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The Honorable John Bryson
Secretary
US Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Bryson:

AFE Consulting, at the request of the Association of National Advertisers (ANA), is carrying out an economic analysis of ICANN's announced intention to allow and encourage a virtually unlimited expansion of the Domain Name System (DNS) by adding many hundreds of new generic Top Level Domains (gTLDs) to the 22 already in existence and to continue to expand the number of gTLDs by the thousands in later years. The authors of this letter are professional economists leading the AFE study. We have reached the conclusion that this dramatic alteration in the landscape of the Internet would be contrary to the interests of both consumers and businesses. Our brief biographies are attached at the end of this letter.

ICANN's authority to consider the possible expansion of the number of gTLDs dates back to the November 25, 1998 Joint Memorandum of Understanding between the U.S. Department of Commerce and ICANN. We believe it is critical to keep in mind this foundational document, which, among other provisions, requires ICANN to:

> Collaborate on the design, development and testing of a plan for creating a process that will consider the possible expansion of the number of gTLDs. The designed process should consider and take into account…potential consumer benefits/costs associated with establishing a competitive environment for gTLD registries.[1]

[1] *Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers,* November 25, 1998.

In December 2008, as ICANN proceeded with its plans for the introduction of new gTLDs, the U.S. Department of Commerce wrote to ICANN's Chairman Peter Dengate Thrush:

> [I]t is unclear that the threshold question of whether the potential consumer benefits outweigh the potential costs has been adequately addressed and determined. In that regard, we would like to call to your attention a decision of the ICANN Board on October 18, 2006, that called for an economic study to address [this and related questions] … ICANN needs to complete this economic study and the results should be considered by the community before new gTLDs are introduced.[2]

Following its receipt of that December 2008 letter, ICANN acknowledged that:

> [S]everal members of the ICANN community requested that ICANN commission economic studies that would specifically address the possible economic consequences of new gTLDs … Accordingly, ICANN retained the services of economist Dennis Carlton, who recently had served as the chief economist to the United States Department of Justice Antitrust Division.[3]

Thereafter, in March 2009, Carlton issued a report in which he concluded, generally, that:

> ICANN's proposed framework for introducing new TLDs is likely to improve consumer welfare by facilitating entry and creating new competition to the major gTLDs such as *.com*, *.net*, and *.org*. Like other actions that remove artificial restrictions on entry, the likely effect of ICANN's proposal is to increase output, lower price and increase innovation. This conclusion is based on the fundamental principles that competition promotes consumer welfare and restrictions on entry impede competition.[4]

But in his series of reports, Carlton never squarely addressed or analyzed whether or not the potential future benefits of ICANN's gTLD expansion would outweigh the future costs.

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[2] Letter to Peter Dengate-Thrush from Meredith A. Baker, December 18, 2008.

[3] ICANN, *Rationale for Board Decision on Economic Studies Associated with the New gTLD Program*, March 21, 2011, at page 3.

[4] *Preliminary Report of Dennis Carlton Regarding Impact of New gTLDs on Consumer Welfare*, March 2009, at pages 2-3, *available at* http://www.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf

To remedy this shortcoming (of which many took notice), ICANN turned to Michael Katz[5] and Gregory Rosston for additional economic analyses. They submitted a series of three reports in June 2010, December 2010 and February 2011. In their third report—the final economic analysis of the new gTLDs received by ICANN—Katz and Rosston conceded:

> [O]ur report does not conclude that benefits will exceed costs for new gTLDs as a whole…The purpose of [our report] is to lay out a structure within which *to think about* the benefits and costs of new gTLDs.[6]

They added:

> [Our report] summarized prior studies on issues relevant to the introduction of new gTLDs. The report identified shortcomings of specific studies and concluded that existing studies were incomplete. *The central finding was that additional information should be collected*.[7]

At the end of this series of economic reports that ICANN itself had commissioned, ICANN reported:

> Ultimately, ICANN obtained reports from several economists, including some of the world's leading economists who specialize in competition issues…[T]he studies made clear that the economists did not anticipate that the costs that might be associated with new gTLDs would outweigh the overall benefits of their introduction, and determined that it was too difficult to predict…As a result, ICANN's Board has concluded that there is no economic basis that would justify stopping the New gTLD Program from proceeding and no further economic analysis will prove to be any more informative in that regard than those that have already been conducted.[8]

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[5] Katz had also served as the chief economist of the Justice Department's Antitrust Division.

[6] Michael L. Katz, Gregory L. Rosston and Theresa Sullivan, *Reply to Comments on An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names*, February 21, 2011, at page 3 (emphasis added), *available at* http://www.icann.org/en/topics/new-gtlds/analysis-response-phase-ii-report-21feb11-en.pdf

[7] *Id.* at page 4 (emphasis added).

[8] ICANN *Rationale* at page 1.

The Carlton and Katz-Rosston reports reflect almost no actual investigation of the practical effects of the huge expansion of gTLDs that ICANN plans. It is an axiom of competition analysis that any such analysis must rest on a factual background. Moreover, these reports do nothing to demonstrate that general principles that apply in many markets actually apply to the unique nature of gTLDs and the scale of ICANN's planned increase in their number. A new gTLD is not a product in the sense that a new electric car is a product.

Domain names like *NYTimes.com* are essentially trademarks. They are small fragments of text that consumers associate with the products and services of businesses and organizations on the Internet. By convention, Internet domain names ("trademarks") have two parts separated by a period. On the left is a brief version of a product or business name and on the right is the gTLD (or non-generic TLDs such as country codes that are not at issue today).

From the perspective of the consumer, a second-level domain, such as *NYTimes*, connected to a given gTLD, such as *.com*, is essentially the same as *NYTimes.info* or *NYTimes.biz*. Competition based on differentiation of only the gTLD is expressly prohibited by trademark law and by the rules of ICANN, which has procedures that can lead to cancellation of such registrations by a non-owner of the left side of a domain name, but only after the owner successfully brings a legal action against the registrant of the infringing domain name. This key, undisputed principle of the Internet—essential to its usefulness to Internet users—refutes the simplistic Carlton claim that adding gTLDs, *ipso facto*, increases competition, improves product variety and provides more choice to consumers.

As the ICANN economists noted, the gTLDs added by ICANN in the last decade have attracted relatively few registrations, and the overwhelming majority of these merely duplicate second-level domain names already registered under *.com.* They add little or nothing to the benefits that brand owners and consumer achieve from the Internet. Today, many Internet users find desired websites by running searches on Bing, Google, or other search engines. They don't type in *NYTimes.com*, they just type in "NYTimes", or "New York Times" or "NY times" or even just "times" (try it—on Google, *NYTimes.com* is the second search result for a search on "times"). It adds absolutely nothing if the search engine then offers them a choice between *NYTimes.com* and *NYTimes.biz*.

An analogy to printed brand names may be useful in explaining why the extreme proliferation of gTLDs is contrary to the interests of Internet users. Under existing trademark law, a registration of a brand name, say "Tide", also protects the name in other type fonts, such as "Tide" and "Tide" and "TIDE" and "*Tide*". The differences in type fonts are analogous to the gTLD name after the dot in a domain name. They are differentiating markers that do not alter the sense of the brand name and mean almost nothing to the consumer.

The addition of gTLDs is as if a company other than Procter & Gamble could register "*Tide*" as a trademark and use it until Procter & Gamble discovered the misuse and filed a legal proceeding against it. Under ICANN's plan to expand the number of gTLDs, Procter & Gamble would either need to preempt such misuse by paying to register "Tide" defensively under these new gTLDs, or it could elect to spend the time and resources needed to detect such registrations after the fact and then incur the expense of dealing with them individually as they are discovered. And even this assumes that it is possible to determine ultimately who the registrant is, something that is not always possible with the *Who-Is* databases available today.

Of course, it is true, as ICANN has said, that both trademark law and ICANN's procedures for dealing with cybersquatting would be available to domain-name registrants. But the proliferation of gTLDs would raise the monitoring costs of domain-name owners. ICANN has acknowledged that such proliferation would raise costs, but nevertheless maintains—without any quantification of either costs or user benefits—that the benefits would exceed these costs.

In fact, the benefits, as we have demonstrated above, are negligible. The costs are not.
Of course, the proliferation of gTLDs will create profit opportunities for companies that offer domain name registration and consulting services as they process defensive registrations under the additional gTLDs. The revenue these companies will derive from either defensive or infringing domain registrations—and the motivation behind these registrations would appear to be a matter of indifference to such companies—is a cost to legitimate domain-name owners.

Our analysis to date shows that an unlimited expansion of gTLDs would not add anything material to the product variety facing Internet users. It would merely create a costly nuisance for those users. ICANN is sponsoring a perversion of the economic analyses that it commissioned by even suggesting that this nuisance has net benefits for the Internet community. We therefore urge you to take action to block the unlimited expansion of gTLDs unless it is satisfactorily and transparently demonstrated that any such expansion—or a limited expansion on a case-by-case basis—would be in the public interest and that the benefits to any expansion would exceed the clear costs that the expansion would impose on the global multi-stakeholder community that ICANN serves.

Respectfully submitted,

Robert E. Hall

Michael A. Flynn

cc: Lawrence E. Strickling, Assistant Secretary for Communications and Information and Administrator, National Telecommunications and Information Administration, U.S. Department of Commerce

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Cameron F. Kerry, General Counsel, U.S. Department of Commerce

John D. Rockefeller, Chairman, Committee on Commerce, Science and Transportation, U.S. Senate

Kay Bailey Hutchison, Ranking Member, Committee on Commerce, Science and Transportation, U.S. Senate

Amy Klobuchar, Chair, Subcommittee on Competitiveness, Innovation and Export Promotion, Committee on Commerce, Science and Transportation, U.S. Senate

Daniel K. Inouye, Chairman, Committee on Appropriations, U.S. Senate

Thad Cochran, Ranking Member, Committee on Appropriations, U.S. Senate

Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate

Charles E. Grassley, Ranking Member, Committee on the Judiciary, U.S. Senate

Barbara Mikulski, Chair, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, U.S. Senate

Al Franken, Chairman, Subcommittee on Privacy, Technology and the Law, Committee on the Judiciary, U.S. Senate

Tom Coburn, Ranking Member, Subcommittee on Privacy, Technology and the Law, Committee on the Judiciary, U.S. Senate

Ron Wyden, Chairman, Subcommittee on International Trade, Customs, and Global Competitiveness, Committee on Finance, U.S. Senate

Harold Rogers, Chairman, Committee on Appropriations, U.S. House of Representatives

Fred Upton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives

Henry A. Waxman, Ranking Member, Committee on Energy and Commerce, U.S. House of Representatives

Greg Walden, Chairman, Subcommittee on Communications and Technology, and Technology, Committee on Energy and Commerce, U.S. House of Representatives

Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives

Lamar Smith, Chairman, Committee on the Judiciary, U.S. House of Representatives

Norm Dicks, Ranking Member, Committee on Appropriations, U.S. House of Representatives

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Bob Goodlatte, Chairman, Subcommittee on Intellectual Property, Competition and the Internet, Committee on the Judiciary, U.S. House of Representatives

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ROBERT E. HALL

Robert E. Hall is the Robert and Carole McNeil Joint Professor of Economics at Stanford University and Senior Fellow at Stanford's Hoover Institution. He served as President of the American Economic Association for the year 2010, served earlier as the Association's Vice President and Ely Lecturer, and is now a Distinguished Fellow of the Association. He is an elected member of the National Academy of Sciences and Fellow of the American Academy of Arts and Sciences, the Society of Labor Economists, and the Econometric Society, the professional organization of economists specializing in measurement issues. He is Director of the Research Program on Economic Fluctuations and Growth of the National Bureau of Economic Research. He was a member of the National Presidential Advisory Committee on Productivity. For further information about his academic activities, see Stanford.edu/~rehall . He received his Ph.D. in economics from MIT and his BA from the University of California, Berkeley.
Professor Hall is co-author of the college textbook *Economics: Principles and Applications*, now in its fifth edition, and author or co-author of numerous articles in the *American Economic Review*, the *Journal of Political Economy,* and other academic journals.
Professor Hall has advised a number of government agencies on national economic policy, including the Treasury Department, the Federal Reserve Board, and the Justice Department, and has testified on numerous occasions before congressional committees.

MICHAEL A. FLYNN

Mr. Flynn is a consulting and testifying expert economist, specializing in antitrust, economic damages, intellectual property and other complex business litigation and consulting engagements. He has extensive case experience in a broad range of industries, markets and products. Mr. Flynn studied in the PhD Program in Economics of the Massachusetts Institute of Technology, Cambridge, Massachusetts, from 1971 to 1974, where he was a National Science Foundation Fellow. He completed his general and field examinations for the PhD degree in 1974. Mr. Flynn was awarded his AB degree from the University of California, Berkeley, where he was the 1971 recipient of the Department of Economics Citation as the Outstanding Graduating Senior.