GAC Advice Response Form for Applicants

Please complete this form and submit it as an attachment to the current Customer Portal case using the following naming convention: "[Application ID] Additional Response to GAC Cat 2 Advice" (e.g, "1-111-11111 Additional Response to GAC Cat 2 Advice"). All responses must be received no later than 23:59:59 UTC on 17-January-2014.

Please note: This form will be publically posted.

Respondent:

Application Prioritization Number	1355
Applicant Name	Hughes Satellite Systems Corporation
Application ID	1-2000-89466
Applied for TLD (string)	.DVR

Response:

Please see attached.

PATTON BOGGS LLP

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January 6, 2014

Deborah M. Lodge
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VIA E-MAIL

Dr. Stephen Crocker
Chairman
Internet Corporation for Assigned Names and
Numbers ("ICANN") Board
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Hughes Satellite Systems Corporation's comments on the Buenos Aires GAC Communiqué

Dear Dr. Crocker:

On behalf of the applicant, Hughes Satellite Systems Corporation[1] and its affiliated entities (collectively "Hughes"),[2] I am writing to provide Hughes' response to ICANN's recent request ("Request") for comments on the Buenos Aires Governmental Advisory Committee ("GAC") Communique dated November 20, 2013 ("Buenos Aires Communiqué"). Specifically, this letter addresses the GAC Buenos Aires Communiqué's reference to the new gTLD program committee ("NGPC") consideration of GAC Category 1 and Category 2 Safeguard Advice" letter[3] dated October 29, 2013 ("Advice Letter").

We understand from your Advice Letter to Heather Dryden, Chair of the GAC that the ICANN board plans to accept the GAC's Category 1 and Category 2 safeguard advice in the Beijing Communiqué. We also understand from your Advice Letter that the ICANN staff contacted 186 applicants for strings identified in the GAC's Category 2 safeguard advice. Your Letter further indicates that 174 of these applicants responded that they would not

[1] Hughes and its affiliates are a global satellite service provider; developer of hybrid video delivery technologies; designer and manufacturer of set-top devices; and designer and builder of Slingbox TV streaming devices for customers in the United States, United Kingdom and Canada. Hughes and its affiliates are market innovators in the provision of satellite television, audio programming, home move and video game rental services and interactive televisions services to commercial and residential customers in the United States.

[2] For purposes of disclosure, Hughes applied for four new generic top level domain ("gTLD") strings: .HUGHES, .SLING, .DVR, and .STREAM. At least one of Hughes applied-for TLD strings may be affected by this response.

[3] Available at http://www.icann.org/en/news/correspondence/crocker-to-dryden-3-29oct13-en.pdf.

operate their TLDs as exclusive access registries, *i.e*. "Closed Generic"[4] strings. Your Advice Letter also identified eleven strings[5] whose ten applicants planned to operate them as exclusive access registries. Finally, your Advice Letter suggests that ICANN staff had contacted the ten applicants and "requested the applicants to provide an explanation of how the proposed exclusive registry access serves a public interest goal." Hughes is an applicant for one of these eleven strings -- .DVR. To date, however, Hughes has not been contacted by the ICANN staff regarding the public interest goals for the .DVR TLD. However, if this current Request is part of the ICANN staff's outreach, Hughes has previously provided and herewith again provides reasons below why it believes that the .DVR TLD will serve public interest goals.

1) **The Applicant Guidebook ("AGB") does not prohibit "Closed Generic" applications.**

Hughes reiterates all of the arguments in its prior correspondence to the ICANN board dated May 10, 2013 (enclosed). Specifically, Hughes highlights its previous argument that the Applicant Guide Book ("AGB")—both the version in effect at the onset of the new gTLD process and as revised on June 4, 2012 -- do not prohibit applicants from operating TLDs as exclusive registry TLDs. Hughes also highlights its previous arguments that exclusive access registries do not limit competition, but provide new pro-competitive business paradigm that will foster competition and innovation for the Internet Community. Hughes also respectfully submits that ICANN's apparent intention to bar exclusive access TLDs, as is signaled in the Advice Letter, would be a departure from ICANN's guidance in the AGB, which permitted applications for exclusive access registry TLDs.

2) **Hughes application for the .DVR TLD serves a public interest goal.**

In its gTLD applications, including its application for the .DVR TLD, Hughes reaffirmed its commitment to public interest goals that affect members of the Internet Community. For example, in response to Q. 18 (b) of its gTLD applications, Hughes stated *inter alia* that:

> *"The Internet has been plagued by cybersquatting, typosquatting, phishing, pharming and identity theft scams. This malicious online conduct has shaken the trust and confidence of consumers to share information and transact*

[4] In the gTLD Base Registry Agreement dated updated November 20, 2013, ICANN defines "Generic String" as "a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others."

[5] .BROKER, .CRUISE, .DATA, .DVR, .GROCERY, .MOBILE, .PHONE, .STORE, .THEATER, .THEATRE and .TIRES

> *business online. The proposed…gTLD[s have] the following user experience goals…*
>
> *o Foster trust and confidence in online interactions by customers …;*
>
> *o Reduce the risk of Internet users being misled, believing and/or acting on erroneous, information …"*

In another example, Hughes also provided the following response to Q.18 (b) in its TLD applications:

> "*[One of t]he goal of [Hughes in operating its TLDs is to] …[t]o further demonstrate Applicant's commitment and market leadership in the area of data security and privacy within its industry…[Hughes] intends to utilize the [.DVR TLD] … with the goal of further securing the collection and transmission of personal and other confidential data …*"

The above examples demonstrate Hughes' continued commitments to public interest goals that affect the Internet community. Among these goals are alleviating consumer concerns about the authenticity of a website, fostering confidence and trust for Internet consumers, combatting online infringement of copyright, combatting trademark infringement, combatting cybersquatting, combatting phishing and combatting other fraudulent or criminal acts online. Those goals will be facilitated if Hughes is able to operate these gTLDs on a restricted access basis, with access defined by specified criteria and affiliations.

If Hughes had not applied for the .DVR TLD, Hughes would require scores of second-level domain names ("SLDs") to address the public interest goals discussed above, potentially under several different third level domain names. This would lead to an increase in public confusion and may foster cybersquatting and phishing scams. Hughes intends to operate the .DVR TLD to reduce such problems. By controlling the criteria for registering second-level domains in the .DVR TLD, Hughes will be able to reduce the risk of Internet users being deceived and defrauded by unauthorized third parties. Allowing Hughes to set the rules for the .DVR TLD is the only practical way to increase the screening ability of the Registry and keep the .DVR TLD unadulterated, thereby increasing consumer confidence and trust.

Hughes is a member of information and communications technology (ICT) industry associations and data communication standards associations, such as the Telecommunications

Industry Association (TIA),[6] a leading trade association representing the global ICT. The ICT industry recognizes the importance of consumer privacy concerns and has a strong interest in ensuring that consumers have sufficient confidence about their privacy so that they are willing to embrace new technologies and services.[7] Hughes realized during the new gTLD application process that the ICT associations were not planning to register for domains, such as the .DVR TLD, to protect the internet community. Hughes felt compelled to act. Hughes invested its own resources in a new gTLD application for the .DVR TLD to reaffirm its commitment to the Internet community public interest concerns, protect its interests and those of its customers, and to protect public interest goals of the ICT discussed above.

3) Hughes is willing to discuss potential resolution steps with ICANN for the .DVR string to satisfy the GAC's Category 1 and 2 safeguards.

The AGB **does not** prohibit Hughes from applying for exclusive access registry TLDs. However, in the spirit of cooperation, Hughes welcomes the opportunity to work with ICANN to determine how the .DVR TLD may be amended to support the GAC's Category 1 and 2 safeguards, while preserving/protecting Hughes rights and consumer protections. Some of the options that Hughes would like to explore with ICANN on this matter, include, but are not limited to:

1) Whether ICANN would permit Hughes to amend its applications for the .DVR TLD to permit registration by a defined yet still limited cross-section of the Internet community to protect Internet consumers.

2) Whether ICANN would permit Hughes to convert the .DVR TLD application from a standard application to a community application to satisfy the GAC's Category 1 and 2 safeguards.

3) Other options that may be available to Hughes for the .DVR TLD to satisfy the GAC's Category 1 and 2 safeguards without eroding any of Hughes' rights.

Hughes reserves the rights to amend any statements above as a result of further guidance from ICANN and/or the GAC.

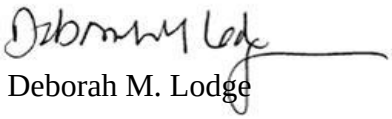
The above response is intended to continue the discussion regarding possible solutions to the "closed generic" issues as they may pertain to the Hughes gTLD application. Hughes remains

[6] Hughes' interests are represented on the TIA by one of its affiliates that is a member of the TIA. http://www.tiaonline.org/about/member-list.
[7] http://www.ntia.doc.gov/files/ntia/tia_comment_040212.pdf.

ready and willing to work with ICANN and other interested groups in the hope that reasonable solutions will be achieved.

Thank you for your time and consideration.

Sincerely,



Deborah M. Lodge

Enclosure

cc: Fadi Chehadé, ICANN President & CEO
Cherine Chalaby, Chair of the new gTLD Program Committee
Suzanne Radell, United States Governmental Advisory Committee Representative at the National Telecommunications and Information Administration
Gretchen Olive, Director, Policy & Industry Affairs, Corporation Services Company
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May 10, 2013

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VIA E-MAIL

Dr. Stephen Crocker, Chairman of the Board
of ICANN
Mr. Fadi Chehadé, President & CEO
Internet Corporation for Assigned Names and
Numbers (ICANN)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Response to GAC Advice for .DVR (1-2000-89466)

Dear Dr. Crocker and Mr. Chehadé:

Hughes Satellite Systems Corporation[1] and its affiliated entities (collectively "Hughes")[2] welcome this opportunity to provide a response to the recent Governmental Advisory Committee ("GAC") Communique dated 11 April 2013 ("Communique"). Hughes reserves the rights to amend any of the statements below as a result of changes to the ICANN new generic top level domain (gTLD) program.

I. SAFEGUARDS APPLICABLE TO ALL NEW GTLDS

[1] Hughes is a global satellite services provider, developer of hybrid video delivery technologies, designer and manufacturer of set-top and designer and builder of Slingbox TV streaming device for customers in the United States, United Kingdom and Canada. Hughes, through its affiliates is a market innovator in the provision of satellite television, audio programming, home movie and video game rental services and interactive television services to commercial and residential customers in the United States.

[2] For purposes of disclosure, Hughes applied for four new gTLD strings: .SLING, .HUGHES, .DVR and .STREAM. Some of Hughes applied-for TLD strings may be affected by this response.

Hughes welcomes the six safeguards[3] proposed by the GAC in the Communique, and where those matters are within its control, Hughes remains committed to strongly considering the recommendations during their implementation of the Hughes applied-for gTLD strings.

I. Category II Advice – Restricted Registration Policies – Exclusive Access

The GAC Advice appears to further recommend the creation of additional restrictions for the TLDs that the community has labeled as "closed generic" TLDS. Section 6 of Specification 9 ("Code of Conduct") in Module 5 (gTLD Agreement") of the Applicant Guidebook ("AGB") v. 2012-06-04 provides that:

> *Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, if Registry Operator demonstrates to ICANN's reasonable satisfaction that (i)* ***all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for its own exclusive use****, (ii)* ***Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator****, and (iii)* ***application of this Code of Conduct to the TLD is not necessary to protect the public interest.*** **(Emphasis added)**

An interpretation of Section 6 of the Code of Conduct clearly suggests that ICANN created a single set of criteria for "closed" TLDs that the community has labeled as "closed generics" and "closed brand" TLDS. ICANN should not attempt to stifle innovation by adopting additional criteria for "closed generic" as suggested by the GAC for the following reasons.

A) CLOSED TLDS PRESENT A NEW PARADIGM FOR INTERNET BUSINESS

Some have suggested that if ICANN allows the registration of "closed generic" TLDs to proceed, competition will suffer.[4] No evidence supports this claim.[5] These claims appear to

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[3] "WHOIS verification and checks," "Mitigation abusive activity," "Security checks," "Documentation," "Making and Handling Complaints" and "Consequences."

[4] *See* http://www.icann.org/en/news/announcements/announcement-2-05feb13-en.htm.

[5] Leonard, Tom. "'Open' or 'Closed' Generic TLDs: Let the Operators Decide." CircleID Internet Infrastructure. http://www.circleid.com/posts/print/20130307_open_or_closed_generic_tlds_let_the_operators_decide (Last Accessed May 9, 2013).

be based on a review of the existing TLDs, which are open.[6] "Closed generic" TLDs, however, represent a change to the *status quo*, which will likely result in innovation and new business opportunities that have not been possible up to this point.[7] This innovation may further result in significant competitive and consumer benefits.[8]

Some of these new business models will likely rely on a business's ability to choose between running an open or closed TLD.[9] There is no reason to deter these new business models, as without the free process of innovation and market discipline, there is very little chance that the full benefits of both open and closed TLDs will be reached.[10]

Closed generic TLDs essentially do not exist today, so there is no experience to draw on to assess the best way to use them.[11] And ICANN should refrain from stifling innovation by rejection "closed generic" TLDs, as even speculative benefits must be given great weight in assessing optimal policies.[12]

B) CLOSED TLDS WILL FOSTER COMPETITION

While some have argued that "closed generic" TLDs will limit competition, that limitation would occur only within that particular, "closed generic" TLDs.[13] To the extent that ICANN allows synonyms to be used as gTLDs the potential competitive issues become even more remote.[14] The market for TLDs does not present particular competitive risks, and there is no a priori reason for ICANN to intervene prospectively.[15]

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[6] Manne, Geoffrey A, *et al.* "An Error Cost Approach to Competition Issues in Closed gTLDs." International Center for Law & Economics. http:// forum.icann.org/lists/comments-closed-generic.../pdfn146uB1DAF.pdf (Last Accessed May 9, 2013).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See* Lenard.

[15] *See* Manne.

Some have also suggested that "closed generics" will increase market power held by particular market participants, resulting in abuse and leading to outcomes that hurt competitor and consumers alike.[16] As discussed above, one cannot determine the competitive effects beforehand in a market that has never existed and will not exist until a "closed generic" TLD has been granted by ICANN.[17]

If a market can be defined as the use of a particular gTLD, then the market is so small as to be meaningless.[18] Showing abuse within this market will be challenging, at least in the US, because the Supreme Court has recognized that even a monopoly has a right to profit and this is what incentivizes competitors to enter into the market.[19] The existence of market power is not actionable; only its abuse is and until that occurs, there is no basis for constraining "closed generic" TLDs.[20]

Some have raised further concerns that under a closed system, consumers may be confused about whether they are dealing with a single private company or the market at large.[21] However, any deception that arises under this scenario is already under the jurisdiction of the FTC or consumer protection regulators in other countries.[22]

The domain name service ("DNS") space is vast.[23] For any given online resource, there are multiple TLDs, second level domains (SLDs) and third level domains (TLDs) that may be used to access the same resource. For example, .laptop, laptop.com or laptop.seller.com could all point to an individual business that sells laptops to consumer. Consumers using the internet are relatively sophisticated as they are able to navigate amongst 22 gTLDs and 250

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See* http://www.internetgovernance.org/2012/09/19/generic-top-level-domains-who-should-own-book/.

country code TLDs ("ccTLDs") to access the resources that they need, for example, gTLDs, such as .aero, .info, .biz, .edu and ccTLDs, such as .me or .us.[24] Because the internet consumer is pretty sophisticated, the length of the uniform resource link ("URL") to access a resource online does not necessarily confer any sort of market power on a competitor. Additionally, as noted above, the idea that closed-name space business models create a monopoly on anything is just wrong and an anachronistic artifacts of the .COM boom 15 years ago, when nearly 90% of the world's domains were registered under .COM.[25] There is no evidence for the claim that market dominance inherently flows from the control of a generic domain name by an applicant who sells products or services that can be described by a generic name.[26]

In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.[27] These policies suggest that "all applicants should be evaluated against transparent and predictable criteria, fully available **before initiation of the process**."[28] (emphasis added). ICANN and the GAC's attempts to change the criteria for "closed generic" TLD registrations during the process appears to contradict the GNSO's policies.

While there may be some risk arising from this, the most likely use of closed domains would be either for further brand or product marketing by their owners, or else the creation of a robust platform aimed at drawing in—not alienating—consumers. In either case, the risk is minimal and the potential benefits substantial. Regardless, it is clear that the costs of closed registration policies have been considered.

C) PRO COMPETITIVE RATIONALE FOR CLOSED TLDS

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[24] *See* Applicant Guidebook v. 2012-06-04.

[25] *See* http://www.internetgovernance.org/2012/09/19/generic-top-level-domains-who-should-own-book/.

[26] *See* http://www.internetgovernance.org/2012/09/19/generic-top-level-domains-who-should-own-book/.

[27] *See* Applicant Guidebook v. 2012-06-04.

[28] *See* Summary of ICANN Generic Names Supporting Organisation's (GNSO's) Final Report on the Introduction of New Generic Top- Level Domains (gTLDs) and Related Activity.

The competitive environment for gTLDs would be further aided by permitting "closed generic" TLDs, because competing companies could purchase thematically similar gTLDs.[29] The ability to operate even "closed generic" TLDs, presents the incentive and opportunity for investment (and new avenues of competition) from which the entire ecosystem will benefit.[30]

Therefore, the chance that a new "closed generic" TLD and/or its sponsor could provide an innovative, heretofore unimagined business model is an important reason for ICANN to approving "closed generic" TLDs.[31] Such a model could "put direct competitive pressure on established gTLDs or could expand the market in new directions."[32]

D) ICANN IS NOT THE BEST FORUM TO DEAL WITH ANTI-COMPETITON ISSUES THAT MAY ARISE FROM CLOSE TLDS

ICANN already has authority to disclose contracts and business arrangements to the competition authorities under 2.9(b) of the gTLD Registry Agreement.[33] As noted above, ICANN should simply defer to competition authorities on the issue of closed registration policies because it does not have the expertise or resources to make informed competition policy.[34] Moreover, even the GAC lacks the institutional capacity to act in place of the FTC or DOJ or competition authorities in other countries.[35]

In summary, ICANN's policies do not ban "closed generic" registrations and ICANN should not retroactively change its policy. Further, ICANN should refrain from creating new criteria for "closed generic" TLDs as there is no evidence that "closed generic" will be anti-competitive. Rather, ICANN should encourage the innovation that the "closed generics" will provide to the market and refer any anti-competitive issues that results to the appropriate competition authorities. Finally, ICANN should comply with its stated objectives for the new

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[29] *See* Manne.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

gTLD program, "enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction."[36]

Sincerely,

Deborah M. Lodge

[36] *See* http://newgtlds.icann.org/en/about/program.

GAC Advice Response Form for Applicants

The Governmental Advisory Committee (GAC) has issued advice to the ICANN Board of Directors regarding New gTLD applications. Please see Section IV, Annex I, and Annex II of the GAC Beijing Communique for the full list of advice on individual strings, categories of strings, and strings that may warrant further GAC consideration.

Respondents should use this form to ensure their responses are appropriately tracked and routed to the ICANN Board for their consideration. Complete this form and submit it as an attachment to the ICANN Customer Service Center via your CSC Portal with the Subject, "[Application ID] Response to GAC Advice" (for example "1-111-11111 Response to GAC Advice"). All GAC Advice Responses must be received no later than 23:59:59 UTC on 10-May-2013.

Respondent:

Applicant Name	Hughes Satellite Systems Corporation
Application ID	1-2000-89466
Applied for TLD (string)	.DVR

Response:

Please see the attached.