tele2sw299.htm>

U.S. Press Censorship of Criticism of ICANN

by Ronda Hauben

Press Censorship of criticism of ICANN is unfortunately widespread in the U.S. even preventing Op Eds to be allowed to be printed. A while ago I wrote to a computer trade magazine that played an important role in reporting a story about some problems in making the cutover from NCP to TCP/IP and asked if they would be willing to run a story investigating what was happening with the creation of ICANN. The editor I wrote to told me that I couldn't do that, but that I could do an op -ed as long as it was limited to a certain number of words.

At first I found it difficult to do the Op Ed as it is hard to write something short that is also specific. However, I finally did something and sent it to the editor. He referred me to the new Op Ed editor. The new Op Ed editor asked me to redo the Op Ed. I did. He said it would be accepted and run. Then 2 hours before he would be running it, he told me to rewrite it, cut the word count, and answer a number of questions he gave me.

I did so. Got it back to him in the 2 hours. And he wrote me back that he wouldn't run it.

I had thought that Op Eds were to be alternative viewpoints. It became clear in accepting an invitation to do an Op Ed that that isn't true, at least in the experience with the computer trade magazine that I had. There is a serious need for a broad ranging public discussion about what is happening with the creation of ICANN and the U.S. government shift of control of enormous economic wealth and power over the Internet and its users to ICANN. But this requires an open press and the welcoming of a broad ranging set of diverse views.

Following is the Op Ed I submitted before all the additional rigid requirements I was given. I thought it should circulate despite the censorship by the computer trade magazine.

Is ICANN out of Control?

On Thursday, July 22, 1999 the U.S. Congress held a hearing on the subject: Is ICANN out of control? It was held by the Subcommittee on Oversight and Investigations of the U.S. House Commerce Committee.

ICANN or the Internet Corporation for Assigned Names and Numbers was created in Fall '98 as a private sector non profit corporation to take over ownership and control of certain essential functions of the Internet. These functions include among others, the IP numbers, the domain name system and root server system, and the protocols.

It is good to see the beginning effort by the U.S. Congress to investigate what has happened with the creation and manipulation behind the scenes of ICANN.

Such investigation is needed. But it is only the beginning of the needed government effort to find a solution to the controversy over ICANN. The hearing was a very meager beginning of the kind of study and input needed by Congress to understand the problem that ICANN is creating for the Internet community. Unfortunately, with a very few exceptions, most of the witnesses were supporters of ICANN, or were involved in protecting their own stake in getting a piece of the wealth from transferring essential functions of the Internet to the private sector. Some Congressmen asked good questions. The absence of witnesses who would be able to help to identify the problem, however, showed the pressure by those who feel they will benefit from the privatizing of what has functioned effectively as a public sector responsibility. ICANN was created in the midst of a controversy over what would be the appropriate institutional form for the ownership and control of these functions of the Internet that are crucial to its operation.

At an ICANN meeting in January of 1999, a panelist from the Kennedy School of Government, Elaine Kamarck, explained that the nonprofit corporate form was inappropriate for the administration of functions like those that ICANN will be controlling. Since an individual's or company's economic life will be dependent on how these functions are administered, there needs to be the kind of safeguards that government has been created to provide. A nonprofit entity, even if it is a membership organization, does not have such safeguards for the kind of economic responsibility that ICANN is being set up to assume.

The development of ICANN over the past seven months has indeed demonstrated that the nonprofit corporate form, the structural form of ICANN, does not have a means to provide internal safeguards to counteract the tremendous power to control the Internet and its users which is being vested in ICANN. Contrary to popular opinion, the Internet is not a "finished" entity. It is a complex system of humans, computers, and networks which makes communication possible among these diverse entities. Scientific and grassroots science expertise continue to be needed to identify the problems and to help to figure out the solutions for the Internet to continue to grow and flourish.

A crucial aspect of the governance structure for the first 12 years of the life of the Internet had to do with being a part of the Information Processing Techniques Office (IPTO) of the research agency in the U.S. Department of Defense known an ARPA or the Advanced Projects Research Agency. ARPA/IPTO was created to make it possible for computer scientists to support computer science research like that which gave birth to and made it possible to develop the Internet. This early institutional form made it possible for people of different nations to work together to build the Internet.

How this was done needs to be understood and the lessons learned for designing the institutional form to support vital Internet functions today and for the future. The U.S. Congress needs to be willing to raise the real questions and to look for the answers wherever they are to be found.

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*URL: http://www.heise.de/tp/english/inhalt/co/5106/1.html See also: URL: http://www.heise.de/tp/english/ inhalt/te/2837/1.html

[Editor's Note: In Oct. 1998, U.S. Congressman Thomas Bliley raised a number of questions concerning ICANN in letters to the Department of Commerce and to the White House. Following are two answers he received in response.]

Letter from the DoC

UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D. C. 20230

November 5,1998

The Honorable Thomas J. Bliley, Jr.
Chairman
Committee on Commerce
House of Representatives
Washington, DC 205 15-6115

Dear Chairman Bliley:

Thank you for your October 15th letter to Secretary Daley expressing your continued interest in efforts to privatize management of the Internet domain name system (DNS) and requesting information about the Department's role in these efforts. Secretary Daley asked me to respond to your questions and concerns on the Department's behalf. The Department of Commerce has been a strong proponent of the Administration's view that the private sector should continue to lead the expansion of the Internet. To that end, the Department has supported the efforts of the private sector to develop mechanisms to facilitate the successful operation of the DNS. At the same time, the Department has recognized the need to ensure stability and continuity in the operation of the Internet during the transfer of DNS management to the private sector. These beliefs formed the basis for the Administration's policy statement, "Management Internet Names and Addresses " (the "White Paper"). The White Paper envisioned that the private sector would create a new, not-for profit corporation to undertake DNS management. In her testimony before the Subcommittee on Telecommunications, Trade and Consumer Protection in June and subsequent answers to the Subcommittee's follow-up questions, Becky Burr of the National Telecommunications and Information Administration (NTIA) reiterated the Department's commitment to private sector leadership in this area.

Consistent with the White Paper approach, the Department encouraged and supported all private sector efforts to create a new, not-for-profit corporation for DNS management, but did not endorse or direct any of them. The Department repeatedly and publicly encouraged all Internet stakeholders, including the Internet Assigned Numbers Authority (IANA), to participate in an open, consensus-driven process. It would have been inappropriate, however, for the U. S. Government to dictate to the private sector the method or process by which they should participate. Thus, aside from encouraging all parties to conduct their processes in an open and inclusive manner, the Department did not direct the type of process in which the private sector should engage to reach consensus.

For example, Commerce employees, including Ms. Burr, attended the meeting of the International Forum for the White Paper (IFWP) in Reston, Virginia in July. The President's domestic policy advisor, Ira Magaziner, spoke at the Reston IFWP meeting, as well as at the IFWP meeting held in Geneva. At these meetings, Ms. Burr and Mr. Magaziner encouraged IFWP organizers to include the more traditional Internet community in its processes, and encouraged the Internet technical community to participate in the IFWP meetings. The Department understands that the late Dr. Jon Postel, Director of the Information Sciences Institute (ISI) of the University of Southern California and Director of IANA, personally participated in the IFWP meeting in Geneva, and that he was represented at all of the other IFWP meetings. Based on this understanding, the Department does not share your view that IANA did not meaningfully participate in the IFWP process.

It is the Department's view that the IFWP and the IANA process to develop a proposal for a new, non-profit corporation were complementary. The IFWP process brought people together physically in locations around the globe (Reston, Virginia, Geneva, Switzerland, Buenos Aires, Argentina and Singapore) to discuss issues pertaining to the creation of the new corporation. The IANA process reached out to the global community through the Internet to craft and discuss proposed governing documents for the new corporation.

The responses of the Department of Commerce to specific questions appear below. For ease of reference, we have included your questions in the text of the Department's responses.

1. Please provide the Committee with an explanation, including citations to relevant statutes, of the Administration 's authority over management of the Internet. In particular, please explain: (1) the Department of Commerce's authority to assume the NSF cooperative agreement with NSI; and (2) the Department of Commerce's authority to transfer responsibility for the management of the DNS to the private sector.

As noted in the White Paper, much of the U. S. Government's initial investment and oversight over the Internet was conducted through research and scientific agencies, including the Department of Defense's Advanced Research Projects Agency (DARPA) and the National Science Foundation (NSF). See White Paper, 63 Fed. Reg. 3 1741-42 (1998). In 1992, Congress gave NSF the statutory authority to permit commercial activity over what was to become known as the Internet. See Section 4 (9) of the Scientific and Advanced Technology Act of 1992, Pub. L. No. 102-476, 106 Stat. 2297,230O (1992) (codified at 42 U. S. C. 9 1862(g)). Major components of the domain name system are still performed by, or subject to, agreements with agencies of the U. S. Government, including the cooperative agreement with Network Solutions, Inc. (NSI) for domain name registration services.

The U. S. Government, however, recognizes that the Internet is rapidly becoming an international medium for commerce, education and communications and that Internet governance and technical functions should evolve to meet the new reality. In recognition of the changing nature of the Internet from a U. S. research-based tool to a dynamic medium for business and commerce, the President on July 1, 1997, directed the Secretary of Commerce to support efforts to make the governance of the domain system private and competitive. This directive recognizes the Department of Commerce's broad authority to foster, promote, and develop foreign and domestic commerce. See 15 U. S. C. 0 1512.

2. Specifically, NSF transferred the authority and the responsibility for administering its cooperative agreement with NSI to the Department of Commerce under the authority of section 1870 of the National Science Foundation Act of 1950. See 42 U. S. C. 1870. Among other things, this statutory provision authorizes NSF to enter into arrangements with other government agencies to perform any activity that NSF is authorized to perform. Moreover, NTIA is specifically authorized to coordinate the telecommunications activities of the Executive Branch and assist in the formulation of policies and standards for those activities including, but not limited to, considerations of interoperability, privacy, security, spectrum use, and emergency readiness. 47 U. S. C. 5 902(b)(2)(H). Attached please find the interagency agreement between NSF and the Department in which the Department assumes responsibility for the cooperative agreement.

As noted in the White Paper and as reiterated by Ms. Burr in answers to questions from the Telecommunications Subcommittee, the Department of Commerce contemplates entering an agreement (or agreements) with a not-for-profit corporation that would address the management of certain DNS technical functions. These functions include the assignment of numerical addresses to Internet users, the management of the system of registering names for Internet users, the operation of the Internet root server system, and the coordination of protocol assignment. The Department of Commerce, like other Federal agencies, has a number of congressionally authorized mechanisms for entering into agreements with third parties, including contracts, grants, joint projects, and cooperative agreements.

3. Given IANA 's historical role in the operation of the Internet and its role in establishing a new management structure, please describe the Department of Commerce's efforts to encourage IANA 's meaningful participation in the IFWP process. Additionally, please describe the Department's knowledge and/or involvement in IANA 's decision to submit its own proposal. Please provide all records relating to IANA's participation in the IFWP or IANA's decision to submit a separate proposal.

Through the testimony of Anthony Rutkowski, the Department of Commerce learned of the formation of the IFWP and its plans to hold a meeting in Reston, Virginia on June 10, 1998, at the Subcommittee hearing on the future of the domain name system. In telephone conversations with Dr. Postel on June 11, 1998 and June 29, 1998 Ms. Burr encouraged IANA's active participation in any initi-

ative that met the White Paper's criteria of openness and inclusiveness to the diverse interests of the Internet community. Dr. Postel indicated that he would be unable to participate in the Reston meeting, but that IANA would be represented there. He also stated that he would personally attend the next IFWP meeting scheduled in Geneva on July, 24-25. It is our understanding that IANA representatives did participate in all meetings of the IFWP.

On July 31, 1998, Joe Sims, IANA's legal counsel, sent an e-mail to Ms. Burr describing a telephone conversation he had with IFWP organizer John Wood. In the message, Mr. Sims indicated that the IFWP was organizing a final "wrap-up" meeting for early September to bring closure to the documents on which the group had been working. It was rumored in public accounts that IANA would not be participating in the IFWP "wrap up" meeting. As a result, Ms. Burr sent an e-mail to Mr. Sims on August 20, 1998 expressing concern about IANA's participation in the meeting. Mr. Sims responded to Ms. Burr's e-mail on August 22, 1998, indicating that IANA was in discussions with IFWP organizer Larry Lessig. No further action was taken by Ms. Burr. Department personnel were not involved in IANA's decision to submit a separate proposal for the creation of the new non-profit contemplated by the White Paper. Department personnel, however, did monitor IANA's open and iterative process for drafting and revising proposed by-laws for a new corporation throughout the summer via IANA's web site at http://www.iana.org. Successive draft by-laws for the corporation were posted and a discussion mailing list was created to receive public comments on the drafts. IANA postings and mailing lists were open to all interested parties, including members of the IFWP, and generated significant on-line comment and discussion. We understand this discussion was used to modify later drafts.

Enclosed please find records responsive to this question. 3. Why is the Department of Commerce's comment period so short? Why did the Department provide just six full business days for the public to analyze the proposals and provide comment ? Please explain the Department's regulations and guidance governing public comment periods generally and in relation to the consideration of the four DNS proposals together with the relevant regulations and guidance.

The Department of Commerce was under no legal obligation to make the various proposals for a new, non-profit corporation available for public comment. These proposals were not rule-makings subject to the requirements of the Administrative Procedures Act or otherwise subject to a requirement for public comment.

Nevertheless, to continue in the spirit of openness and transparency begun by the White Paper process, the Department posted for public review and comment all submissions concerning the private sector initiatives for the creation of a new, non-profit corporation. In deciding on a ten-day comment period, the Department balanced the desire for public comment with the need to move expeditiously toward establishing a relationship with a new non-profit corporation to manage DNS functions. The ten-day period seemed a reasonable balance of these two purposes. In those ten days, the Department received over 150 comments on the various proposals.

Under the Department's regulations, only rule-makings under section 553 of the Administrative Procedures Act, 5 U. S. C. 0 553, are subject to a requirement for public comment. See E. O. 12866, section 6(a)(l). Executive Order 12866 established as Administration policy that the public should usually be provided a 60-day comment period on proposed regulations subject to 5 U. S. C. 0 553.4. Did the Department of Commerce have any involvement in the consideration or selection of ICANN's proposed interim board members? If so, please describe the Department's involvement and list and describe any communications the Department had with the following people or entities regarding the consideration or selection of the proposed interim board members prior to the announcement of the proposed interim board members: (1) IANA or its representatives; (2) the proposed interim board members; (3) representatives of foreign governments, international organizations, or non-governmental organizations; (4) other individuals and organizations outside the U. S. government. Please provide all records relating to such communications (whether written, electronic or oral).

Department of Commerce personnel did not have any involvement in the consideration or selection of proposed ICANN interim board members.

Consistent with the White Paper, the Department of Commerce supported the private sector's efforts to form a new, non-profit corporation, but did not select or endorse any proposed ICANN board members. Moreover, the Department was well aware of its legal limits regarding actions that could be interpreted to suggest the formation of government-chartered or sponsored corporation. That is not to say that various private sector and governmental interests did not attempt to seek guidance from Department of Commerce personnel during this process. As described below, Departmental personnel had the following communications on this subject:

(1) To the best of her recollection, Ms. Burr spoke with Dr. Jon Postel and Ron Ohlander, Deputy Director of ISI, along with IANA's attorney Joe Sims, via telephone on one or two occasions during the first two weeks of August. During these conversations Dr. Postel mentioned that discussions about an interim board were underway. No specific names of interim board candidates were discussed between Ms. Burr and IANA or its representatives. Ms. Burr, however, specifically encouraged IANA to seek input on the issue of the interim board selection from some of its critics, citing Jay Fenello, President of Iperdome, as an example of an individual committed to the development of a new, DNS management organization but also a critic of the IANA process.

To the best of her recollection, during the week of September 21, 1998, Ms. Burr received a telephone call from Mr. Sims, who reported that the European Commission was "insisting" on a particular candidate for the interim board. Mr. Sims inquired as to whether the United States had a position with respect to this potential board member. Ms. Burr responded, after discussion with Mr. Magaziner, that the U. S. Government had no position as to possible candidates for an interim board and that the Administration believed that no government had the right to dictate to the private sector the selection of candidates to the board of directors.

(2) The proposed interim board members. Department of Commerce officials had no communications with proposed interim board members.

(3) Representatives of foreign governments. To the best of her recollection on two occasions between September 7, 1998 and September 18, 1998, Ms. Burr spoke with Christopher Wilkinson, Adviser, Directorate-General XIII, European Commission, regarding the ICANN board. Mr. Wilkinson indicated that the Commission had in mind several candidates for the interim board of directors. On both occasions, Ms. Burr suggested that any European recommendations be sent directly to Mr. Sims, Dr. Postel and IFWP organizers.

On September 9, 1998 Ms. Burr and Karen Rose, Telecommunications Policy Specialist, Office of International Affairs, NTIA, met with Michelle D'Aurey and Janis Doran, representatives of the Canadian Government to discuss preparations for the October 7-9 Organization for Economic Cooperation and Development (OECD) meeting in Ottawa, Canada. During the course of the conversation, the Canadian representatives inquired about DNS, and whether a Canadian would serve on the board of directors of the new corporation. Ms. Burr and Ms. Rose suggested that any Canadian recommendations should sent directly to Mr. Sims, Dr. Postel and IFWP organizers. On September 28, 1998, Ms. Doran informed Ms. Burr and Ms. Rose that the Canadian government had recommended two individuals to IANA representatives.

Ms. Burr also had a conversation with Australian government representatives that took place, to the best of her recollection, on or about July 1, on the White Paper process in general. The Australian representatives indicated that they were interested in proposing an individual for the board of the to-be-formed corporation. Ms. Burr suggested that they contact Dr. Postel or IFWP organizers directly regarding this issue.

In a meeting with Ambassador Aaron on September 25, 1998, European Union Commissioner Martin Bangemann raised the issue of the composition of the interim board with the Ambassador. Ambassador Aaron, in turn, informed Andy Pincus, Department of Commerce General Counsel, and Ms. Burr of Commissioner Bangemann's interest. Neither Ms. Burr nor Mr. Pincus transmitted this interest to Dr. Postel or any other IANA representative.

(4) Other individuals and organizations outside the U.S. government. To the best of her recollection

during the first week of August, Mr. Roger Cochetti, Program Director, Policy and Business Planning with IBM's Internet Division, contacted Ms. Burr and said that he was working on developing a set of names for the interim board. He indicated that Esther Dyson was being considered and asked Ms. Burr for suggestions of potential board members from the civil liberties and/ or public interest community. Consistent with the Department's position refraining from recommendations, Ms. Burr did not provide Mr. Cochetti with any suggestions or indicate any preference for potential interim board members.

Enclosed please find records responsive to this question, Please note that Department of Commerce personnel are regularly copied on various e-mail broadcast lists and, as a result, have received thousands of unsolicited e-mail messages from the Internet community, some of which may have reported on IANA's participation in the IFWP process or the proposed ICANN board. Department of Commerce personnel, however, did not act on these unsolicited broadcast messages. We are not providing copies of these unsolicited e-mails at this time, however, we will do so if the Committee feels that they would be relevant to its inquiry. I hope that this information addresses your concerns. The Department of Commerce will gladly keep you and your staff informed of our progress to privatize management of the Internet DNS. We are, of course, available at your convenience to discuss the contents of this reply further. If you have any questions, please do not hesitate to contact me or Susan Truax at (202)482-6440.

John Sopko
Chief Counsel for Special Matters

Letter from Ira Magaziner

THE WHITE HOUSE
W A S H I N G T O N

October 27, 1998

Tom Bliley
Chairman
Committee on Commerce
U. S. House of Representatives
Room 2125, Rayburn House Office Building
Washington, D. C. 205 15-6115

Dear Chairman Bliley:

This letter is a preliminary response to your inquiry of October 15 concerning the Administration's role in the transfer of the Internet's Domain Name System (DNS) from the public sector to the private sector. If after reading this response, you desire further information, I will forward it to you by your requested date of November 5.

Before addressing your specific questions, it would perhaps be useful to describe to you the process which we have undertaken since July 1, 1997, when the President directed the Commerce Department to oversee the transition of the DNS to the private sector.

In the Presidential directive on electronic commerce issued on July 1, 1997, the President stated:

> "I direct the Secretary of Commerce to support efforts to make the governance of the domain name system private and competitive and to create a contractually based self-regulatory regime that deals with potential conflicts between domain name usage and trademark laws on a global basis."

In his directive, the President created an interagency working group to oversee the implementation of the various parts of his electronic commerce strategy. As a coordinator of this group, I have supervised the interagency process which has overseen the Commerce Department's DNS efforts.

On July 2, 1997, the Department of Commerce issued a Request for Comments (RFC) on DNS administration. During the comment period, more than 430 comments were received, amounting to some 1,500 pages.

Informed by these comments and other broad consultations, on January 30, 1998, the Department of Commerce issued for comment "A Proposal to Improve the Technical Management of Internet Names and Addresses" also known as the Green paper. It made proposals to privatize the management of Internet names and addresses. The Department received more than 650 public comments from

around the world on the proposal, amounting to over 2000 pages.

In response to these comments and reflecting the rapid pace of technological development of the Internet, the Department issued on June 5, 1998 its plan, "Management of Internet Names and Addresses" (also known as the White Paper). The White Paper invited the international community of private sector Internet stakeholders to work together to form a new corporation by October 1 to manage DNS functions currently performed by or on behalf of the U. S. Government. These functions include 1)management of the Internet IP numbering system; 2) coordination and management of the Internet root server system; 3) allocation and management of generic top level domains; and 4) coordination of Internet protocol assignments.

In keeping with the principles of the President's electronic commerce strategy, the White Paper states that the new corporation should be a private, non-profit, globally and functionally representative organization, operated on the basis of sound and transparent processes that protect against capture by self-interested factions. It further states that the new corporation's processes need to be fair, open and pro-competitive, and should have mechanisms for restructuring itself to reflect changes in the constituency of Internet stakeholders.

The White Paper also sets conditions for negotiations between the Commerce Department and Network Solutions, Inc. (NSI), a private company which manages certain aspects of the DNS for the Government, designed to end the NSI monopoly in the registration of second level domain names in generic top level domains. It also calls upon the World Intellectual Property Organization (WIPO) to conduct a study to be presented to the new organization on the proper way to handle trademark issues related to the DNS.

Finally, the White paper indicates that the U. S. Government would continue its oversight of the DNS for a transition period not to exceed two years and that the Government would consult with other interested governments during the process of forming the new corporation and during the period of oversight.

The Department of Commerce has completed its negotiations with NSI and an amendment to the cooperative agreement between the U. S. Government and NSI, which accomplish the goals laid out in the White Paper, and was announced on October 6.

WIPO has begun its study and has indicated that it will be prepared to report to the new corporation early in 1999.

The White Paper's principles and process won widespread support from the Internet community worldwide. Immediately after it was issued, at least two different efforts were initiated to respond to it. One process was initiated by the Internet Assigned Numbers Authority (IANA), the group at the University of Southern California which now performs some of the DNS functions under contract with the Defense Advanced Research Projects Administration (DARPA). The other process, the International Forum for the White Paper (IFWP) was initiated by NSI, The Domain Name Rights Coalition (DNRC), the Commercial Internet Exchange (CIX) and a number of other companies and associations.

The IANA process consisted of solicitations of views on the Internet and negotiations with various groups on five successive drafts of proposed bylaws for the new corporation. The IFWP process consisted of a series of public meetings chaired by Professor Tamar Frankel from Boston University and coordinated by a steering group. These meetings were held throughout the summer in Reston, Geneva, Singapore and Buenos Aires. In addition, a meeting convened by the European Union in conjunction with this process was held in Brussels.

The Administration encouraged both processes and we would have encouraged other processes initiated by private stakeholders had they emerged. We did not see it as our role to define any specific process as being legitimate. Advocating private sector leadership to us meant allowing the private sector to lead, even if this meant competing processes for a period of time.

Those organizing the IANA process felt that the IFWP process was not sufficiently democratic because it gave undo weight to those who had the time and money to attend meetings around the world, a possibility not open to many Internet stakeholders. They argued that a process of successive drafts publicly posted on the Internet with opportunities for public comment was more democratic.

Those organizing the IFWP process argued that the meetings were more democratic because no one

group controlled the drafting pen and the give and take of meetings and associated discussions on line provided for a more open process.

We did not see it as our role to shut off one process or the other. Instead, we encouraged those organizing each process to cooperate with each other as much as possible. We encouraged those associated with the IANA process to attend the IFWP meetings, and I believe that representatives from the IANA group and those associated with it did attend all the meetings. We also encouraged those organizing the IFWP process to respond to the IANA drafts and I believe that many did do so.

I spoke at two of the IFWP meetings, reiterating the principles of the White Paper and urging that consensus be reached. I responded to phone calls and meeting requests I received from representatives of both groups and from a variety of other participants in the process. As expressed in the White Paper, I also had periodic conversations with representatives from other interested governments who requested to participate in the process. These included the European Union, France, Great Britain, Australia and Japan.

In late August, I was informed that the IFWP group was divided on whether to hold a wrap up meeting to summarize its work and produce a proposal. I gather that a vote taken on this possibility at one of their meetings produced a slight majority against the idea of a wrap up meeting. I was also informed that some people associated with IFWP wanted to hold a meeting at Harvard University in mid September to culminate the process and hammer out a final agreement. Tamar Frankel requested that I come to the meeting and put the US Government on record as officially sanctioning that meeting as the process we would recognize.

Others, including some who had been sponsors of the IFWP process such as CIX, opposed the idea of such a meeting, preferring to negotiate with IANA to incorporate into its latest draft the consensus points of the IFWP meetings.

Those favoring a big public meeting felt that it would be more democratic. Those opposing the idea of a meeting felt that a large discussion forum of that sort was not the best way to draft a final set of bylaws and that the location of any such meeting would inherently bias the results since those who lived closest to the meeting site would have the greatest representation.

The Administration decided not to endorse one view or the other. Instead, we urged the groups to talk with each other and to try to reach consensus. We left it to them to decide whether this would occur in a big meeting or not.

From talking to the various parties involved, and reading the various lists on which groups were communicating with each other, we felt that consensus could be reached. There appeared to be agreement on 80% of the issues, a consensus which had been formed over the past months. The areas of disagreement were serious, but we believed could be negotiated.

While encouraging the groups to talk with each other, we understood that there could be one of two outcomes, either of which would provide the basis for a next step. There might emerge a consensus proposal because the existence of the deadline would force the groups to come together. If not, we would receive two or three proposals representing the consensus of different groups and we could then put together a process to reconcile differences after taking the pulse of the Internet community.

The latter has been the result. From the vast array of factions and proposals which existed last June, we now have three proposals which follow from the White Paper (and one proposal which rejects the White Paper principles and process and has little support in the public comments). These proposals agree on most of the fundamental issues, There are serious areas of disagreement, but we believe, having talked at length with the proposing groups, that these differences can be bridged.

The public comments we have received, numbering over 500 pages, provide the guidelines for these discussions. We have sent letters to the three groups that have made proposals expressing the consensus of the public comments and have encouraged them to engage in discussions to reach a satisfactory conclusion based on the public comments.

Most of the public comments support moving ahead with the ICANN group, but most also support many of the concerns voiced in the other proposals about the insufficient accountability, transparency, and protections against conflicts of interest in the ICANN proposal. If these and some other modi-

fications are made in the ICANN proposal, we believe that there will be sufficient consensus to move ahead.

As with many issues relating to the new digital economy, there are no established templates to follow on how to set up an organization to coordinate the DNS system. While this process has had many twists and turns, there has been significant progress. Even after the Commerce Department enters into a transition agreement with a new organization, there will be many difficult decisions and consensus building processes which will be necessary before that organization attains legitimacy and stability. The U. S. Government will have an important oversight role to play during this transition. The Administration will be pleased to work with you and your committee as we proceed through this difficult and uncertain process.

With this introduction, I will now turn to your specific questions.

1. The Commerce Department will respond to this question since it involves authorities of the Commerce Department.

2. As indicated above, after the White Paper was issued, IANA expressed an interest in submitting a proposal to meet the objectives of the White Paper process. In a few phone calls with Jon Postel and others from IANA in June, I encouraged them to do so, indicating that they should try to consult widely and achieve as broad based a consensus as possible. The IANA is a respected organization which has often succeeded at finding consensus within the Internet community over the years. Though there had been controversy over the IANA role in an Internet Society process to address domain name issues during the previous year, IANA was certainly capable of potentially pulling together a process which might find consensus and therefore there was no reason to discourage them.

When the IFWP process was proposed, I also encouraged its organizers. When the IANA group phoned me late in June and asked my opinion about the IFWP process, I encouraged them to participate.

As different groups approached me in September, I urged them to speak with each other to try to find consensus.

3. On October 2, in a phone conversation, I did encourage the Department of Commerce to limit the comment period. The stakeholders interested in the DNS had been following the issues all summer and were well aware of the October 1 deadline. There is a very widespread view among these stakeholders, reflected in the public comments, that after years of debate, this process should move forward quickly.

I believed on October 2 and still believe that virtually all those who wished to comment would be able to do so in the ten day period provided for public comments. We have not received a significant number of requests to extend the period for comment. Assuming that ICANN and the Commerce Department reach an agreement, there will be opportunity for public comment on it before it proceeds.

4. The ICANN group approached me late in August to describe the board structure and possible board members they were considering appointing. I urged them to try to find people of stature who would be viewed as independent, to consult widely before making choices and to make public as soon as possible the names they were considering. I had a few subsequent discussions with them as they considered names to propose.

In one discussion, they indicated that they were proposing four U. S. representatives, one representing academia, one from the policy community and two from the business community. They had settled on the representatives from academia and the policy community and asked my advice on the business representatives. I told them that it was not appropriate for me to make specific recommendations. When pressed, I gave them examples to indicate the stature and type of individual I thought might be appropriate, for example someone at a senior level from a company with significant interest in the Internet but not a significant interest in DNS issues as one choice, and someone from a company using the Internet who understands trademark issues as another choice. I suggested a few names as examples, none of whom were proposed.

In a few subsequent discussions in mid September, I expressed concern about the lack of a developing country representative and about the fact

that Europe had three members and the Asia/ Pacific region had only two. I suggested that a structure with four from the U. S., two from Europe, two from Asia/Pacific and one from a developing country, perhaps in Latin America, would be more reflective of Internet usage.

I had a number of discussions with officials from foreign governments on this issue which usually occurred as one item in a discussion of a number of Internet related issues. These included representatives from the European Union, the Japanese government and the Australian Government. I discussed with a number of European Union officials my view that their representation should be roughly equivalent to that of the Asia Pacific region and that there should be some developing country representation. They indicated that they had already discussed the matter with the IANA group and felt that the structure as proposed by IANA was more appropriate.

In discussions with the head of the National Office for the Information Economy in Australia, he indicated that he had discussions with the IANA group supporting the Australian nominee that the IANA group was proposing. Similarly, on a trip to Japan in mid September, I discussed with MITI and MPT officials, the IANA proposed Japanese member of the board. These officials expressed their support for that candidate.

In the European and Australian cases, the other government representatives brought up the issue and I discussed it with them, but indicated that they should talk to the IANA group directly. In the Japanese case, I responded to questions about whether I knew who from Japan, if anyone, was being considered for the board by IANA. I expressed what I had been told by the IANA group and heard their reactions.

I do not know, and don't believe I have ever met or talked with seven of the nine people that have been suggested for the interim board of ICANN. I have met Jun Murai once, on a recent visit to Tokyo when he was part of a group of Internet experts invited by the U. S. embassy to have a breakfast meeting with me at the embassy. I did not discuss his potential board nomination with him.

I have known Esther Dyson for many years and frequently meet her when we are asked to speak at the same fora. I did not suggest her for this board. She approached me at a meeting in late August and indicated that she had been asked if she would be interested in serving on the board. She asked my opinion about whether the new organization would be significant. I indicated that the new organization would play an important role but made clear that no decision had been made as to whether the ICANN proposal would in fact go forward.

I would be pleased to meet with you and or your staff to discuss these matters further. In particular, I would be happy to discuss whether there is any additional information or documentation you require.

Sincerely,
Ira C. Magaziner
Senior Advisor to the President for Policy Development

The Computer as a Communication Device Report from SIGCAS/POLICY 98 ACM Conference

by Ronda Hauben
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The SIGCAS/POLICY 98 ACM conference on Computers and Social impact held in Washington D.C.[(1)] The conference was a combination of papers, talks and panels about computers and society and about government policy. These papers were interesting in parts, and problematic in other parts. The issue that I felt emerged was the need for a vision for the future development of the Internet, a vision that recognizes the importance of the communication that the Net makes possible, and one that makes it possible to expand and build on the research, educational and scientific origins of the development of the Net.

One speaker from the University of Pittsburgh, Professor Janet Ward Schofield, described research conducted under an NSF grant to explore bringing the Internet into the schools in the Pittsburgh area. She described how difficult and yet welcomed was the process. In most cases, the research grant provided 2 or 3 computers with Internet access into

certain selected classes. This meant that the Internet was seen as a scarce good. Students asked to use it and disputes arose. The research described how teachers with 30 students and a lesson for the whole class would have difficulty deciding how to integrate 3 students using the Internet into that lesson. There were many others problems discovered.[2] However, what seemed the most important observation that Professor Schofield shared with us during questions after her talk was that those students who used the Internet for communication found it of interest over a long period of time, while those using it to surf the web didn't maintain their interest. Also she observed that when used for communication, students loved using the Internet. After the research group interviewed the students who had taken part in the program, they reported that students felt that with the Internet they could do things that were real, they could create something that someone else would use. Previously so much of what they did was for the teacher, while using the Internet was conducive to the kind of learning that happens with and for others.

What students reported was something important to examine. What is the significance of their recognition that the collaborative and interactive learning and communication made possible by using the Internet is interesting and valuable?

This is similar to an observation made by Norbert Wiener in a period before computers had become generally accessible and widespread. Wiener recognized that in the development of automation, the feedback one received was crucial to determine how to continue in pursuit of one's objectives. He recognized how the interactive mode and the signals communicated were of crucial importance to the continual operation and development of automatic machinery. Wiener also determined that at the heart of automation was the nature of the relationship between the human and the machine. What should be the role of each in this relationship? This was a crucial question to identify and study. Building on Wiener's work, J.C.R. Licklider, one of the early networking pioneers and visionaries, did a study and concluded that the human-computer relationship was one of symbiosis, or mutual dependence and contribution.[3] Licklider also began to envision an intergalactic computer network.

Thus students utilizing the Internet in Professor Schofield's research, had rediscovered something that cybernetic pioneer Norbert Wiener and networking pioneer J.C.R. Licklider had identified and studied. The students were excited by the ability of computers and the Internet to facilitate communication, and interactive, collaborative work and relationships.

In the 1930's Norbert Wiener was part of a seminar to encourage an interdisciplinary approach to the problems of communication in animal and machine.[4] In the 1940's Wiener's ideas about communication and feedback in man and machine helped to spawn new visions of research for those interested in communication from a myriad of scientific and engineering disciplines. In the Spring of 1947, Wiener began a series of weekly meetings where those involved in different disciplines would gather and share their research. Jerome Wiesner, from MIT, who participated in those seminars, reports how they gave birth to important new ideas and to collaborative research for many years afterwards.[5] Included in the research that grew out of these talks seminars was the work on time-sharing and networking.

At the heart of the development of time-sharing, the ARPANET and the Internet is the development of the computer as a communications device. Is this new paradigm affecting different areas of computer science research and practice? What new methodological and theoretical developments is this making possible? In order to understand this achievement, however, is it again necessary to undertake interdisciplinary discussion and study? Is it impossible or at least more difficult to understand the role of computer as a communication device in a particular field if that field of study is isolated from other fields?

What will grow out of efforts to foster interdisciplinary research and study and increased communication, around the role of communication in different fields of computer science research and practice? How would such an effort impact the theory and practice of computer science?

The past 40 years have seen tremendously important developments in the fields of computers and communications and the marriage of computers and communication. Out of these collaborative relationships and research in the role of communication in different disciplines has grown the current developments that have created the Internet. Discussing and

sharing views of what was made possible by the Net has in the past helped to clarify the vision for the future of the Net. We are now standing on a new plateau, but to scale the next summit we need to pause and understand how we have gotten this far. Maintaining a connection with the principles and insights that made our current achievements possible will help to provide the lenses to view the next summit to be scaled. And the continued study of and research into the role of the computer as a communication device will provide the ropes to connect us as we continue the climb.

Footnotes

(1) The SIGCAS/Policy '98 Conference was held by ACM May 10-12, 1998. See "Proceedings of the Ethics and Social Impact Component", ACM Policy '98.

(2) See for example Janet Ward Schofield and Ann Locke Davidson, "The Internet in School: The Shaping of Use by Organizational, Structural, and Cultural Factors," in S. Lobodzinski & I. Tomek (Eds.) Proceedings of WebNet 97 - world Conference of the WWW, Internet, & Intranet (pp. 485-489), Charlottesville, FA: Association for the Advancement of Computing in Education, 1997. Professor Schofield noted that where all students in a class had access to a computer the problem of computer as a scarce resource didn't occur.

(3) See for example, *Netizens: On the History and Impact of Usenet and the Internet*, IEEE Computer Society Press, Los Alamitos, 1997, p. 80-83.

(4) ibid. p. 79.

(5) ibid.

[Editor's Note: The following is a report of the U.S. General Accounting Office analyzing the illegality of the creation of a private corporation to carry out government functions.]

GAO Review of Government Creation of Non-Profit Corporations

February 10, 1998

The Honorable Ted Stevens
United States Senate

Dear Senator Stevens:

This letter is in response to your request dated November 28, 1997, asking us to review the Federal Communications Commission's implementation of section 254(h) of the Communications Act of 1934, as amended. 47 U.S.C. sec. 254(h). Subsection 254(h) provides the authority for the Commission to authorize universal service support benefits for eligible schools and libraries and rural health care providers.

Your request concerns those provisions of the Commission's orders implementing subsection 254(h) that led to the incorporation in Delaware of two not-for-profit corporations. These corporations were formed to administer certain functions of the universal service programs for schools and libraries and rural health care providers. The Chairman of the Commission selects or approves the board of directors for these entities and the operating expenses of the corporations are recovered from industry fees assessed to support universal service. You asked whether the Commission has the legal authority to establish such corporations. In addition, you asked us to describe the federal laws (for example, the Federal Advisory Committee Act), employment rules, and congressional oversight that govern the operation of the corporations.

We sought the views of the Commission about these and other questions, and by letter of January 5, 1998, the Commission provided its legal opinion.

Question 1: Was the Commission authorized to establish the Schools and Libraries Corporation and the Rural Health Care Corporation?
Answer: As explained more fully below, the Commission exceeded its authority when it directed the National Exchange Carriers Association, Inc. (NECA) to create the Schools and Libraries Corporation and the Rural Health Care Corporation. The Government Corporation Control Act specifies that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. sec. 9102. These entities act as the agents of the Commission and, therefore, could only be

created pursuant to specific statutory authority. Because the Commission has not been provided such authority, creation of the two corporations violated the Government Corporation Control Act. Because the Commission has argued that it did not "establish or acquire" the corporations, we provide some background about the establishment of the corporations. More detail is contained in the attached Appendix.

Establishment of the Corporations

Section 254, as added by the Telecommunications Act of 1996[1], among other things, made the Commission's universal service mandate more explicit and extended the reach of universal service support to schools, libraries, and rural health care providers. The section requires the Commission, acting on the recommendations of a Federal-State Joint Board, to define universal service and develop specific, predictable, and equitable support mechanisms. The provision expands both the base of companies that contribute to the universal service fund and the category of customers who benefit from the universal service support programs.

Section 254 is silent on how the Commission is to administer the universal service programs, including the programs for schools and libraries and rural health care providers. In the Universal Service Order released on May 8, 1997, the Commission, consistent with the Joint Board's recommendation, determined that it would create a Federal Advisory Committee to recommend a neutral, third-party permanent administrator of the universal service programs. In the interim, the Commission appointed the National Exchange Carrier Association, Inc. (NECA) the temporary administrator, subject to changes in NECA's governance.[2] NECA was established in 1983, at the direction of the Commission, as an association of local exchange carriers (LECs) to administer the interstate access tariff and revenue distribution process.[3] Prior to that time, AT&T had acted as a tariff filing agent for the entire industry and had also performed most of the administrative functions in connection with the settlements pooling arrangement.[4] Since NECA's creation, the Commission has assigned it the responsibilities for administering the existing universal service fund and other explicit support mechanisms. On July 18, 1997, the Commission released NECA's Governance Order and directed NECA to create an independently functioning not-for-profit subsidiary to be designated the Universal Service Administrative Company (USAC) that would temporarily administer the universal service support program for high-cost areas and low-income consumers, as well as perform billing and collection functions for all of the universal service programs, including the programs for schools and libraries and the rural health care providers.[5]

The Commission also directed NECA to create two unaffiliated, not-for-profit corporations to be designated the Schools and Libraries Corporation and the Rural Health Care Corporation. The Commission concluded that such entities were critical to the successful implementation of the schools and libraries and rural health care programs. Moreover, to ensure continuity in and efficient administration of these programs, the Commission concluded that the corporations should continue to perform their designated functions even after the date on which the permanent administrator is appointed. Thus, the Commission removed these entities from the scope of the functions that will be performed by the temporary and permanent administrator.

NECA was directed to incorporate the corporations under the laws of Delaware and to take such steps as are necessary under Delaware and federal law to make the corporations independent of, and unaffiliated with, NECA and USAC. NECA was further required to submit to the Commission for approval the proposed articles of incorporation, bylaws, and any documents necessary to incorporate the independent corporations in order for the Commission to determine prior to their establishment that the requirements of the Order had been satisfied.
This Order and the subsequent incorporation documents provide that the corporations were organized by the Commission to carry out functions connected with the provision of universal service support to schools, libraries, and rural health care providers. These functions include the administration of the application process for schools and libraries and rural

health care providers and the establishment of a website on which applications will be posted. See 47 C.F.R. sec. 69.618(a), 69.619(a).

The certificate of incorporation of the Rural Health Care Corporation specifies that the purpose of the corporation"... is defined in the Federal Communications Commission's... rules at 47 C.F.R. sec. 69.618, as it exists today and as it may be amended." The certificate of incorporation further states that the corporation may engage in other activities "so long as it is consistent with FCC Orders and Rules."[6] In its letter to our Office of January 5, the Commission stated that it did not envision these entities "operating outside the scope of the activities set forth in the Commission's orders." Commission letter at 9.

Under Commission rules the boards of directors of these entities are comprised of members either selected or approved by the Chairman of the Commission. The size and composition of the boards is set by the Commission, as is the term of office. The Commission Chairman must approve the removal of any director as well as a resolution to dissolve the Corporation. The Chief Executive Officer (CEO) of these corporations must be approved by the Chairman of the Commission. Authority to enter into contracts must be in compliance with Commission rules. All of these requirements have been included in the corporations' by-laws.

Authority to Establish the Corporations

It is the Commission's view that it has authority to establish the Schools and Libraries Corporation and the Rural Health Care Corporation under sections 4(i) and 254 of the Communications Act of 1934, as amended. Section 4(i) of the Act provides that:

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. sec. 154(i).

Although we recognize the breadth of section 4(i),[7] the provision is constrained by the later passage of the Government Corporation Control Act. Under the Control Act:

"[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." 31 U.S.C. sec. 9102.

Section 4(i) does not provide the specific statutory authority needed by the Commission to meet the requirements of the Control Act. Nor do we find that section 254 provides this authority.[8] Indeed, the Commission does not suggest that either of these provisions is broad enough to overcome the requirement of the Control Act. Rather, in a letter to our office dated January 5, 1998, the Commission contends that the Control Act is not implicated because the Commission did not "establish or acquire" the Schools and Libraries Corporation or the Rural Health Care Corporation in this case. According to the Commission, NECA established these corporations as a condition of becoming the temporary administrator.

We disagree. The Control Act requirement that a Federal agency possess specific authorization to "establish or acquire" a corporation to act as an agency could not be avoided by directing another organization to act as the incorporator. In our view, the Control Act prohibits an agency from creating or causing creation of a corporation to carry out government programs without explicit statutory authorization.

Prior to enactment of the Government Corporation Control Act in 1945, there was no requirement for specific authority to create corporations. As the Supreme Court noted in Lebron v. National Railroad Passenger Corporation, "[b]y the end of World War II, Government-created and -controlled corporations had gotten out of hand, in both their number and their lack of accountability." Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 389 (1995). Partly in response to this proliferation of corporations, a Joint Committee of Congress conducted a 2-year study and issued a "Report on Government Corporations" in 1944.[9] The report concluded that from simple beginnings the government corporation concept had evolved into a rationale for a maze of quasi-governmental corporations with little accountability. The inevitable

results of this growth, noted the report, was the impairment of control by the Congress. Id. at 2. The report went on to find that the corporations had little congressional or executive branch supervision, few fiscal controls, and in many instances were in competition with the private sector. Specifically, the report stated: "There is no effective over-all control. Alone, or in certain groups, these corporations are autonomous."[10] The Committee called for over-all public control to be established.[11]

Legislative control of government corporations actually occurred in two stages during 1945. In February of that year, legislation required the General Accounting Office (GAO) to audit the financial transactions of all government corporations.[12] In December, the more comprehensive Government Corporation Control Act superseded these audit requirements.[13]

The Act was intended to make the corporations accountable to the Congress for their operations while allowing them the flexibility and autonomy needed for their commercial activities. Under the Act, the Bureau of the Budget (now Office of Management and Budget) controlled the corporations' budgets, Treasury controlled financial transactions, and GAO performed financial auditing.[14]

The Act also specified that without explicit congressional authorization, no corporation should be acquired or created by "any officer or agency of the Federal Government or by any Government corporation for the purpose of acting as an agency or instrumentality of the United States...." sec. 304(a), 59 Stat. 602. In addition, the Act required that all corporations then operating under state charters were to be dissolved and reincorporated under federal law. The House Report accompanying the legislation stated:

"The committee does not consider the practices of chartering wholly owned Government corporations without prior authorization by the Congress or under State charters to be desirable. It believes that all such corporations should be authorized and chartered under Federal statute. The bill provides that in the future all corporations which are to be established for the purpose of acting as agencies or instrumentalities of the United States must be established by act of Congress or pursuant to an act of Congress specifically authorizing such action." H.R. Rep. No. 79-856, at 11 (1945).

The Congress enacted legislation whose applicability was to be encompassing. The requirement for specific legislative foundation for corporations to act as agents of the United States was not to be thwarted by having another party act as the incorporator. In fact, the identity of the incorporator was not the determinant of the statue's applicability; the act expressly prohibits the "acquisition" of corporations to act as instrumentalities of the United States. As the Supreme Court noted in Lebron, the purpose for providing that government corporations could not be established (or acquired) without specific legislation "...was evidently intended to restrict the creation of all Government-controlled policy-implementing corporations, and not just some of them." Id. at 396. Thus, if an entity was to be established for the purpose of carrying out government functions under the control of an agency, legislation would be necessary. In other words, an agency on its own could not create or cause to be created a "captive corporation" to carry out government functions and designate such an entity as "private."

As discussed above and detailed in the attached Appendix, the Schools and Libraries Corporation and the Rural Health Care Corporation were clearly created to carry out governmental functions in connection with the Commission's responsibilities under section 254. We note that even the corporations, themselves, do not deny that they were established by the Commission. For example, the Rural Health Care Corporation, in its Request for Proposals for Program Administration Services defined itself as:

"...a not-for-profit organization created by the Federal Communications Commission (FCC) to administer funds allocated to rural health care providers to aid in improving the telecommunication infrastructure at rates reasonable and acceptable to urban health care providers." (emphasis added).

NECA simply acted as the incorporator for the convenience of the Commission. There is no nexus

between NECA's role as temporary administrator and the creation of these corporations. By the Commission's own rules, these entities were removed from the mandates of both the temporary and permanent administrator. Under the circumstances, we conclude that the Commission violated the Government Corporation Control Act by directing the establishment of the Schools and Libraries Corporation and the Rural Health Care Corporation to act as its agents in carrying out functions assigned by statute to the Commission.

Question 2: What federal laws (for example the Federal Advisory Committee Act), employment rules, and congressional oversight apply to the operation of the corporations?

Answer 2: The Commission's Order required that private corporations be established. As such, they are not subject to statutes that impose obligations on federal entities and federal employees in the areas of employment practices, procurement, lobbying and political activity, ethics, and disclosure of information to the public. On the other hand, each of the corporations is subject to federal statutes applicable to private corporations, unless outside the coverage of the statute. For example, we note that the Federal Advisory Committee Act (FACA) would not apply to these corporations since these entities are primarily operational in nature.[15]

Finally, as established by the Commission, Congress has no direct oversight over the corporations. The corporations do not provide budget information directly to Congress, but rather are accountable to the Commission, which in turn, is accountable to the Congress.[16]
We trust this is responsive to your inquiry.
Sincerely yours,
Robert P. Murphy General Counsel

Notes:

1. Pub. L. 104-104, 110 Stat. 56 (1996).

2. Federal-State Joint Board on Universal Service, First Report and Order, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1996) (Universal Service Order).

3. MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, FCC 82-579 (rel. February 28, 1983).

4. With the imminent breakup of AT&T, the Commission believed that AT&T could no longer perform this function in the post-divestiture environment.

5. Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service, Report and Order and Second Order on Reconsideration, CC Docket No. 97-21 and No. 96-45, FCC 97-253 (rel. July 18, 1997) (NECA Governance Order).

6. A similar provision is contained in the Schools and Libraries Certificate of Incorporation. See 47 C.F.R. sec. 69.619(a).

7. Courts have characterized this section as analogous to Article 1, Section 8, Clause 18 of the Constitution, which authorizes Congress to make all laws that "shall be necessary and proper" for carrying out its enumerated powers and "all other powers" vested in the federal government. Mobile Communications Corp. of America v. FCC, 77 F.3d 1399, 1404 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 81 (1996); New England Tel. & Tel. v. FCC, 826 F.2d 1101, 1107-08
(D.C. Cir. 1987); North American Telecommunications Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985); see also United States v. Southwestern Cable Co., 392 U.S. 157, 181 (1968).

8. The Telecommunications Act of 1996 did provide the Commission with specific authority "to create or designate" one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. 47 U.S.C. sec. 251(e)(1). It also established a body corporate to be known as the Telecommunications Development Fund. This fund provides grants to small businesses to enhance competition in the telecommunications industry, among other things. The provision establishing the fund specifies the composition of the board of directors, as well as its meetings and functions. 47 U.S.C. sec. 614. However, with respect to the provision of universal service, Congress provided no authority to establish such entities.

9. U.S. Congress, Joint Committee on Reduction of Nonessential Federal Expenditures, Report on Government Corporations, Senate Doc. 227, 78th Cong., 2d Sess. (Washington: U.S. Govt. Print. Off., 1944).

10. Id. at p. 27.

11. For a complete history of the Control Act, see, Managing the Public's Business: Federal Government Corporations prepared for the Senate Committee on Governmental Affairs by the Congressional Research Service by Ronald C. Moe, S. Prt. 104-18 (April 1995).

12. Public Law 4, sec. 5, 59 Stat. 5 (1945).

13. In 1982, Pub.L. 97-258 codified the 1945 Act's provisions.

See 31 U.S.C. sec. 9101-9110.

14. Primary auditing responsibilities were shifted in 1990 (Pub.L. 101-576) from GAO to the individual corporate Inspectors General appointed under the Inspector General Act of 1978.

15. The Federal Advisory Committee Act (FACA) was enacted to control the establishment of advisory committees to the federal government and to allow the public to monitor their existence, activities and costs. FACA's legislative history, relevant court cases, and General Services Administration regulations suggest that coverage is limited to those committees that provide advice and are not operational in nature. See, H.R. Rep. No. 92-1017, at 4 (1972); S. Rep. No. 92-1098, at 8 (1972); Judicial Watch, Inc. v. Clinton, 76 F.3d 1232 (D.C. Cir. 1996); and 41 C.F.R. sec. 101-6.10004(g).

16. A Memorandum of Understanding between the Department of Treasury, the Commission, and NECA, dated April 1997, provides the concepts and guidelines for reporting cash transactions and accrual-based balances of the Universal Service Fund to meet the fiscal needs of the U.S. Treasury. The Congressional Budget Office and the Office of Management and Budget have interpreted the language of the Telecommunications Act of 1996 to mean that payments into the Universal Service Fund should be counted as federal revenues and payments from the fund as federal outlays. This is because the transfers of income between various classes of telephone users would not occur but for the exercise of the sovereign power of the federal government. Furthermore, portions of the Universal Service Fund, most notably its Lifeline and Linkup Programs, have already been included in the federal budget. "Federal Subsidies of Advanced Telecommunications for Schools, Libraries, and Health Care Providers" prepared by the Congressional Budget Office (January 1998).

APPENDIX

Universal Service

Historically, universal service has meant access to basic telephone service, sometimes called "plain old telephone service" or "POTS." As evidence of the importance of providing universal service, the Commission points to section 1 of the Communications Act of 1934, which provides that the purpose of the Act is to:

"...make available, so far as possible, to all the people of the United States... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities and reasonable charges...." 47 U.S.C. sec. 151. Universal service has been achieved through a combination of implicit and explicit subsidies at the federal and state levels. Implicit subsidies are provided through elevated interstate and intrastate access charges, elevated prices for business services, average rates over broad geographic areas, and elevated prices for advanced services, such as Caller ID and call forwarding.[1] In addition to implicit subsidies, the Commission and some states also provide explicit support mechanisms directed at increasing network subscribership by reducing rates in high-cost areas and at making basic telephone services available for low-cost consumers.[2] Section 254, as added by the Telecommunications Act of 1996[3], for the first time provided explicit statutory support for the Commission's responsibility to assure universal service. Universal service is defined as:

"... an evolving level of telecommunications services that the Commission shall establish periodically..., taking into account advances in telecommunications and information technologies and services." 47 U.S.C. sec. 254(c)(1). The Joint Board in recommending and the Commission in defining the services that are to be supported by universal support mechanisms are to consider the extent to which such telecommunications services (a) are essential to education, public health, or public safety; (b) have, through the operation of market choices, been subscribed to by a substantial majority of residential customers; (c) are being deployed in public telecommunications networks by telecommunications carriers; and (d) are consistent with the public interest, convenience, and necessity. 47 U.S.C. sec. 254(c)(1). Under the Universal Service Order, the Commission defined the "core" or "designated" services that will be supported by universal service support mechanisms as: single-party service; voice grade access to the public switched network; Dual Tone Multifrequency signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation for qualifying low-income consumers.

In addition to the services included in the general definition, section 254 authorizes the Commission to designate additional services for schools, libraries, and health care providers for the purposes of subsection 254(h). Subsection 254(h) has two main

parts. Subsection 254(h)(1) provides that any public or nonprofit health care provider that serves rural areas is entitled to receive upon a bona fide request "telecommunications services which are necessary for the provision of health care services" at rates comparable to those charged in urban areas of the same state. 47 U.S.C. sec. 254(h)(1)(A). Schools and libraries, on the other hand, are entitled to receive upon a bona fide request services "at rates less than the amounts charged for similar services to other parties." 47 U.S.C. sec. 254(h)(1)(B).

Subsection 254(h)(2) directs the Commission to establish competitively neutral rules to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries. In addition, the rules are to define the circumstances under which a telecommunications carrier may be required to connect its network to qualified elementary and secondary schools, libraries, and health care providers. 47 U.S.C. sec. 254(h)(2).

The legislative history of the provision sheds some light on the intended scope of the programs. The Conference Report provides that:

"For example, the Commission could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to educational materials, research information, statistics, information on Government services, reports developed by Federal, State, and local governments, and information services which can be carried over the Internet." S. Rep. No. 104-230, at 133 (1996); H.R. Rep. No. 104-458, at 133 (1996).

On May 8, 1997, the Commission released its Universal Service Order that, among other things, outlined a plan to implement subsection 254(h). With respect to schools and libraries, the plan provided discounts ranging from 20 to 90 percent on all commercially available telecommunications services, Internet access, and internal connections. The level of discounts would be based on a school's or library's level of economic disadvantage and its location in an urban or rural area. The Commission concluded that there should be established an annual cap of $2.25 billion on universal service expenditures for eligible schools and libraries.

With respect to public or nonprofit rural health care providers, the Commission's Order provided that these entities would be eligible to receive universal service support not to exceed an annual cap of $400 million. A health care provider may obtain telecommunications services at rates comparable to those paid for similar services in the nearest urban area with more than 50,000 residents, within the state in which the rural health provider is located. Rural health care providers will receive support for both distance-based charges and a toll-free connection to an Internet service provider. Each health care provider that lacks toll-free access to an Internet service provider may also receive the lesser of 30 hours of Internet access at local calling rates per month or $180 per month in toll charge credits for toll charges imposed for connecting to the Internet.

Administration

Section 254 is silent on how the Commission is to administer the universal service programs, including the programs noted above for schools and libraries and for rural health care providers. In its March 1996 Notice of Proposed Rule-making and Order Establishing the Federal-State Joint Board on Universal Service, the Commission sought comment on the best approach to administer the universal service mechanisms fairly. The Commission noted that the fund could be administered by a non-governmental entity or the funds could be collected and disbursed through state public utility commissions.[4] Consistent with the Joint Boards' recommendations that were released in November 1996,[5] and the record in the proceeding, the Commission decided to create a Federal Advisory Committee (Committee), pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, sec. sec. 4(a) and 3(2)(c), whose sole responsibility would be to recommend to the Commission through a competitive process a neutral, third-party administrator to administer the universal service program.

The Commission also noted that because the needs of educational institutions are complex and substantially different from the needs of other entities eligible for universal support, it would require the administrator, after receiving recommendations submitted by the Department of Education, to select a subcontractor to manage exclusively the application process for eligible schools and libraries. Additionally, the Commission adopted the Joint Board's recommendation that the National Exchange Carrier Association, Inc. (NECA), be appointed the temporary administrator, subject to changes in NECA's governance that would make it more representative of the telecommunications industry as a whole.

NECA was established in 1983, at the direction of the Commission, as an association of local exchange carriers (LECs) to administer the interstate access tariff and revenue distribution process.[6] Prior to that time, AT&T had acted as a tariff filing agent for the entire industry and had also performed most of the administrative functions in connection with the settlements pooling arrangement.[7] Since NECA's creation, the Commission has assigned it the responsibilities for administering the existing high-cost and low income support mechanisms.

The Joint Board noted that NECA's current membership of incumbent local exchange carriers, its board of directors composed primarily of representatives of incumbent local exchange carriers, and its advocacy positions in several Commission proceedings may appear to non-LEC carriers as evidence of NECA's bias toward ILECs. Accordingly, the Board recommended that prior to appointing NECA the temporary administrator, the Commission should permit NECA to add significant, meaningful representation for non-incumbent LEC carrier interests to the NECA's Board of Directors. The Joint Board also recommended that NECA be eligible to compete in the process for selecting a permanent administrator if changes to NECA's membership and governance rendered NECA a neutral, third party.

The Commission conducted a separate proceeding to deal with the issue of NECA's governance. By a letter dated October 18, 1996, NECA requested that the Commission modify the size and composition of NECA's Board of Director by adding six directors from groups that would have a substantial stake in the new universal service programs.[8] On January 10, 1997, the Commission issued a Notice of Proposed Rulemaking and Notice of Inquiry addressing NECA's proposal and the Joint Board's recommendation that NECA be allowed to alter its governance structure. The NPRM tentatively concluded that in order for NECA to be eligible to serve as temporary administrator, NECA's Board must become more representative of the telecommunication industry as a whole.[9]

Also, on January 10, 1997, NECA requested that the Commission consider a revised proposal based on NECA's finding that it might not be possible to develop a satisfactory governance proposal within the context of a single administrative organization. Under NECA's January proposal, NECA recommended establishing a separate subsidiary to administer the universal support programs. As envisioned by NECA, this wholly owned subsidiary, designated as the Universal Service Administrative Company, would have a representative board of directors based on the Commission's recommendation and would include some representation from the current NECA Board.[10]

In June, subsequent to the Commission's Universal Service Order, NECA filed a discussion paper with the Commission that highlighted the advantages of single over multiple subsidiary approach. NECA proposed the creation of board committees that would have specific program responsibilities, including a committee for the high cost and low income program, a committee for the schools and libraries program, and a committee for the rural health care program. As proposed by NECA, these committees would have final decision-making authority with respect to defined aspects of program administration.[11]

On July 18, 1997, the Commission released its NECA's Governance Order that created a three-company structure for administration of new universal service programs. Under this Order, the Commission directed NECA to create an independently functioning not-for-profit subsidiary to be

designated the Universal Service Administrative Company (USAC) that would temporarily administer the universal service support program for high-cost areas and low-income consumers, as well as perform billing and collection functions for all of the universal service programs, including the programs for schools and libraries and the rural health care providers.[12] The Commission also reconsidered, on its own motion, its decision in the Universal Service Order that a subcontractor manage the application process for schools and libraries.[13] Instead, the Commission directed NECA to create two unaffiliated, not-for-profit corporations to be designated the Schools and Libraries Corporation and Rural Health Care Corporation to administer portions of the schools and libraries and rural health care universal service programs (collectively referred to as the corporations).[14] The Commission also reconsidered the scope of functions that will be performed by the temporary administrator and the permanent administrator, by concluding that the corporations should continue to perform their designated functions even after the date on which the permanent administrator is appointed.[15] The Commission argued that the creation of the two non-profit corporations was critical to the successful implementation of the schools and libraries and rural health care support mechanisms. This was because the programs were new and involved potentially large number of participants and beneficiaries and could require special expertise.

Establishment of the Corporations

Under the NECA Governance Order, the Commission outlined the functions of the corporations and designated the size and composition of their respective boards. The Commission directed that the Board of Directors of the Schools and Libraries Corporation will consist of seven members, including three schools representatives, one libraries representative, one service provider representative, one independent director, and the CEO of the corporation. Similarly, the Commission directed that the Board of Directors of the Rural Health Care Corporation will consist of five members, including two rural health care representatives, one service provider representative, one independent director, and a CEO.

The Chairman of the Commission selects or approves all of the members of the board of directors for the universal service corporations. The Chairman of the Commission will select the independent board member for the Schools and Libraries Corporation. In addition, under the Commission's Order, the three directors on the USAC Board of Directors representing schools and the one director representing libraries will be appointed to the Schools and Libraries Board of Directors. The USAC Board will also select the service provider from its board of directors to serve on the Schools and Libraries Board of Directors. The six board members of the Schools and Libraries Corporation will submit a CEO candidate to the Chairman for approval. The CEO will also sit on the board of directors.

A similar process was mandated for the selection of the board of directors of the Rural Health Care Corporation. The Chairman of the Commission will select, based on nominations, one of the two board member to represent rural health care providers. Additionally, the Chairman of the Commission will select an independent board member. The USAC Board of Directors is to select from its members the other director representing rural health care providers and a service provider. These four board member will submit a CEO candidate to the Chairman of the Commission for approval. The chosen CEO will serve on the board of directors.

Not only does the Commission direct the USAC Board to appoint certain of its board members to serve on the independent corporations' boards of directors but these USAC Board members are, in the first instance, also selected by the Chairman of the Commission. Under the NECA Governance Order, the Commission directed that USAC's Board will be comprised of: three directors representing ILECs; two directors representing long distance carriers (IXCs), one director representing commercial mobile radio service providers, which includes cellular, Personal Communications Services, paging, and Specialized Mobile Radio companies; one director representing Competitive Local Exchange Carriers; one director representing cable operators; one

director representing information service providers; three directors representing eligible schools; one director representing eligible libraries; one director representing eligible rural health care providers; one director representing low-income consumers; one director representing state telecommunications regulators; and one director representing state consumer advocates.

Members of the industry or non-industry groups that will be represented on the USAC Board submit nominees selected by consensus to the Chairman of the Commission. The Chairman will review the nominations and select the members of the USAC Board. If a group fails to reach consensus and submits more than one nominee, the Chairman will select the individual to represent the group. Similarly, if no nomination is submitted, the Chairman will select the individual from the appropriate industry or non-industry group.

Notes for the Appendix

1. FCC has defined "implicit subsidies" to mean that a single company is expected to obtain revenues from sources at levels above "costs" (i.e., above competitive prices levels), and to price other services allegedly below costs. Such intra-company subsidies are typically regulated by states. On the federal level, the primary implicit subsidies are the geographic averaging of interstate long distance rates and interstate access charges. In section 254(g) of the Communications Act, as added by the Telecommunications Act of 1996, 47 U.S.C. sec. 254(g), Congress expressly directed that the geographic averaging of interstate long distance rates continue. See Federal-State Joint Board on Universal Service, First Report and Order, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1996) (Universal Service Order).

2."Telephone Subscribership in the United States," a 1998 report by the FCC's Common Carrier Bureau that was based on Census Bureau figures for November 1997 found that almost 94% of households have telephone services. However, the rates vary based on income, age, household size, race, geographic location, and other factors. See also Common Carrier Bureau, FCC, Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms (Feb. 23, 1996).

3. Pub. L. 104-104, 110 Stat. 56 (1996).

4. Federal-State Joint Board on Universal Service, Notice of Proposed Rule-making and Order Establishing a Joint Board, CC Docket No. 96-45, FCC 96-93 (rel. Mar. 8, 1996) (Universal Service NPRM).

5. Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, FCC 96J-3 (rel. Nov. 8, 1996) (Recommended Decision).

6. MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, FCC 82-579 (rel. February 28, 1983).

7. However, with the imminent breakup of AT&T, the Commission believed that AT&T could no longer perform this function in the post-divestiture environment.

8. Letter from Bruce Baldwin, NECA, to Reed Hundt, Chairman, FCC, October 18, 1996.

9. Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Notice of Proposed Rule-making and Notice of Inquiry, CC Docket No. 97-21, FCC 97-2 (rel. Jan. 10, 1997), errata, mimeo 71784, CC Docket No. 97-21 (rel. Jan. 15, 1997) (NECA NPRM and NOI).

10. Letter from Bruce Baldwin, NECA, to Reed Hundt, Chairman, FCC, January 10, 1997.

11. Letter from Robert Haga to William F. Caton, Acting Secretary, FCC, June 23, 1997, recording an ex parte meeting between NECA personnel and Commissioner Quello and Commission staff.

12. The Commission agreed that expanding NECA's board would not assure neutrality. The Commission noted the concern expressed by commenters that NECA may be precluded from confining authority of newly added non-ILEC directors to matters relating

solely to the administration of universal service support programs. Alternatively, if non-ILEC directors were allowed to participate in ILEC matters, there might be an issue of the duty owed by non-ILEC and non-carrier directors to NECA's membership on LEC issues unrelated to universal service.

13. The Commission stated that the creation of private corporations"... will provide for greater accountability and more efficient administration of the schools and libraries and rural health care programs than would the approach adopted earlier because a subcontractor, unlike the Corporations, would not be directly accountable to the Commission." (emphasis added).

14. The Commission stated that it was unpersuaded by NECA's argument that a single structure would be more efficient, avoid duplication of functions, or produce greater cost savings.

15. Changes to the Board of Directors of the National Exchange Carrier Association, Inc., and Federal-State Joint Board on Universal Service, Report and Order and Second Order on Reconsideration, CC Docket No. 97-21 and No. 96-45, FCC 97-253 (rel. July 18, 1997)(NECA Governance Order).

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