

February 5, 2002

Nancy J. Victory
Director
National Telecommunications and Information Administration
Department of Commerce
1401 Constitution Ave. N.W.
Washington, DC 20230

Dear Ms. Victory:

The National Telecommunications and Information Administration (NTIA) recently awarded a contract for administration of the Dot US Domain Space to a private sector entity. The contract contains elements that are more than mere contractual provisions. Some of the provisions amount to a legislative rulemaking that will affect the legal rights of millions of small businesses and individuals. The elements of greatest concern to us are:

- (1) requiring the contractor to implement a Sunrise Provision that allows trademark holders to register domain names before non-trademark holders, and
- (2) requiring the contractor to bind all registrants to a uniform dispute resolution policy (UDRP).

NTIA did not submit these legislative rules for notice and comment as required by the Administrative Procedure Act (APA) and did not conduct a regulatory flexibility analysis as required by the Regulatory Flexibility Act (RFA).

As part of our statutory duty to monitor agency compliance with the RFA, Advocacy requests that the NTIA place the contract for administration of the Dot US Domain Space on hold and submit the legislative rulemaking provisions for notice and comment, and conduct a regulatory flexibility analysis. Alternatively, NTIA can strike the rulemaking provisions from the contract, and the contract would no longer be subject to the APA. Unless and until NTIA does so, the contract for the management of the Dot US domain is unlawful, as it violates both the APA and the RFA.

I. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305¹ to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.² Advocacy also has a statutory duty to monitor

and report to Congress on the Commission's compliance with the Regulatory Flexibility Act of 1980 (RFA),³ as amended by the Small Business Regulatory Flexibility Act, Subtitle II of the Contract with America Advancement Act.⁴

II. Importance of Dot US to Small Businesses

Small businesses are a crucial element of the U.S. economy and the Internet. In 2000, there were 25 million small businesses in the United States, who represent more than 99 percent of all employers in this country. Advocacy estimates the number of small employers in 2000 at 5.8 million. These small businesses, both employer firms and sole proprietorships, employ 51 percent of private workers, employ 38 percent of private workers in high-tech occupations, and create 75 percent of net new jobs in the United States.⁵

Small businesses use of the Internet is rapidly expanding. According to a recent study by the National Federation of Independent Business (NFIB), 57 percent of all small employers (about 3.3 million businesses) use the Internet for business-related activities and 61 percent of small employers (about 3.5 million businesses) have a business Web site.⁶ This number does not include sole-proprietors who were not covered by the NFIB survey.

While most small business Web pages are registered in Dot Com, Advocacy believes that this is due to the current management of Dot US. When the Dot US is reorganized to become a viable top level domain, Advocacy expects that millions of small businesses will register. Any policy that detrimentally affects the ability of these small businesses to use the Dot US would have a significant impact on this nation's economy and limit the effectiveness of the Internet as a tool of business and commerce.

III. History of the Dot US Administrative Assignment

NTIA has been wrestling with management of the Dot US Domain Space for nearly four years. NTIA released an initial "Request for Comments on the Enhancement of the .us Domain Space" on August 3, 1998. This request for comments was repeated on August 17, 2000, when NTIA requested comments on a Draft Statement of Work (draft SOW). NTIA stated that the draft SOW was expected to be incorporated in a request for proposals for management of the .us domain space. A regulatory flexibility analysis was not performed in conjunction with the draft SOW.

On June 13, 2001, NTIA issued a Request for Quotations (RFQ) for management and coordination of the Dot US domain space. The Sunrise Provision and the mandatory UDRP provisions appeared for the first time in the RFQ. NTIA accepted questions received in response to the RFQ and posted them in a series of amendments throughout the month of July. Advocacy submitted objections to the sudden inclusion of the sunrise provision and the mandatory UDRP on July 29, 2001. NTIA acknowledged these concerns in the amendments, but did not directly address the questions we asked, nor did NTIA's responses justify or otherwise provide any rational explanation for the sudden inclusion of the provisions in the RFQ.

Advocacy sent an e-mail on August 9, 2001 to the NTIA raising concerns about unlawful delegation of authority to a private entity. In a responding e-mail, the NTIA staff stated that the RFQ was a contract and therefore exempt from the APA. On October 25, 2001, Advocacy sent a second e-mail to the staff detailing that the APA did indeed apply because the Sunrise Provision and the mandatory UDRP were legislative rules. Advocacy requested a meeting. NTIA did not respond to this request. Instead, on October 29, 2001, NTIA went ahead and announced that it had awarded management of the Dot US Domain Space to Neustar, Inc.

IV. Applicability of the APA on an Agency's Contractual Authority

The Administrative Procedure Act⁷ was created by Congress to allow agencies to accomplish their statutory objectives while ensuring public participation and that an agency's decisions are both informed and responsive. The APA laid out guidelines for the informal rulemaking process, which permitted agencies to make broad policy rules but required agencies to submit these proposed rules to the public for notice and comment. The APA defined a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."⁸

As the Court said in State of New Jersey v. Dept. of Health and Human Services, Congress adopted the APA for a good reason, because it ensures "that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public."⁹ Public participation is a key component of this check on government power, as a means of assuring that an agency's decisions are both informed and responsive.¹⁰

A. Exceptions to the APA

The APA does not cover all agency actions. Section 553 carves out two exceptions where agency actions are not covered by the APA: (1) interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; and (2) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.¹¹ However, Congress did not intend for the exception to consume the rule,¹² and did not give agencies a blank check to adopt any contractual provision whatsoever without undertaking notice and comment review.¹³ In the legislative history of the APA, the Senate Committee responsible for considering the bill stated that the courts have a duty to prevent avoidance of the APA by any manner of form or indirection.¹⁴

The second exception is not applicable to the facts at hand, as NTIA did not issue a rule that included a brief statement as to why notice and public participation were unnecessary or impracticable. Instead, the staff of NTIA is contending that the DOT US assignment is a contractual action and not covered by the APA. Therefore, it is important to define a legislative rule as opposed to an interpretive rule or some other agency action.

B. Differentiating a Legislative Rule from an Interpretive Rule

The courts have spent a great deal of time wrestling with defining a legislative rule. Factors that courts have looked at include whether or not the agency action is a product of delegated legislative power rather than merely setting forth an agency's own interpretation of the meaning of a statute it administers, and whether the agency action essentially creates new law by creating or affecting individual rights or obligations.¹⁵ Courts also have taken into account the authority and intent with which the agency actions are taken,¹⁶ and whether or not the agency action has a present-day binding effect.¹⁷ On the other hand, interpretative rules are not determinative of issues or rights, but are limited to narrow situations where substantive rights are not at stake.¹⁸

Courts have addressed the applicability of the APA to agency contracts specifically. For example, the D.C. Circuit Court stated in American Hosp. Ass'n v. Bowen¹⁹ that "any contract provisions that are legislative are subject to § 553's notice and comment requirements." The D.C. Circuit in the same case also noted that an agency "may not hide behind its authority to contract in order to evade the APA."²⁰ Furthermore, courts are not bound by the "label" attached by the administrative agency. Instead, they must look to such factors as the real effect of the rule, the source authority for its promulgation, and the force and effect which attach to the rule itself.²¹

V. The Dot US Administrative Assignment Violates the APA and the RFA

The Dot US Administrative Assignment is a contract between the NTIA and a private entity. The D.C. Circuit in American Hosp. Ass'n states that contract provisions which are legislative in nature *are* subject to the APA. Therefore, it becomes important to determine whether or not the RFQ contains legislative rule provisions. Advocacy contends that it does in the case of the Dot US RFQ.

A. Certain Provisions in the Dot US RFQ Are Legislative Rules and the APA Applies

There are two provisions in the RFQ that were not contained in the Request for Public Comment on the Draft Statement of Work:

- (1) requiring the contractor to implement a Sunrise Provision that allows trademark holders to register domain names before non-trademark holders, and
- (2) requiring the contractor to bind all registrants to a uniform dispute resolution policy (UDRP).

Advocacy believes these two provisions are legislative rules, as they meet the criteria that the courts have laid out: (i) they are issued using legislative authority, and (ii) they create new law that affects individual rights or obligations.

In the RFQ, the NTIA asserts that it is issuing the contract under Congressional statutory authority. As it stated in the Request for Public Comment on the draft SOW, the NTIA is relying upon five different statutes for the authority to issue the RFQ. These statutes provide only non-specific, general grants of authority from Congress to the NTIA to issue regulations to carry out

its various functions. Since the NTIA is relying entirely upon them for its authority, the agency is essentially relying upon the delegated legislative power.

Moreover, these provisions affect and bestow substantive individual rights and obligations on third parties outside of the contractor and the NTIA. In the first provision, a class of parties gets a senior right to register for a public resource. In the second provision, the NTIA is mandating that every individual or entity who uses this public resource will have its rights at law modified by forcing them to agree to an alternative dispute resolution procedure. Therefore, both provisions substantively (and substantially) affect individual rights and obligations.

Because the NTIA relies on legislative authority from Congress and the provisions substantively affect individuals' rights and obligations, Advocacy finds that these two provisions are legislative rules, subject to the notice and comment provisions of § 553 of the APA.

B. NTIA Must Conduct a Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires an agency to perform a regulatory flexibility analysis on any action that is subject to the notice and comment provisions of § 553 of the APA.²² As discussed above, the contract is covered by § 553, and in turn, it is subject to § 603 of the Regulatory Flexibility Act. We have seen nothing in the record which would indicate that NTIA has performed any such regulatory flexibility analysis.

Conclusion

The RFQ for the administration of the Dot US domain is a legislative rule and must undergo the informal rulemaking process of the APA. Notice and opportunity to comment must be permitted and the NTIA must undertake a regulatory flexibility analysis.

To rectify this situation and breach of administrative law, Advocacy sees two possible paths for the NTIA. The first and best option is to put the two aforementioned provisions of the RFQ out for notice and comment and to perform an initial regulatory flexibility analysis. The second option is to redact the two provisions out of the contract. Without these two provisions, the RFQ would no longer be a legislative rule and would qualify for an exception to § 553 of the APA.

However, unless and until the NTIA takes one of these steps, the contract for the management of the Dot US domain is unlawful, as it violates both the APA and the RFA. If you wish to discuss this issue further, please contact me or my staff. We would be happy to work with you to reach a solution that is accomplishes your agency's goals while complying with the APA and the RFA.

Sincerely,

/s/ _____
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ _____
Eric E. Menge
Assistant Chief Counsel for Telecommunications

/s/ _____
Jonathan R. Pawlow
Assistant Chief Counsel for Intellectual Property

¹¹ Codified as amended at 15 U.S.C. §§ 634 (a)-(g), 637.

² 15 U.S.C. § 634(c)(1)-(4).

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (*codified at 5 U.S.C. § 601 et seq.*).

⁴ Pub. L. No. 104-121, 110 Stat. 857 (1996) (*codified at 5 U.S.C. § 612(a)*).

⁵ < <http://www.sba.gov/advo/stats/sbfaq.html>>.

⁶ The Use and Value of Web Sites, National Small Business Poll (National Federation of Independent Business, Washington, D.C.) Vol. 1, Issue 2 (2001).

⁷ 5 U.S.C. § 551 (*et. seq.*).

⁸ 5 U.S.C. § 551(4).

⁹ 670 F.2d 1262, 1281 (3rd Cir. 1981).

¹⁰ See American Bus Ass'n. v. United States and Regular Common Carrier Conference, 627 F.2d 525, 528 (D.C. Cir. 1980).

¹¹ 5 U.S.C. § 553 (b)(A)-(B).

¹² American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (“...Congress intended the exceptions to § 553’s notice and comment requirements to be narrow ones.”)

¹³ American Hosp. Ass'n, 834 F.2d at 1053-1054.

¹⁴ American Bus, 627 F.2d at 528.

¹⁵ See State of New Jersey, 670 F.2d at 1281-2; see also Chamber of Commerce of U. S. v. Occupational Safety and Health Admin., 636 F.2d 464 (D.C. Cir. 1980).

¹⁶ See Joseph v. U. S. Civil Service Comm’n, 554 F.2d 1140, 1153 (D.C. Cir. 1977).

¹⁷ See Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987).

¹⁸ See American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987).

¹⁹ 834 F.2d 1037, 1054 (D.C. Cir. 1987).

²⁰ Id.

²¹ See Hou Ching Chow v. Attorney General, 362 F. Supp. 1288 (D.D.C. 1973).

²² 5 U.S.C. § 603(a).