

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	1586
Applicant Name	KBE gTLD Holding Inc
Application ID	1-1326-3558
Applied for TLD (string)	THEATRE

Response:

January 17, 2014

Dr. Steve Crocker, Chairman of the Board
Mr. Fadi Chehade, President and CEO
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Key Brand Entertainment Inc. / KBE gTLD Holding Inc. Additional Response to GAC Category 2 Advice

Dear Dr. Crocker and Mr. Chehade:

We thank you for the opportunity to engage in a continued dialogue regarding our new gTLD applications. In consideration of the ongoing and most recent GAC Category 2 Advice (the “Advice”), we now respectfully provide an additional response to ICANN, the Board, the GAC and the New gTLD Program Committee (collectively, “ICANN”).

Key Brand Entertainment Inc. and its wholly-owned subsidiary, KBE gTLD Holding Inc., the applicant for .theatre (collectively, “KBE” or “Applicant”), would like to preface this response by referencing our May 10, 2013 Applicant Response to GAC Advice issued in response to the GAC Beijing Communique (the “Beijing Response”). In the Beijing Response, Applicant provided our company background, described the objectives of our application and addressed specific portions of the GAC Beijing Communique, all of which continue to be germane to the Advice and this additional response.

KBE is the operator of the preeminent website for online Broadway and theater ticket sales and related services, content and information as well as one of the world’s leading developers, producers, presenters and distributors of live theater and stage shows. As owner and operator of the industry-leading broadway.com and theatre.com websites as well as a robust portfolio of other Broadway- and theater-related domain names, KBE offers a full range of online services and features, including consumer ticketing, group sales and complete editorial coverage of

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Broadway presentations in New York City and over 40 other markets. Additionally, through its Broadway Across America and Broadway Across Canada businesses, KBE serves as a leading Broadway producer and presenter of first-class touring productions in more than 40 cities across the United States, Canada, the United Kingdom and Japan. As such, KBE is one of the world's leading brands in the Broadway and theater industry with well-recognized global brands serving as authoritative sources for high-quality content, services, information and industry news.

Within this context, there are constant challenges that KBE and other legitimate industry participants face as operators of online content and sales properties and that the general public faces as consumers of their content and services. The most difficult of these is competition with unlicensed and unauthorized ticket sellers who impersonate legitimate third parties (e.g. shows, venues, actors, etc.) and, by leveraging their goodwill, drive traffic away from legitimate sources. These unscrupulous actors impersonate intellectual property rights holders and mislead the public. Their actions are extremely damaging to the shows and venues, legitimate ticket resellers, the theater industry, and ultimately and most importantly, the public as a whole. The problem is pervasive not only in the United States but globally. Policing it is increasingly difficult given the sophistication of infringers, counterfeiters and scalpers. The lack of enforcement of existing laws globally is complicated by the sheer number of shows, venues and other theater-affiliated stakeholders, all of whom are targets of infringers and counterfeiters. This practice is rampant in the theater industry and undermines and infringes upon the trademark and other intellectual property rights of legitimate constituents of the theater industry.

In operating its gTLDs as stated in its applications and in accordance with all ICANN guidance, directives and contractual obligations, including the Registry Agreement and all of the Specifications, KBE will serve a public interest goal by protecting intellectual property rights holders, the industry, and, most importantly, the general public from the above articulated predatory and harmful behavior. As a leading participant in the theater industry, KBE has historically served as a promoter and custodian of both the physical and digital space within which it and the theater community operate for the benefit of the public at large. KBE has been successful in the past at combatting the unauthorized and illegal practices that have damaged the general public in its wholesale interaction with the theater industry. KBE has served, and will continue to serve, a public interest goal by protecting the integrity and safety of that space for the public at large when interacting with the theater industry and its community as customers, partners and contributors.

In sum, KBE will undoubtedly "serve a public interest goal" by creating a cohesive digital space that strikes a tactful balance between providing quality, enjoyable and meaningful theater-related content, services and opportunities for community engagement while maintaining a safe, constructive and controlled environment that protects the public from the predatory and harmful behavior of infringers, counterfeiters and scalpers.

Lastly, Applicant feels it necessary to again articulate its position on the Advice within the context of the new gTLD program as a whole. As we have stated in the past, Applicant maintains its position that the Advice is inconsistent with the rules, policies and procedures contained in the Applicant Guidebook ("AGB") and the open multi-stakeholder process that created it. The AGB embodied the rules for application for new gTLDs and the iterative process of the AGB was documented along the way. The final AGB published prior to the application window closing did not differentiate between open versus closed business models or mention

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“closed generics”. In fact, the debate leading up to the final version of the AGB, one which included extensive input from the ICANN community including GAC constituents, contemplated the validity of different registry and business models (e.g. sponsored, open, community, etc.) as well as the idea of restricting and even disallowing “closed generics”. Ultimately, the GNSO and the Board decided against creating such distinctions with the understanding that the business model and operation of the gTLD would be determined by the applicant. As long as the application passed evaluation pursuant to the AGB criteria and complied with the Registry Agreement, the business model and operating rules of that gTLD (including whether the applied-for string was to be “open” or “closed”) were to be determined by the applicant. KBE relied in good faith on the AGB and the authoritative guidance available to it at the time of application. KBE and all applicants have made significant investments and taken positions in reliance on that guidance, which if changed retroactively would negatively impact the new gTLD program, its applicants and ICANN.

Thank you for your time and consideration on this matter and we look forward to and hope for meaningful progress on these issues.

Sincerely,

Matt Kupchin
Co-CEO, Interactive Division

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Respondent:

Application Prioritization Number	117
Applicant Name	Lifestyle Domain Holdings, Inc.
Application ID	1-1326-50608
Applied for TLD (string)	.FOOD

Response:

Thank you for the opportunity to provide further information regarding our application for the .FOOD gTLD in response to the GAC Category 2 Safeguards for Exclusive Access Registries. In this response, we have provided more details about our intended use and why this serves the public interest, as well as voice our strong concerns about the policy decisions being made that have significant financial consequences to applicants in direct contrast with the policy set forth in the Application Guide Book (AGB).

BACKGROUND

As background, Scripps Networks Interactive, Inc. is a publicly-traded company in the United States, and is the parent entity of its solely-owned subsidiary Lifestyle Domain Holdings, Inc., the applicant for .FOOD (collectively “Scripps”). Scripps is one of the world’s leading developers of lifestyle-oriented content for many media platforms, including television, digital, mobile and publishing. Scripps’ portfolio includes some of the most popular and famous media brands in the world, including Food Network, Food.com, HGTV, Travel Channel, Cooking Channel and DIY Network. Scripps has applied for numerous gTLDs related to its brands, including its famous FOOD brand.

Scripps has been operating its famous television network under the brands FOOD and FOOD NETWORK for twenty years, and its television programming is currently watched in over 150 countries around the world, including 24 hour networks in the U.S., Great Britain, Asia, India and Africa. Consumer research has ranked Scripps’ Food Network (which is branded on-air as “FOOD,”) as the #1 favorite ad-supported cable channel in the United States, and international distribution of Scripps’ FOOD programming continues to grow at a fast pace given the worldwide popularity of its content. Scripps’ FOOD branded programming is enjoyed by almost 100 million television subscribers in the United States alone, and tens of millions more individuals throughout the world. Scripps’ foodnetwork.com website averages over

225 million visitors each month, and Scripps' FOOD brand is the #1 brand relating to cooking and the culinary arts in social media with over 5 million collective fans and growing. Scripps expends approximately \$30 million per year marketing its FOOD and FOOD NETWORK branded shows and products, and Scripps' programming is often the subject of considerable attention from other branches of media, including coverage in leading newspapers, magazines and radio and television talk shows. Further, Scripps' FOOD brand represents more than eight hundred million dollars (USD \$800,000,000) in annual revenue.

In addition to Scripps' famous television network, Scripps has been operating a well-known website featuring recipes and information on cuisine and meal planning under the brand FOOD.COM since 2010. That website currently enjoys over 20 million visitors each month, and the brand has a rapidly-growing social media following of over 300,000 fans.

FOOD APPLICATION & INTENTIONS

Scripps has applied for .FOOD as a brand extension of its famous global brands FOOD, FOOD NETWORK and FOOD.COM. As stated in our application, the mission of .FOOD is to provide diverse internet users an enhanced online experience through high quality programming, content, information and authentic connected experiences centered on cuisine, cooking, recipes, restaurants, home life, entertaining, and other related concepts, topics and activities. The reputation of Scripps' family of lifestyle brands is well-recognized as a single source for high quality entertainment, instruction, information, education and tips and tools to better enjoy life, make improvements inside and out of the home, cook, eat, travel and enjoy new experiences in an ever increasingly connected world. The quality of content and level of service provided to its customers is highly regarded as the single most trusted source for fun and interesting educational entertainment for lifestyle related activities generally and for cooking, cuisine and meal related activities more specifically with regard to .FOOD.

Internet users will benefit from the .FOOD TLD because it will provide an enhanced online experience connected to the existing family of Scripps' lifestyle branded .coms through its ability to build more personalized experiences for Internet users and provide greater control over its second level domains as a registry operator. It will provide authenticity to internet users with assurances that they have found the high quality information they have come to expect from Food.com.

Maintaining distribution and content control over the top level domain is critical to ensure that the same high quality, integrity and authentic experience is delivered to internet users under our famous FOOD, FOOD NETWORK and FOOD.COM brands. To open the top level domain means that anyone could register a domain for a small annual amount of money and exploit, confuse and infringe upon the brand equity and goodwill of the famous FOOD, FOOD NETWORK and FOOD.COM brands established by Scripps with more than twenty years and hundreds of millions of

dollars in investment. This not only harms and misleads the public, but is contrary to the general consensus of global public and legal policy that seek to protect the investment made by brands in developing goodwill associated with its products and services. In this instance, as defined in more detail below, FOOD's brand is for programming, content and instruction provided on-line and via television networks. Accordingly, any use of a domain including the allowance of a .FOOD top level domain that is not owned and operated by Scripps in relation to its famous FOOD, FOOD NETWORK and FOOD.COM brands would directly infringe upon our trademark rights as recognized in multiple jurisdictions across the globe.

We have provided support below of our global trademark rights and evidence of internet user and consumer connection with FOOD as a brand source indicator of our famous brands FOOD, FOOD NETWORK, and FOOD.COM in Annex One. Furthermore, we have provided a policy recommendation with regard to brands in order to provide all internet users fair access to the internet balanced with protecting brands and the public policy associated with protecting and recognizing brands for developing good will, as well as following the spirit and tenets of the AGB, on which these applications were founded.

PUBLIC INTEREST IN OPERATION OF .FOOD

While we respectfully understand the GAC concerns set out in the Communique following ICANN 46, 47 and 48 to provide for equal access to the Internet, we urge you to consider an alternative policy for brand applicants with global registration and proof of a consumer connection between the brand name and their products and services. We also urge you to consider the public interest that may be served in following the AGB as originally set out and in allowing brands to provide a more secure and authentic experience in a closed or exclusive access top level domain.

In addition to the specific trademark registration evidence, Scripps' FOOD and FOOD-variant brands have developed unique and distinctive meaning as the one authentic source for high quality, trusted programming, instruction, advice, products and services relating to cuisine and the culinary arts. Internet users and consumers around the world regularly rely upon the goodwill and reputation associated with Scripps' FOOD brands in seeking out culinary content and advice. If the .FOOD gTLD were to be available to another party to resell second string domains to the general public on an unrestricted basis, it would irreparably damage the goodwill associated with Scripps' FOOD and FOOD variant brands and the products and services provided by Scripps by eroding consumer confidence in the brand as an authoritative source of information, programming, content and advice, and would ultimately confuse and mislead the public into believing that the content, information and/or products in the .FOOD top level domain is provided by Scripps. Internet users and the public will not only be confused, but harmed as a result of such confusion.

FOOD is commonly known by consumers as the famous FOOD brand as a source indicator to Scripps Networks high quality programming and content. In addition to

the viewership and social media metrics already cited, as further evidence of the consumer connection between the FOOD marks and Scripps, it is telling that the first organic search result from popular web searches for “food” is Scripps’ website.

If .FOOD were to be open to second string domains, the millions of consumers with known source identification to FOOD as a media source will be confused and potentially harmed when they find information and content that does not meet the same standards. Whereas, Scripps’ intended use of the top level domain is to provide internet users and the public a safe, authentic environment to find content about cooking, cooking instruction, food preparation, entertaining and lifestyle related content associated with meals, with the security of knowing it is associated and connected with the famous FOOD brand. The goodwill associated with that famous FOOD brand is based upon more than twenty years of global operations and substantial investment in building that brand loyalty. Global trademark policies support protecting the investment made to acquire that goodwill and recognize the secondary meaning that is derived when that investment is made. In support of the above, we have attached a list of the Food Trademarks. More evidence and support can be provided if needed for your review of this matter.

Internet users will benefit more from Scripps operating .FOOD because it will provide more trusted experiences. Left open to the wild west of typosquatters and cybersquatters or fraudulent users, internet users will be harmed rather than helped. With a plethora of unregulated websites in a fully open registry, the public could be misled or confused as to the origin of the content and information and rely, to their detriment, on such content.

Phishing, pharming, cybersquatting, and other forms of Internet fraud proliferate in unrestricted TLDs like .com, because anyone can register a domain name in them, without any verification of rights or intended use, and the full burden of monitoring and stopping these fraudulent uses of domain names falls primarily on the companies whose names or marks are being used to perpetrate the fraud, or in some cases government/law enforcement.

As the Board is surely aware, the number and sophistication of Internet scams sent out to the public is continuing to increase dramatically. One of the most common ways is through fraudulent websites which solicit the consumer for sensitive information, which the consumer provides because it recognizes the company or brand name. Such domain names incorporating and/or resembling well-known company names and marks can be used to set up fake websites that can trick the public to enter their personal, password, or financial information. In addition, public trust has been eroded by unauthorized and inaccurate sources of information. Protecting this domain space from abusers is the very definition of a public interest. Since the .FOOD TLD would be securely restricted to only Scripps, its affiliates, and its trusted partners, the public will benefit by accessing content and information in the .FOOD top level domain that is authentic, verified and accurate

rather than in a wild west of bad actors securing .FOOD domains that may mislead or confuse internet users. Additionally, the vast new opportunities on the internet with 900+ new generic top level domains create substantial opportunities for internet users to find domain names in such spaces as .cooking, .recipes, .cafe, which will not be limited by allowing .FOOD to proceed based upon the AGB as an exclusive access registry, in parity with the other brand applicants.

POLICY CONCERNS & RECOMMENDATIONS

We believe that in weighing the balance of interests, the Board must consider that while a generic term is generic in one context it may not be generic in another. If the term is applied to an alternative or non-descriptive product or services and/or acquires secondary meaning, then it is not considered generic and is afforded trademark protection in jurisdictions around the globe, and should in this instance be permitted to pursue the application as a brand, exclusive access registry.

Consider for a moment the following trademarks and brand TLD applications: Live, Delta, Apple, A Family Company, Blockbuster, Home Depot, Frontier, Guardian, Jaguar, Juniper, Northwestern, Observer, Virgin, Yellow Pages, The Weather Channel, Good Year, etc. Each of these comprise terms which have acquired secondary meaning and distinctiveness as a brand and yet could also be considered a generic term in a different context. Additionally, there are many other famous brand trademarks such as American Airlines, Best Buy, World Market or Frosted Flakes which acquired secondary meaning and have been recognized as famous incontestable brands.

While we acknowledge that brand rights of these terms may give a brand control over that top level domain and ostensibly cut off the right for any other party to acquire a sub-domain using that same term, the greater good as a policy should be considered. There is no restriction in applying for these terms under a .com or under a .cc, so why should there be a restriction as a gTLD?

In support of this position, the final AGB contemplated such applications and permitted brands to invest in new top level domains, a process in which the GAC and the Board participated. To now change the rules after substantial time and investment is made is inherently unfair and goes against traditional policy and legal principles. In fact, in the GNSO meeting held 14 February 2013, this exact issue was discussed with regard to “closed generics”. Pursuant to the transcript, Councilor Jeff Neuman, stated that the GNSO had discussed this exact issue and had agreed that there would be no opposition if, for instance, Kraft Foods had applied for .food. *See Annex Three*. While the Board must consider the fair access to the internet and create a fair and equal balance of power, the purpose of the expansion was to create more consumer choice, as well as foster innovation by brands to utilize the internet in more meaningful ways to connect with the public.

Ultimately, we understand you must address the policy question: “why should you allow a brand applicant to proceed as an exclusive registry if it could also be considered a generic term?” The answer is clear: (i) to support a global trademark system that recognizes consumer goodwill associated with a brand and intends to avoid confusion or misleading to the public; (ii) to acknowledge companies for investing in that goodwill, integrity and brand equity, which benefits internet users, (iii) because the public will likely have a better experience with the brand if there is an authentic top level operator as opposed to a disorganized, top-bidder approach to the acquisition of top level domains (i.e. who is better situated to ensure authentic, safe and secure environment), (iv) because there is still a wide open landscape of other open top level domains to provide for consumer choice without infringing on a famous global brand (i.e. in this instance .restaurants, .pizza, .cafe, .bar, .coffee, .cooking, .kitchen, .eat, .health, .recipes, .fish, .wine, .pub, . or any of the other 900+ new open generic terms to launch, and (v) because new opportunities will be created to apply for other related names in future rounds of gTLDs. Ultimately, the question is: are you creating a better internet environment by opening this domain to anyone, including bad actors, or is recognizing a global brand by simply allowing them to proceed as provided for in the AGB furthering the goals of the gTLD program?

Accordingly, we recommend that the Board consider a policy for brands which have developed secondary meaning in an otherwise generic term as their brand. These brands should still be afforded that exclusive access so long as they have sufficiently provided evidence of: (i) valid trademarks in more than one jurisdiction, (ii) supporting evidence of a consumer connection to the brand rather than the generic term, and (iii) longstanding use of the brand and investment in building brand loyalty and equity.

This furthers trademark rights that value consumer goodwill with a brand and rewards companies for building goodwill and integrity associated with their brand, as well as protects internet users from a misleading top level domain open to anyone.

Additionally, while the GAC has included .FOOD in its list of “closed generics” it is important to recognize that we are not, pursuant to our application, providing exclusive access to sell food in such a way as to restrict others from obtaining a .food domain name, but rather extending its current brand offerings from FOODNETWORK, FOOD and FOOD.COM. “Not every dictionary term is of relevance because the majority of applications that seek to employ ‘closed’ registration policies are for terms which, when viewed as trademarks, do not hinder competition, because they are not generic with respect to the goods and/or services sold in connection with those terms.” *See the IPC Memorandum attached as Annex Two.*

If the GAC intended to express concerns about specific applications, the expectation is that it would have articulated such concerns on a case-by-case basis, taking into consideration the specifics of each string, application, and applicant. Instead, the

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GAC has selected specific strings and identified them as “closed generics” without regard for the application, the applicant, nor the brand and trademark implications associated with such a selection.

Furthermore, the strings identified in the GAC Communique have no basis in the AGB, which only specifies two types of applications: community-based and non-community-based. The AGB makes no mention of, or distinction between, restricted or unrestricted TLDs, because the AGB allows each applicant to set its own registry restrictions and business models in order for innovation and competition to flourish. The Board should not be rewriting the AGB at this late date and the GAC should follow its principles to review new applicants for gTLDs in a transparent manner with predictable criteria available to the applicants prior to this process. The GAC is changing the rules without any clear criteria.

The implications of this policy based decision making by the GAC and Board will cause significant and irreparable economic harm to us. We relied upon the AGB in making investment decisions.

Finally, we respectfully request that the Board provide clarification on what it means to agree to be non-exclusive. Many other brands have indicated in a yes or no questionnaire provided by ICANN that they will change their application from an exclusive access registry to a non-exclusive access registry. What exactly does that mean? In the letter from Heather Dryden of 29 October 2013, those applicants are now permitted to move forward, but with what accountability or policy definition of what is exclusive versus non-exclusive access? How can the Board simply allow some to go forward because they check yes to a box without more detailed review and revisions to such applications?

FURTHER ASSURANCES AND SAFEGUARDS

As stated in our application for .FOOD, “[t]he [.FOOD] gTLD will provide an authentic and authoritative Internet space for content, where the trusted services and resources of its affiliates, and partners will be closely controlled and made available to people around the world.” As such, the .FOOD TLD will be a securely restricted TLD which will initially only allow registration of second-level domain names by Applicant, its affiliates, and trusted partners, for which registrant criteria has been specified by us in our application. As such, we are confident that there is minimal risk of domain names under the .FOOD TLD being registered using deliberately false, inaccurate, or incomplete WhoIs data.

We have detailed our abuse prevention and mitigation and rights protection mechanisms in question 28 and 29 of the application and incorporates these provisions by reference to this response. Our intention is to operate the TLD with the highest possible standards to protect the public and internet users from abuse and believe operating it as an exclusive registry further supports these safeguards.

CONCLUSION

In summary, there are several key reasons that the public will not be harmed and, in fact, will benefit from Scripps operating the top level domain .FOOD: (i) demonstrates ICANN's support of a global trademark system that recognizes consumer goodwill associated with brands and avoids consumer confusion; (ii) recognizes companies that invest in that goodwill, integrity and brand loyalty and encourages companies to develop the goodwill that benefits the public interest; (iii) provides the public a better experience as an authentic source indicator rather than misleading into a safe and unsecure environment open to anyone; (iv) there is still a wide open landscape of other top level domains available in the 900+ generics which are open systems and available to internet users everywhere; (v) new opportunities will be available in future rounds to apply for food related top level domains; (vi) the AGB contemplated such closed brand domains and this is changing that policy at a late date in the process, penalizing brands who invested in the future of the Internet.

We thank you for your consideration of these matters and invite further discussion with you regarding the importance of allowing our application to proceed as intended for the benefit of internet users around the globe.

ANNEX ONE - Trademark Rights in the Famous Brand FOOD

In further support of our statements and positions above, we have provided a brief overview of our global trademark rights below:

- Trademark rights are held by Scripps in the mark "FOOD" for "entertainment services, namely, an on-going audio and visual program distributed over television, satellite, wireless, audio and video media, fiber optics, cable, and a global computer network in the fields of cooking and culinary arts, health, fitness, and nutrition." The mark has been registered on the Principal Register in the United States as Trademark Registration No. 4,049,665 since 01 November 2011.
- Trademark rights held by Scripps in the mark "FOOD" for "providing information via a global computer information network in the fields of cooking and culinary arts." The mark has been registered on the Principal Register in the United States as Trademark Registration No. 3,658,544 since 21 July 2009.
- Trademark rights held by Scripps in the mark "FOOD" for "entertainment services in the nature of ongoing television programs in the field of cooking and culinary arts, health, fitness and nutrition; production and distribution of television programs." The mark has been registered on the Principal Register in the United States as Trademark Registration No. 3,658,543 since 21 July 2009.

- Trademark rights held by Scripps in the mark “FOOD” for “cable television broadcasting services.” The mark has been registered on the Principal Register in the United States as Trademark Registration No. 3,658,542 since 21 July 2009.
- Scripps also holds other marks on variants of FOOD, including “FOOD.COM” and “FOOD NETWORK,” among others. These marks are registered in seventy-five (75) or more countries around the world for more than twenty years. A complete description of the FOOD and FOOD-related portfolio of marks held by Scripps is provided and attached.
- Scripps’ acquisition and use of rights in the FOOD mark(s) has been bona fide as evidenced by the fact that those marks have been registered in more than seventy-five jurisdictions, in many instances for more than twenty years, in identifiable and legitimate classes of goods and services that have consistently been associated with the FOOD brand including, but not limited to, television broadcasting and entertainment services, online entertainment and information services, sweepstakes and contests, and other related goods and services.

ANNEX TWO – IPC Public Comments on Closed Generics.

ANNEX THREE – GNSO Transcript 2013 February

Comments of the GNSO Intellectual Property Constituency (IPC)
“Closed Generic” gTLD Applications

15 March, 2013

<http://www.icann.org/en/news/public-comment/closed-generic-05feb13-en.htm>

INTRODUCTION

A dramatic expansion of the Internet domain name space has been planned for many years through various iterations of the New gTLD Applicant Guidebook and is now imminent, with many hundreds of applications for new generic top level domains (gTLDs) pending. A substantial number of applications involve applied-for names that appear “generic” with “closed” registration policies¹. The purpose of this comment is to consider these issues to the extent relevant and possible within established legal frameworks that are generally acceptable under international principles of law.

When ICANN announced its plan to increase the number of gTLDs available in the Domain Name System (DNS), one of its stated goals was to enhance competition and choice.² Consistent with the rules as established for introducing new gTLDs by ICANN through its New gTLD Applicant Guidebook (the “Guidebook”), many applicants filed applications for top-level domains for common industry terms with the stated goal of controlling the domains as “closed” registries.

The IPC is pleased to provide the following comments on this important issue³.

A. What is a “Generic” string?

The IPC recommends that in determining whether a TLD is considered “generic” there must be an initial analysis of whether the applied-for TLD is a word that is a genus of a quality, feature, function, or characteristic of the stated mission and purpose of the applied-for TLD in its answer to question 18(a). We recognize that this analysis is not a bright line analysis and there are several nuances to the relatively straight-forward test set forth above.⁴ For instance, a word that has been used on a wide range of different types of products or services that are not within the same species may be less likely to be considered generic. *See 2 J. Thomas McCarthy, McCarthy*

¹ See Discussion *infra* regarding “what is a ‘generic’ string?”

² See, <http://newgtlds.icann.org/en/about/program>

³ IPC President Kristina Rosette did not participate in the discussions or the drafting of this comment. IPC member Intellectual Property Institute of Canada also wishes to be on record as abstaining on this topic

⁴ Compare, for instance, the holding of *In re Reed Elsevier Properties Inc*, 482 F.3d 1376, 82 USPQ2d 1378 (Fed Cir. 2007) (LAWYERS COM generic for “providing an online interactive database featuring information exchange in the fields of law, legal news and legal services”) with *In re Steelbuilding com*, 415 F.3d 1293, 75 USPQ2d 1420 (Fed Cir. 2005) (STEELBUILDING COM not generic for “computerized on line retail services in the field of pre-engineered metal buildings and roofing systems”)

on Trademarks and Unfair Competition § 12:23 (4th ed. 2009). Moreover, a proper analysis requires an in-depth factual investigation of the relevant public's understanding of the alleged generic term.⁵

Additionally, the weight given to the analysis will depend upon the intended purpose of the TLD. When the generic term describes the class, certain courts have found such use to be descriptive rather than generic. *In re Waverly Inc.*, 27 U.S.P.Q.2d at 1623. In *In re Waverly Inc.* the Board found that the mark MEDICINE was not generic for medical journals, but rather descriptive. *Id.* In reaching this decision, the Board noted that “[c]ourts have been reluctant to find a magazine title generic, perhaps in part because the magazines in such cases were not literally the class title designated but were *about* that class.” *Id.* at 1622 (quoting *CES Publishing Corp v. St Regis Publications, Inc.*, 531 F.2d 11, 188 U.S.P.Q. 612, 615 (2d Cir. 1975) (emphasis in original)). The Board in *In re Waverly Inc.* considered the competing interests of allowing magazine subscribers to more easily locate publications (by tolerating greater suggestiveness in magazine titles), enabling subscribers to differentiate among publications in the same field (by allowing registration of publication names whenever appropriate), while still protecting competition among publications (by forbidding registration of marks that would foreclose competition). *Id.* at 1623. As a result, it is possible that an applied-for closed TLD with a purpose to provide information on that genus may be considered non-generic.

B. Two categories of applications for gTLDs do not present the concerns that gave rise to this request for public comment.

Traditional principles of trademark law provide a foundation for distinguishing among categories of gTLDs, and identifying whether any categories may require further review. It is necessary to distinguish between those categories of new gTLDs that are *prima facie* consistent with traditional legal principles and other categories of applications. Those categories that do NOT raise the potential concerns that gave rise to this request for comments are: (a) “closed” gTLDs that identically match the applicant’s trademark for the same or related goods or services to be provided in connection with the proposed TLD - regardless of whether or not those TLDs are also ordinary dictionary terms (i.e. “brand”); and (b) “closed” or “restricted” TLDs⁶ that consist of terms used by communities or associations and will be used by members of the community or association (whether the term is owned by an association or eligibility is limited to members of the category described by the term—e.g. banks in .bank or charities in .charity).

⁵ In the U.S., the Trademark Manual of Examining Procedure and relevant case law require substantial proof of examples of use of the generic term clearly used by both the applicant or competitors to refer to a genus or class of the products or services. TMEP § 1215.05 (citing *In re DNI Holdings Ltd.*, 77 U.S.P.Q.2d 1435 (TTAB 2005)).

⁶ While IPC’s comments do not propose a definition of “closed”, we stress that “closed” and “restricted” are not synonymous terms and should not be treated as such.

As evident above, not every dictionary term is of relevance because the majority of applications that seek to employ “closed” registration policies are for terms which, when viewed as trademarks, do not hinder competition, because they are not generic with respect to the goods and/or services sold in connection with those terms. For this reason, we again strongly encourage ICANN to recognize a specific “.brand” category of TLDs for which the registry would presumptively be able to set the policy requirements for second-level registrations. ICANN has repeatedly referenced “.brand” TLDs on its website and in its program materials dating back to its first announcement of new gTLDs in 2008.⁷

Such a category could conceivably form a replacement to the single-registrant-single-user exception from the Registry Operator Code of Conduct, an exception that was designed, at least in part, for the “.brand” registry - but was drafted more broadly, in a way that allowed “closed generic” registries to claim an exemption from the Code of Conduct. In determining whether a TLD qualifies as a “.brand”, the criteria should exactly match the criteria for inclusion and Sunrise eligibility in ICANN’s Trademark Clearinghouse. Such requirements include proof of use, and either a national or regional trademark registration; a trademark validated through a court of law; or a trademark protected by statute or treaty.

An additional group of applications appear to involve terms controlled by communities or associations where protection is again consistent with the traditional legal framework. Similarly, a registry for a “generic” term that incorporates eligibility requirements relevant to the meaning of the term itself (for example, a .pomegranate registry limited to pomegranate growers) is permissible and would not fall under the definition of “closed generics”. This might be particularly appropriate in regulated industries (for example, a .bank registry limited to chartered banks or a .charity registry limited to bona fide charities in good standing), or in sectors where there are particular sensitivities to fraud, counterfeiting, IP infringement, and other consumer-abusive behaviors.

C. Concluding Observations

The IPC notes that some of its members have submitted public comments through their respective IP Organizations, companies or law firms or as individuals. We refer ICANN staff to these submissions for additional input and consideration on this complex topic.

The IPC believes that any decision by ICANN on this issue must be categorically without prejudice to determinations by national trademark offices and courts with respect to (i) the concept of a prohibition of generic terms as trademarks, and (ii) their evaluation of domain names (whether at the top, second, or other level) as trademarks.

⁷ See ICANN New gTLD Program materials (slide 7) at: <http://archive.icann.org/en/topics/new-gtlds/basics-new-extensions-21jul11-en.pdf>

Finally, the IPC reiterates its request for ICANN to disclose any third-party analysis or independent research commissioned by ICANN in association with this public comment topic.

Thank you for considering our views on these important issues. The IPC looks forward to participating in any policy-development or implementation steps taken by ICANN in connection with so-called “closed generics” as well as the post-delegation review of new gTLDs, and their impact on consumer trust, choice, and competition.

Respectfully submitted,

Steve Metalitz, IPC Vice President

**Transcript GNSO Council Teleconference
14 February 2013 at 11:00 UTC**

Note: The following is the output of transcribing from an audio recording of the GNSO Council teleconference on 14 February 2013 at 11:00 UTC. Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at: <http://audio.icann.org/gnso/gnso-council-20130214-en.mp3>
on page :

<http://gnso.icann.org/calendar/#feb>

The Adobe Chat transcript is also posted on this page and can be directly viewed at:
<http://gnso.icann.org/en/meetings/chat-transcript-council-14feb13-en.pdf>

List of attendees: NCA – Non Voting – Jennifer Wolfe

Contracted Parties House

Registrar Stakeholder Group: Mason Cole, Yoav Keren, Volker Greimann

gTLD Registries Stakeholder Group: Jeff Neuman, Jonathan Robinson, Ching Chiao

Nominating Committee Appointee (NCA): Thomas Rickert

Non-Contracted Parties House

Commercial Stakeholder Group (CSG): Wolf-Ulrich Knoben, Zahid Jamil, proxy to John Berard in case needed, John Berard, Osvaldo Novoa, Brian Winterfeldt, Petter Rindforth

Non Commercial Stakeholder Group (NCSG): Maria Farrell, Joy Liddicoat - absent, apologies, temporary alternate Norbert Klein, Magaly Pazello, absent proxy to Maria Farrell, Wendy Seltzer, David Cake, Wolfgang Kleinwächter, absent proxy to David Cake

Nominating Committee Appointee (NCA): Lanre Ajayi

GNSO Council Liaisons/Observers:

Alan Greenberg – ALAC Liaison

Han Chuan Lee– ccNSO Observer

ICANN Staff

Akram Atallah - Chief Operating Officer

David Olive - VP Policy Development

Rob Hoggarth - Senior Policy Director

Margie Milam - Senior Policy Counselor

Marika Konings - Senior Policy Director

Julie Hedlund – Policy Director

Barbara Roseman – Policy Director

Berry Cobb – Policy consultant

Brian Peck – Policy Director
Carlos Reyes – Policy Analyst
Lars Hoffmann – Policy Analyst
Karen Lentz - Manager, Business, Research & Content
Glen de Saint Géry - GNSO Secretariat
Eric Evrard- Systems Engineer
Guest
Chris Disspain – ICANN Board

Coordinator: The call is now being recorded, please go ahead.

Glen de Saint Géry: Thank you. Good morning, good afternoon, good evening everyone. This is the Council call. And on the call we have Jeff Neuman.

Jeff Neuman: Present.

Glen de Saint Géry: Ching Chiao.

Ching Chiao: Present.

Glen de Saint Géry: Jonathan Robinson.

Jonathan Robinson: Present.

Glen de Saint Géry: Mason Cole.

Mason Cole: Here.

Glen de Saint Géry: Yoav Keren.

Yoav Keren: Here.

Glen de Saint Géry: Volker Greimann.

Volker Greimann: Present.

Glen de Saint Géry: Thomas Rickert.

Thomas Rickert: Present.

Glen de Saint Géry: Zahid Jamil.

Zahid Jamil: Present.

Glen de Saint Géry: And may I also mention that we have a proxy for Zahid Jamil which will be carried by John Berard in case Zahid has to go off the call for some business matters.

John Berard.

John Berard: I'm here.

Glen de Saint Géry: Brian Winterfeldt.

Brian Winterfeldt: Present.

Glen de Saint Géry: Petter Rindforth.

Petter Rindforth: Present.

Glen de Saint Géry: Osvaldo Novoa.

Oswaldo Novoa: Present.

Glen de Saint Géry: Wolf-Ulrich Knoben.

Wolf-Ulrich Knoben: Present.

Glen de Saint Géry: Maria Farrell. Maria is in transit but she will be on the call and she has the proxy for Magaly Pazello who will not be - who is absent.
Wendy Seltzer.

Wendy Seltzer: Yeah, hello.

Glen de Saint Géry: David Cake.

David Cake: Present.

Glen de Saint Géry: And David Cake is carrying the proxy for Wolfgang Kleinwachter who will not be able to be on the call. Norbert Klein.

Norbert Klein: I'm here.

Glen de Saint Géry: Norbert is the alternate for the - the temporary alternate for Joy Liddicoat who is still on vacation. Lanre Ajayi.

Lanre Ajayi: Present.

Glen de Saint Géry: Jennifer Wolfe.

Jennifer Wolfe: Yes, present.

Glen de Saint Géry: Alan Greenberg.

Alan Greenberg: Present.

Glen de Saint Géry: Han Chuan Lee. Absent.

And for staff we have David Olive, Marika Konings, Julie Hedlund, Rob Hogarth, Barbara Roseman, Brian Peck, Berry Cobb, Lars Hoffman, Carlos Reyes, Eric Evrad from our technical staff, Margie Milam, myself, Glen de Saint Géry. And we have on the call with us Chris Disspain from the ICANN Board. And I see that Han Chuan Lee has just joined the call.

May I just remind people please to say their names before speaking for transcription purposes. And, Jonathan, I think that's over to you. Thank you. Have I left anybody off? Thank you, Jonathan, over to you.

Jonathan Robinson: Thank you, Glen. Thanks and welcome everyone and welcome especially to Chris. Good to have you here, Chris. Can I call now under Item 1.2 for any updates to statements of interest please?

Glen de Saint Géry: Jonathan, this is Glen. Just to note that Maria Farrell has updated her statement of interest.

Jonathan Robinson: Thank you, Glen. I think we, under Item 1.4 then, note that the status of the minutes of the Council - these were published in accordance with the Council procedures. Are there any comments on that last set of minutes that anyone would like to make?

All right moving swiftly on then to Item 2 which, as you know, I've been starting each meeting with a couple of opening remarks. I'm not going to take much of your time. Many of themes remain the same. So, Glen, if I could have that slide up and just highlight a couple of points please?

That's a good point. Did you receive a slide from me, Glen?

Glen de Saint Géry: No I didn't, Jonathan.

Jonathan Robinson: All right, fine. Let me just talk through a couple of key points then and I can always forward you a slide after the meeting. As you know I've really focused on three key strategic points really; our effective internal working as a Council, some of our key external relations and workload management.

I was really encouraged by the work that we managed to do on what was essentially a contentious issue with the GAC letter. Whilst we didn't all agree the tone was positive and constructive and I think we produced a thorough piece of work so hopefully we can take that same spirit into the work on the Strawman, which is challenging us and some of the other items we've got to work on.

I've continued and I know other councilors have to work on some of our key relations with respect to the GAC, the Board, constituency and stakeholder group chairs, other SOs and ACs. And I will continue and encourage all of you to reach out and to explain the Council's function, which is not always as well understood as it could be and the content of the work we are doing.

And of course we've, in the interim, had the meeting in Amsterdam with the staff, the Council leadership, and we'll touch on that a little bit more later. And one of the key outcomes of that is a small but significant detail where we're running an ongoing action list, as you will have seen.

Our project list was comprehensive if somewhat unwieldy and so we've distilled down a shorter and more functional short-term action list which we intend to update after each Council call, circulate mid-month and then recirculate ahead of the next Council meeting.

So I hope you'll find that helpful. Please pay attention to it. It's short. We'll try and keep it down to just one or two pages of key actions that have either been committed to by individual councilors or groups of the Council and to keep our work running effectively and smoothly.

And as you know all of this is really about trying to ensure that the Council is both productive and effective and either is or becomes well-respected for the work and its throughput and quality of work.

We won't rest on our laurels. I'll focus on continuous improvement and the tone of, you know, collaboration and consensus oriented work so that we produce output that reflects that.

I've talked with some people about process and been reminded that, you know, in many ways this is all about process; it's about following the operating rules and procedures and that's what is a very essential component of the way in which the Council works.

But nevertheless as we all know at times process has been used for process's sake and to that extent while valuing the effective process we've got to not ever indulge in process for its own sake.

We've got a number of challenging items to cover here. I think I'm not going to try and anticipate the agenda. We've all seen the agenda and will work through it now and try and stick to time and work through it effectively.

Touching for a moment on the action list then as I said, we did complete our response to the GAC just in time according to our own deadline. We get to work on the ATRT, on the ATRT endorsements. We've had a communication from the selectors. I don't believe - and someone please feel free to correct me if I'm mistaken here - but I don't believe we've had a communication of who has actually been selected rather a response to our endorsements.

Petter, is there something that you would like to say? Let me just - I see your hand is up and make sure I come to you.

Petter Rindforth: Yeah, sorry, for the next point is - several minutes so like a quick question on the status of the Fake Renewal Notice Drafting Team. Of course I've got questions from other groups and I couldn't find it on the list.

Jonathan Robinson: That is...

Petter Rindforth: Maybe you can check and it out and email.

Jonathan Robinson: That's a good question. And, yeah, I don't have that at the tip of my tongue. Perhaps, Marika, you can help me or one of the staff on that. But, yeah, okay, Petter, point taken and we'll come back to that. Thanks.

So where were we? There's - we've - I'm trying to think what other writings are worth covering. Anyway those of you - you can refer to the action list. There are a number of items that are completed but there's a couple of key open items obviously including our response to ICANN CEO on the Strawman proposal and the more recent The board request for advice on second level protections which we'll come to as a specific agenda item.

So without further ado I think we should go straight on to the consent agenda to which you will notice - well let me just pause a moment. Does anyone have any additional questions or comments on the action item list before we move on? Marika.

Marika Konings: This is Marika. One open item that we still have as well is a liaison for the IRTP Part D Working Group. I sent an email about that as well to the Council mailing list and that group is expected to kick off shortly so would be helpful if someone would come forward as a liaison to that group.

Jonathan Robinson: do we have someone who's immediately available or failing that if councilors could think about that and potentially make themselves available by volunteering on the list. No immediate volunteers, well will chase that up on list and reminds you that we do need someone and I may well have to reach out to one or more individuals to see if you are prepared to do that.

Right so there are a couple of items on the consent agenda. And just to remind you of the consent agenda any councilor may re-open discussions on any of these items at any point in the future of course but also objected them being on the consent agenda.

But for the moment the proposal is that we close off a couple of items off the project list, the outreach work on the outreach task force and RAP Working Group recommendation on cross TLD registrations (unintelligible).

So I'll pause a moment to hear if there are any objections to those items in on the consent agenda and being removed from our project list at this stage. Alan.

Alan Greenberg: Yeah, I don't have an objection to it. Are there actual formal motions that go along with this which will be entered into the, you know, the log of GNSO decisions though? I would have thought there would be. And maybe I'm missing something but I didn't see a list of motions for this week.

Jonathan Robinson: There were no motions submitted. As far as I am aware the work is either complete or inactive at this stage and so that's the reason for - there is no active work going on. And it may well be that this needs to be checked as to whether these need concluding by a motion. But I'm not aware of that. Marika.

Marika Konings: Yeah, this is Marika. As these are not formal PDPs our interpretation has been that by taking an action here it will be recorded in the minutes and then that way the project will be officially closed.

For example on the RAP Working Group recommendation there is not even actually a working group or anything active at the moment. That was just an item that was still on the list. But at this stage there's no further action foreseen. And same with the outreach task force; that work has been overtaken by the broader ICANN effort it appears so the proposal would be just too close those so they can be taken off the project list.

Which of course doesn't prevent anyone from any point in time, you know, requesting additional work or new work on any of these topics in the future.

Alan Greenberg: Jonathan, for the record I wasn't questioning the substance I was just asking about the procedure. I would have assumed that things on the consent agenda, you know, if you use the model the Board does that it would have had a resolution. That was all I was asking not about the substance.

Jonathan Robinson: All right we'll think about that and come back to you then, Alan...

Alan Greenberg: Okay.

Jonathan Robinson: ...on the process.

Alan Greenberg: Don't need to come back just raising the issue. Thank you.

Jonathan Robinson: Thanks. Right moving on then to Item 4 which is for information and potentially some discussion. There have been two meetings that have taken place in the interim that I can do we as the Council leadership

felt that it was worth updating, spending a few minutes updating the Council on.

The first was a meeting that took place in - well parallel - immediately prior to the regional meeting in Amsterdam of the registries and registrars which was simply a convenient timing rather than in any way linked to that meeting where myself, Wolf-Ulrich and Mason got together with the key policy staff.

Now I have - the GNSO Policy staff. I have sent you a briefing note on that but I thought it would be an opportune time for Mason to give you an update on that and then in addition there's been - the Non Contracted Parties have had what I believe is the first instance of a meeting of the - sort of intercessional meeting of the entire house which was held in LA and Wolf-Ulrich is going to give an update on that.

So, Mason, if I could hand over to you first and then if you could say a few words about the Amsterdam meeting and we can take any questions on that and then we'll move on to Wolf-Ulrich.

Mason Cole: Sure. Good morning everyone. I'll just give a brief overview. Lars Hoffman, the new - one of the new folks on the Policy staff helpfully provided notes of the proceedings, which took place for most of the day preceding the Amsterdam meeting.

So I'll just run through a couple of notes very quickly. And before you do I want to say thank you to David and Glen and Marika and others on the policy staff because it was a very helpful and productive session

so I want to say thank you for them taking a day to spend time with the Council leadership.

We met for the day. We initially had input from - input and update from the staff on the way the policy is currently organized and how staff support is put together to help the GNSO as well as other ICANN structures.

The context of that discussion was on the Policy staff objective to help manage the policy process effectively. David Olive reported that there was a policy team planning session that took place in LA at the end of last year the objective there being for staff to share some information and experiences with the idea of orienting policy work for 2013. I was happy to hear that both Fahd and Akram were able to participate in that session and get an overview of what the Council is up to.

We talked about operational management of the Council. Staff had some input that it was their objective to move information and issues forward as efficiently as we could. We talked about the volunteer model and how there's this sort of natural dependency on work group volunteer to make sure that work goes forward on PDPs.

Staff discussed their motivation to make sure that work is progressing as quickly as it could. Both staff and the leadership talked about how to improve the GNSO's workload management, which, as we all know, is sort of a perennial topic for the Council.

One area that we talked about was making sure that there was enough dialogue and information gathered before a request for an issue's report was made.

The idea there being that if there was sufficient information put together in advance of a PDP being initiated then that could effectively reduce the amount of time that a PDP takes and lead to better policy in the end because it would - more information equals, you know, better and more informed actions on the part of the Council and hopefully better policy in the end.

We talk a take a look at ways about the fact that not every issue that comes in front of the GNSO is necessarily a PDP. We've had that experience over the course of the last several months.

And then from the subject came to couple of action items. One was for leadership to take a look at ways that we can improve communication and interaction between the Non Contracted Party House and the Contracted Party House so that different support organizations and advisory committees can - the one sorry between the two houses and between the SOs and the ACs to make sure that there's better understanding of mutual processes and we can, again, arrived at better policy.

One item that arose out of that was exploring the possibility of organizing an intercessional meeting or some kind of special meeting of the Council away from a regular ICANN meeting.

I know that's a time challenge which we also talked about but the potential benefit of that could be that we get away from sort of the ICANN fishbowl and the heavy time demands that are put on us during an ICANN meeting and have a chance for some sustained formal dialogue with each other.

Another action item was the idea of making the launch of the issue report more informed and effective. Excuse me. Marika has been working on improving the existing template that's in the PDP manual and then put that on the Website as a tool for us to be able to populate the initiation of an issues report with better data again so that we can have a more informed PDP process.

A third action item that came out of that was to encourage Council members who are proponents of a potential PDP to be a caretaker or a shepherd of that PDP as it makes its way through the Council. That person would also be then paired with a member of the Policy staff to make sure that there is enough support available if that's needed.

So then we moved on to a discussion about improving work efficiency and how to more effectively on-board new Council members. Staff very helpfully put together a number of draft modules that described in sort of a condensed way the various roles and obligations of Council members, also working group chairs and members and then lay out various Council communications tools and PDP processes.

So before they finalize those documents I know that feedback from the Council is going to be solicited by the staff. But that was a very helpful thing for them to provide.

We also talked a bit about future needs for both staff and Council members and maybe some self designed training tools for new Council members; things that would bring us up to speed on procedure and work items before the Council.

Also in the category of work efficiency we talked about just some basic procedural moves like making sure the agenda of future meetings was made known to the Council at least two weeks prior to the Council meeting so we had sufficient time to discuss the agenda with our respective stakeholder groups.

We talked about communication strategy as well and how that could be made more effective particularly as it relates to other SOs and ACs ends namely the GAC with whom, you know, our relationship has been discussed on the Council for some time now.

We talked about how notes and outcomes of meetings could be provided to encourage feedback. We also talked about, in the realm of communication strategy again, a Council workshop that could be done potentially off-line as a way to improve both our internal to the occasion with each other and then communication externally with others.

I'm just scrolling through my notes. I'm almost finished here. We discussed workload management which, again, is an ongoing concern of the Council. We talked about why workload management always seems to be a problem.

We identified a few issues namely in the process that currently exists for the multi-stakeholder model there is very little constraint of any kind to initiating policy work although there are some issues being discussed now there's no natural termination of that for the establishment of policy.

So we talked about how to, you know, further improve that if constructive changes are made. That includes better comprehensive

representation on SOs and ACs in various GNSO working groups making sure that they are aware of what the Council is doing so that, you know, we avoid this last-minute concern over policy establishment.

We also discussed making sure that there's a concrete work plan and for Council leadership to make sure that the project list is updated and the Council is aware of work that's going on.

And as chair and vice chairs we committed to each other that there would be a regular review of our project list to make sure that items that are completed are taken off the list and that those who are responsible for moving items forward are reminded of deadlines and things of that nature.

We talked about the meeting coming up in Beijing. There's obviously, you know, planning has already started. I got myself in a position where now I'm responsible for organizing that work. And I know that the call has gone out for input on topics of interest and that kind of thing.

So speaking in my own capacity if you have topics of interest to discuss particularly with that Board, the GAC, the ccNSO, that would be appreciated. Also if there are particular issues that we want to hear from staff on during our weekend session that would also be particularly helpful.

Two other items, we talked about our relationship with the GAC. David Olive and the policy staff hopefully discussed with us their discussions with the GAC on GNSO activity and let us know that staff has provided to the GAC just a one-page PDP update that doesn't particularly

contained any additional information that wouldn't be otherwise available to that GAC that summarizes for them in a - sort of a short digest way what the Council is doing so that the GAC can understand at an earlier level what the Council's thinking is on policy development.

And then the final discussion item was the concept of policy versus implementation. The draft paper that David put together that was circulated at the Council in January was reviewed again. We all agreed that it was an important topic and that there would be ongoing discussion particularly in Beijing.

So, Jonathan, I'll turn that back over to you. I think that's everything from the notes from the discussion. But I'd be happy to answer any questions on that day's activity.

Jonathan Robinson: Thanks, Mason. That's a comprehensive review. And I see that John Berard asked in the chat that elements of this - the action items or outcomes be communicated. And I've responded that we can communicate that both via the list and or put them - the action items to the extent that there is ongoing activity there.

Mason Cole: Happy to do that.

Jonathan Robinson: A couple of other points. I mean, certainly - just two brief remarks on what you said. One is that we will come to this again later in our call that this issue of how we produce policy advice outside of going down a full PDP route I think is something that's going to challenge the GNSO and the Council. It's something we're going to have to work on.

And it appears that there's this relatively regular requirement for some form of input on policy other than going down the full PDP route. And we need to look at how we might deal with that. So that's certainly an issue it would be useful to discuss with the Council. Not resolve necessarily now let's start to deal with and, you know, there's a particular item on the closed generic TLDs, which is in that camp.

The other is you touched on this intercessional meeting. I just want to clarify that there were really two issues there. What happens is if, you'll recall, we elected a new counsel in Toronto and as it happens and it's pretty clear instance Toronto is October, Beijing is April and we've been going to a series of telephone calls with a counsel who may not have had the opportunity to meet face-to-face and interact with one another.

And that was really my key concern. I think - and the concern we're discussing. So it's as much about the Council's elected right at the end of the meeting and it may be that the councilors haven't ever met one another face to face or had very little time together and yet we expect - we are expected and expect one another that we'll work closely and effectively together on some potentially contentious topics. And so that's really where some of the idea came from on that.

Let me not hog the microphone. Are there any questions or points people might like to make in relation to the meeting that Mason as just described before we move over to hear from Wolf-Ulrich on the meeting that took place in LA?

It sound like Mason did a good job of summing it up since I'm not seeing any hands come up at the moment. I have just send an email to

the list confirming that Wolf-Ulrich will be the vice chair of the Council elected by the Non-Contracted Parties House for the remainder of the current term. So we've had confirmation of that within the last day or two. And I apologize that that hasn't come to the list sooner. But just in advance of Wolf-Ulrich providing his update I thought I should let you know that and obviously congratulate Wolf-Ulrich in that respect.

So fire away Wolf-Ulrich. Let's hear from you then on the Non Contracted Parties House intercessional meeting in LA.

Wolf-Ulrich Knoben: Yes, thank you, Jonathan. Wolf-Ulrich speaking. Well this gives me the opportunity, well, just to take it over (unintelligible) very well to that topic that I have been appointed as vice chair. That is one of the outcomes of the meeting in LA as well.

And because there was, in the background, there have been several meetings and talks about that issue which took a longer time since Toronto. And I was very happy that it came to a conclusion. And I have to thank everybody here in front of the Council as well from the Non Contracted Parties House, well, that at the end we came to such an agreement and that we all can live with so thank you very much.

And with regards to that - to other topics in the intercessional meeting let me just come back to the intention of that meeting in LA which was just a meeting between ICANN and the Non Contracted Parties House.

So it was planned and it was requested a longer time ago to bridge the large gap between the Toronto and the Beijing meeting and to cover topics which are under development.

Specifically, which was the first intention was, well, to have a - specific eye on the stakeholder engagement and outreach. So in preparing that meeting there was a team preparing together with ICANN staff the agenda. It turned at the end out that we covered a lot of topics which you know from other meetings and which were important enough, well, to cover.

But the format anyway was different to normal meetings - normal public meetings, ICANN meetings, in that way that both parts of the house, the Commercial Stakeholder Group and the Non Commercial Stakeholder Group, had the opportunity or were given the opportunity by Fahd to have separate meetings with him - around 90-minute meetings to go - to have (unintelligible) about specific issues - the specific stakeholder groups are dealing with.

So in this respect I can only talk for the Commercial Stakeholder Group maybe there - it could be completed by somebody else from the - another councilor from the NCSG so wishes.

So we had - with Fahd there was one of the interesting things about that he is - he has on his agenda a series of round tables - so called round tables with CEOs from the DNS industry - let me say it that way - and as you could see also from the ICANN public page - Webpage there have been already two meetings with registrants and registries on that with high-level representatives of that industry. So and we understood it is intended by Fahd to make ICANN more visible and at high levels within the companies affiliated or dealing with (the CTNS) and (acting in the CTNS) sector.

So this idea was also taken up from several parts of the CSG and there shall be follow up of other (on tables) in another environment. (This Friday), there is one thing planned in March and in London and others may follow.

We also went through the - another major items was naturally policy versus implementation and the trademark clearinghouse issue, and Fahd turned out, so he was open to say with regard to the trademark clearinghouse that he - well he formulated it in that way that he may have underestimated the process, which is required.

And so he wouldn't say he made a mistake with regard to the question of the trademark clearinghouse specifically related to the (profit). I think he also touched on this point in the meetings you had with him in Amsterdam and maybe as well at the (unintelligible) party house, so there could be an exchange of the different view about that.

Then the question of how the policy development process is going to be developed or is going to evolve in light of the implementation of new TLDs is also a question, which Fahd touched, and there may be follow-ups (if) necessary about that.

So we had - besides the meeting with the Fahd, there were executive members of ICANN staff available like (Tally Kamar), Sally Costerton, and also, we talked with the CFO about the financial budget. And (Tally Kamar) gave us an overview about the (unintelligible) of the future and how ICANN is planning to deal with Internet governance in light of the (wicked) outcomes and the effects, which that may have on ICANN, so that was a broad overview about that.

And then (Sally Carson) is planning on her table the stakeholder engagement and (about which) things in the U.S. specifically discussing with regard to their own stakeholder activities and plans about outreach.

In this context, there was mentioned so-called MIG activities or projects from ICANN, which (Sally) put to the table. MIG means Multi-stakeholder Internet Governance Project, so that is on the table. It was not in detail outlined, but there are some activities in ICANN related to the Internet governance and to the inclusion in those activities of the stakeholders.

In the context of the fiscal year budget for 2014, we were discussing with the CFO the budget request process and our specific inputs related to the different stakeholder groups, which may be a necessary tool to meet the deadlines as well. And one specific, which was more specifically related to that, is the constituencies and the stakeholder groups requests - the GNSO toolkit. So we discussed it especially with (unintelligible) about those things and our requests (in specific environments).

So at the end of the two days in LA, we had the opportunity since there was a board meeting planned going on the next day and some board members were already (unintelligible) that evening. We also an hour with - or 90 minutes with Steve Crocker and some of the board members just going very (unintelligible).

And specifically, what I have in mind - it was interesting because Steve made it very clear what is going - hello. What is going about the Whois process, because there was some confusion about Whois, what is

going on with that. There is a Whois project on the one hand, but on the other hand, there is the Whois team and what is going on with the recommendations of the outcome of the Whois team.

And it was very clear that is two activities that are going to be dealt with in parallel. On the one hand, the Whois recommendations as they stand, they are fully (unintelligible), and on the other hand, there is this project, which is set up and which we have to bring input as well to that.

So just summing up to that, the specific advantage of that meeting was clearly to our house that we had a meeting very close at the staff (site), so that gave us the opportunity as well to have staff to specific points on the spot available. We had discussions also between constituencies - on the constituency level with staff members and on the stakeholder group's level separate with staff members. There was a very big advantage to that.

And last but not least, as I mentioned at the beginning, there was some interaction within the house, which is not normally going on, and that helped as well a lot, so that is (the summaries).

Jonathan Robinson: Thank you very much Wolf. It's Jonathan speaking. That's a useful summary. I wonder if anyone has any questions or issues they would like to raise about that now or take offline, but it sounds like a comprehensive meeting and you've done a good job of summarizing it, so thank you. Any comments or questions for Wolf or (Rick) on the previous topic before we get onto the next substantial item?

Okay, thank you again both. We will take the action Glen to summarize the work done in Amsterdam and we will work on either putting the action items out to the group and/or on the action list to the extent that that's appropriate.

All right, so moving on to the next item on our agenda, which is an item that we have been working on already for some time. And the deadline that Fahd provided us on this tray Item 5, which is responding to his request for input on the work that was done on the trademark clearinghouse (unintelligible). Could everyone please make sure that their microphones are on mute if you are not talking or haven't been (unintelligible)? There is a little bit of background interference coming in every so often.

So I think on this Item 5, the Trademark Clearinghouse Strawman, Mason has been leading the discussion with a small group, and as you are all aware, there is a draft in circulation, and in fact, there are also some questions that have been asked on list.

I didn't have the opportunity to follow up on Jeff's question in particular, which related to a perceived or actual inconsistency between the statements that Fahd made in Amsterdam and in LA that is causing some (charges), buy I did manage to talk to Sally Costerton this morning who is on my time zone so I will give you an update once Mason has brought us up to speed.

So Mason, if you could bring us up to speed with where we are at on the draft and then I will make a quick comment and then we will take it open to discussion.

Mason Cole: Sure, thank you Jonathan. Mason speaking. This will be very brief.

The initial draft of the letter was circulated to the council on December 28. I know there was some discussion on the list about the content of the letter. There have been a couple changes made to it. I circulated those changes back in the second draft earlier this week. I believe the status as it currently exists is there is general agreement on the content and voice of the letter except on the part of the IPC and BC.

And I have been talking a bit with Brian, who is a part of the drafting team for the letter, who I believe is planning to provide some input on that very shortly. My view is to get this off the council's desk and into Fahd's hands as soon as possible. That's pretty much the update for you.

Jonathan Robinson: Thanks Mason. I am a supporter of that timeframe and I will do what I can to help with - I don't want to use the wrong word here, but assisting and refining the final draft. Since previously as with the GAC letter, it's ultimately going to come with my name on it, so let's get it as far as we can, and I will work with you and the drafting team on this, the group, the finalize it.

Just to update you on - I mean Jeff put a couple of questions on and I think I've got these right, Jeff. One was about the inconsistency of the message or the actual perceived inconsistency of the message, and I guess the other one was I guess more broadly one of operational readiness which included the - touched on the information around the trademark clearinghouse.

As I said, I wasn't able to talk to Fahd because of time zone issues, because there was no - I mean Marika did put helpfully the transcript from LA onto our mailing list, but that then prompted your question Jeff as to whether these are consistent.

I understand from (Sally) that Fahd has already or will imminently be putting out some form of I think video blog rather than just a written blog clarifying and reconciling the position between Amsterdam and LA. And also in that same piece of work, deal with further issues on operational readiness.

So I got some form of update from (Sally), because clearly, this is in part at least a communications issue, so I wanted to try and nudge the council along in that respect. So hopefully what we will have shortly or within 24 to 48 hours after this call is Fahd's view on reconciling the apparent difference between those two positions, so that's the update I have, and over to you, Brian, whose hand is up in the chat in the Adobe room.

Brian Winterfeldt: Certainly, thank you Jonathan. I want to thank you and thank Mason for the work done so far on this draft letter. I just definitely wanted to build a little bit on what Mason mentioned. We were talking on the chat earlier and the IPC and I believe my colleagues on the BC continue to have some serious concerns about the letter, which I'm happy to go into detail on on the list rather than taking up the rest of the meeting today going into a lot of detail. But I just think a couple of different highlights.

You know the letter does seem to state that is the view of the majority of the council and we are not sure if that is really a fair statement if the BC, and IPC, and even the ISPC in its comments expressed some

support to a more limited extent than the BC and IPC for the proposals. So we are a little bit concerned about that language and we are not sure that that's completely accurate.

And ultimately at the end of the day, we do think there are some inaccuracies in the current draft that we would like to see addressed that again, I will work on with Mason, and we will look forward to doing that. But ultimately, if it remains substantially in the form it's in right now, I think the IPC and potentially -- I hope I'm not speaking out of turn for my colleagues -- the BC would like to have some kind of minority statement or our own sort of version of a minority letter submitted along with this one in response to Fahd.

Jonathan Robinson: Thank you Brian. John.

John Berard: I don't really - I suspect that the BC will have more to say, but I think it's pretty clear based upon what it already has said what it's view is. Mason has been gracious enough to discuss a couple of changes I think that would for the purpose of this letter be adequate for the BC. We may choose to - well we will continue to speak publicly on the matter. And whether we resolve everything to our satisfaction now or somewhere down the road, we will continue to work at it.

Jonathan Robinson: Thanks John. Alan.

Alan Greenberg: Thank you. I am pleased to see this letter going forward, but I was - I'm a little bit perturbed that there is no other action on the substance of the issues going on. At the end of the last meeting, I thought that there was general agreement. Not a motion, but a general agreement, that at

least on the issue that even staff says is policy the GNSO should be initiating some sort of action.

Not necessarily a PDP, but something. And from the ALAC's point of view, even the other items where the majority of council believes that there are policy issues, that's something (to start going), because time is flowing. So I really would like to see some action out of council, not only writing letters. Thank you.

Jonathan Robinson: Mason do you want to respond directly to that or in addition to that?

Mason Cole: I can. No, I had my hand up on just the issue of the letter, so I will comment on that if I may.

Jonathan Robinson: So I just had a thought with Alan, and Alan, maybe you could respond directly to this. If indeed the action that gets taken notwithstanding any input from the council, I'm just wondering how we reconcile the council taking action if any action taken by staff proceeds along a certain path and our work on what we perceive to be policy may become redundant in that. So I'm just wondering if there is a sequencing issue here and I'm not disagreeing with you that there may be substantial work that that council could undertake. Maybe you could comment on that.

Alan Greenberg: Certainly, on the issues which staff deemed to be implementation, there is that question. On one of the items, the enhanced protections, I believe even the staff's strawman acknowledged that it was policy. So you know at least on that one, I would like to see some at least discussion of what methods we are going to use to go forward. Is it a

really - does it require a PDP? Can one of the other you know decision-making processes suffice?

But you are right. On the ones where we don't know if staff is going to ultimately pass judgment on the board and saying no this is implementation, we are going ahead with it, that we may be premature on. But certainly on the ones that everyone agrees, not necessarily IPC and the BC, but the staff and the majority of council agree is policy. I would at least like to see a discussion on how - what the options are for going forward if not initiating something. Thank you.

Jonathan Robinson: Thanks Alan. My immediate thought is that we close off the letter, complete our response there, and then pick up the points you've made. That would be my thought. Mason.

Mason Cole: yeah, just on the subject of the letter very quickly. I want to be clear that when - the draft says that the majority of the council supports these points. I believe that's an accurate (reflection) based on comments and discussions that I personally had when drafting the letter, but I do want to make sure that those statements are accurate.

So if there are issues or concerns about support for particular issues or the way that the letter is crafted in the discussion of any issues, then I want to hear from councilors so that we have - when we do communicate to Fahd, that the letter is accurate.

Jonathan Robinson: That's a good point. Thanks Mason. So please everyone, I know the drafting team is a smaller group, which is a more efficient way of working on it, but if councilors do have concerns, especially with particular fine details on any of the sub points within the letter, please

make it known. Support or not as the case may be if you haven't already.

I mean I think Mason has attempted to distill that from previous comments, so there is no need to repeat items that have been put on the list already. But if you haven't made your voice known, and particularly if you have a strong feeling in either direction, it would be useful to know. But in any event, support or lack of it is helpful in trying to form what is either a consensus or majority or similar positions.

I've got John, Thomas, and Jeff, and I've got nominally five minutes more on this topic, so let's hear from John, Thomas, and Jeff in that order.

John Berard: Jonathan, this is John Berard. I think from the BC, there is no doubt that the majority of the council feels this way. It's probably not a point to be belabored.

Jonathan Robinson: Thanks John. Thomas.

Thomas Rickert: Thanks Jonathan. To me, the question is whether there are factual inconsistencies or inaccuracies. Brian made a statement earlier that there were inaccuracies in there, and since some communication must have gone between Mason and Brian, maybe Brian or Mason could enlighten us on that. I have seen one point made by John that Mason was willing to smooth them out in the draft, but otherwise, I think it would be appropriate for the council to move on with that letter and allow for a minority statement or indicate that a separate statement would be submitted.

But I think that we are most likely not in the position to reach consensus on each and every point in the letter, so we need to accept that there will be no unanimity on the points, send out the letter, and allow for the BC and IPC to make their own minority statements. Thank you.

Jonathan Robinson: Thanks Thomas. And just before we go to Jeff, you know my view is to the extent that we can to form as consistent a position in the council, notwithstanding that then to highlight on the letter that we write where there are differences of opinion. And only if we can't achieve forward movement with either of those, to then offer the opportunity of an independent statement. Yeah, so that's my view on what I would like to achieve if possible.

Jeff.

Jeff Neuman: Thanks Jonathan. I'm just - and I'm not sure how I'm going to say this, so - and it may not always come out the best way, but I'm just concerned, especially looking at Karen's response that she just posted a few hours ago on the council list.

Actually, Marika posted it from Karen Lentz, and it's almost like it doesn't matter what we say in this letter. It's almost - I feel like the decision has already been made and it's already been moving forward, especially given the fact that the statement of work for the providers is supposed to be completed by this month. By the end of this month, which means that there has to be drafts already being circulated, a statement of work between the providers and ICANN.

And I just have to say the lack of response that we get from ICANN on these issues and such generalities. I mean if you look, there are some substantive questions that have been asked of ICANN on this issue and all we get back is the current status of the strawman model is that the comment period is closed. There was significant interest -- of course it doesn't saying anything -- in these proposals. We are reviewing feedback to determine whether some, any, or all of these parts or proposals should be implemented.

I think we are owed a little bit more explanation and a little bit more detail than what we as the council gets, since we are the ones that are responsible for policy development, but I feel like we are very reactionary. We are very late, and it's almost irrelevant what we say, because even the people that are making those decisions aren't necessarily on this call, so I'm just hugely disappointed at the way this is proceeding. I feel like it doesn't matter what we say in this letter. I support sending a letter, but I am just - the whole process has been very disappointing from beginning to end. Thanks Jonathan.

Jonathan Robinson: Jeff, when you say we are reactive delayed, I mean I think we have met the timetables as a council that are requested of us. It may be that the concern about the relevance of our responses remains valid, but I just want to be clear that we haven't missed any deadlines or timings requested of us. It's not as though we are behind the curve in that context.

Jeff Neuman: Yeah, if I can just respond. It's more the relevance couple with the fact that it is now February 14. The first TLDs are supposed to be approved in a couple of months. The other thing is that you know look, we haven't heard from ICANN on the trademark clearinghouse technical

list since December, and so the technical specifications have not been circulated on any of this stuff. They are months behind on that. It's just - it's very frustrating on every single level, so thanks.

Jonathan Robinson: All right, I've got Margie's hand up in the Adobe, so let me hand it over to Margie and then I would like...

Zahid Jamil: Jonathan, this is Zahid. Since I'm not in the Adobe, can I get in the queue please? Thanks.

Jonathan Robinson: Yeah, we will take Margie, and then Zahid, and then I would like to wrap this item up if we can give the time constraints.

Margie Milam: Jonathan, actually I raised my hand for Karen Lentz, who is on, but not in Adobe Connect. So Karen.

Karen Lentz: Yes, thank you Margie. Yeah, I just wanted to respond to the last couple of points about the letter and you know whether it has any impact as decisions have already been made. Decisions haven't already been made. You know we are and have been pretty active in the last week looking at the comments. We also are expecting - you know we are aware of the discussion in the council around the letter, and we are expecting that guidance as well.

Someone asked earlier about what happens if you know the council does decide to do policy work on some of these items. I mean that's definitely something that we would want to know about in advance of us being able to make a determination on where we are on the strawman. Thanks.

Jonathan Robinson: Thanks Karen. I have Zahid next.

Zahid Jamil: Thank you Jonathan. I understand Jeff's point that you know there is time that's going by. I just wanted to make maybe a request but also a statement before that. You know the discussion on what the (unintelligible) and what sort of redlines may be sort of acceptable, et cetera, has started only a few days ago if my recollection is correct. I know lots of time before that, but this discussion sort of hasn't had I think as much time.

So my request is that if we had a few more days between Mason, and Brian, and others, maybe we could achieve something. So it's really a request. I understand that the 14th of February was mentioned by Jeff, and I appreciate that, and I understand that you know the process is sort of lagging as a result. But if we had a few more days, I hope and I think - I mean I heard Mason's summary earlier. You know appreciation for the fact that you know even having meetings outside the process as regular ICANN meetings is something now that everybody is begin to realize has value.

I would urge that if we had a few more days, maybe there is something we could come up with. Of course, if we can't within maybe a week or so or maybe some time of timeline respond or agree on things, I think - I understand it would be the majority view to send the letter. But I think a few more days may give us an opportunity and I just wanted to make that request. Thank you.

Jonathan Robinson: Thanks Zahid. On the deadline, Fahd originally asked for a response no later than the 28th of February. We are now on the 14th

of February. I think it seems sensible to me to impose our own deadline of a week to pull this together.

There seems to be a strongish view in the council that we should send this off sooner rather than later. Notwithstanding that, I completely take your point and you know it's my view that if we can take a little more time to reach as close to a common view. It may not be a consensus, but a common view of the content of the letter, that's desirable.

I think we should close the topic on the letter. I'm slightly concerned about this sort of circularity of the issue with respect to whether this is implementation or policy and whether staff acts ahead of the council or the council acts ahead of staff. But let's - on the letter itself, I think if we can work towards a deadline of an internally imposed deadline of a week from now, we will meet Fahd's deadline by a week. Ahead of his ultimate deadline by a week, and that seems like something I would like to ask Mason, the Drafting Team, all of the councilors, and myself to get behind.

Zahid Jamil: Jonathan, I think this is reasonable. Thank you.

Jonathan Robinson: Thanks very much everyone. Thanks for the contributions on that. I think we should probably move on to the next item in the interest of keeping our two-hour agenda and moving through this.

The next item is something, which is new on our agenda unlike the previous item, and this item deals with a request from the board for the council should it so wish to provide advice. I'm sorry, I'm jumping ahead. This is an update. I apologize. I was one item ahead. This is an update on the work being done.

And what I thought was useful to do here was to get an update from Thomas Rickert on the work that's going on within the PDP Working Group on second-level protection for certain IGO names and acronyms. And the reason for this is that the board did ask us for some form of response to a second question. They asked two questions, one of which had a deadline of the end of January and one of which had a deadline at the end of February.

So in order to frame that written response that's required to the board, we need to understand where the work of the PDP is going. So that's why this item is structured as it is and I will ask Thomas to introduce the item, the work of the working group, and potentially discuss our response to the board, and then we can take any council comment on that.

Thomas Rickert: Thank you very much Jonathan. This is Thomas speaking and my statement, which hopefully will be brief, will be consisting of two aspects. One of which is to provide an update to the council on the work that's going on in the PDP, and then secondly, to provide an update on the discussion regarding the upcoming February 28 deadline.

Let me start by saying that the working group is working extremely hard to get the work done that we've been tasked with. We have weekly conference calls that take two hours each and we also have a vivid discussion on the mailing list and other substantive work going on in the background.

As you will remember from previous updates, we have slides that work into work packages. Usually if time would permit, one would work on these work packages sequentially. But actually since there are - since we are under severe time pressure, we have chosen to work on those areas in parallel, and we have created subgroups to work on these specific issues.

It turned out that the deeper we dive or dived into the various questions, the more additional questions came up. And it also turned out that the subgroups were the few exemptions, I must say - and I will get to the exemptions in a moment - did not seem to be able to come up with a group view on the various aspects in question.

What we did accomplish though, and I would like to highlight that, is that we now have quite a complete collection of the pros and cons and the various positions that are represented in the community on the subject matter.

As you can imagine as Working Group Chair and also for the Council, it would make our work much easier and quicker to deal with if the group had all ready reached consensus on the very question. But I guess that at least it's very good to see now that we have a very robust foundation to base our discussion on.

If I remember correctly, it was the aim of the Council tasking the working group to do with these questions to answer the question of special protections once and for all. And I think that as all this information that we now collected will go into report. I think our policy response will be very comprehensive and robust.

So what are the issues that we're grappling with? I would like to highlight three areas. The first of which is that there are some in the working group that wish to see evidence of harm to those that are now requesting protections because they would like to better understand where the problem is that needs to be fixed.

And one might say that, you know, I'm certainly paraphrasing, that there of the opinion that if there is no problem, that no policy response is required to fix it. If there is a problem, they would like to understand the size of the problem and the nature of the problem to create adequate responses to it. And because there are certainly different responses that one can think of starting with blocking of certain registrations, we could only have notifications that are similar to the trademark claims notices and there might also be other processes that one might develop.

Now in order to fence that in, I can staff have carried out a survey on existing domain registrations and 30 TODs because certainly we can't predict the future and predict precisely there's going to be harm or not. But the group has chosen that the best we have is information that we have on existing registrations and existing harm in areas or threats in areas. So we took a look at that and this was received very warmly by the group.

The issue though is that there are also folks in the working group, participants in the working group, that are of the opinion that certain designations need to be protected per se, and that there is no need to evidence harm because treaties or national laws actually do provide the protection that they seek and they just ask ICANN to implement those protections.

And from this you can easily derive that we're facing a challenge of those that want to certain information before granting protections or considering protections, and there are others that are unwilling or reluctant to provide that information.

The question beneath that is whether there is a legal foundation that would require ICANN to implement certain protections. And in order to get that question answered, we have sent a question to the ICANN General Council to establish for us whether ICANN is aware of any jurisdiction in which a statute, treaty or other applicable law prohibits either both of the following actions by or under the authority of ICANN.

And that would be A; the assignment by ICANN at the top level, or B; the registration by registry or registrar accredited by ICANN of domain name requested by any party at the second level, the name of acronym of an intergovernmental organization, IGO or an international or non-governmental organization receiving protections under treaties and statutes under multiple jurisdictions.

And if that answer by General Council would be positive, then actually it would be more a matter for ICANN compliance to ensure that such registrations or applications for the top level occur rather than a policy matter.

Unfortunately, we're waiting for response from General Council for a couple of months now, and we surely need that response rather sooner than later in order to overcome these hurdles in our discussions.

We're also having debates on the potential qualification criteria for those organizations to be eligible to be protected. And a subgroup has actually worked out a list a lot of criteria that could be used, but the group was not able to reach anything near consensus regarding that which is why we're now in a situation where the - I guess the most support would require treaty protection and multiple national law protection.

But there are even those that say that treaty protection would not be an adequate criterion since most INGOs would fail to meet that criterion and therefore fall out of this scheme. And there are others that say that it must be treaty protection or multiple national laws. So there are many unknowns at the moment.

We have made progress in the area of defining what potential protection mechanisms might look like. And I guess there is more or less anonymity with statements such as that the problems we're now facing are primarily stemming from the fact that the RPMs as we know them now are reactive or curative while these organizations that are now requesting protection are looking for proactive protection mechanisms. That's the first fundamental issue that we're dealing with.

The second issue is that current RPMs, and you will remember that those who do not wish to grant extra protections, say the organizations in question should be using the existing and upcoming RPMs. But in fact, since some of the requesting parties do not have trademarks, they wouldn't even be able to use those existing and upcoming RPMs.

There seems to be quite some common ground in the group that we might recommend that the existing and upcoming RPMs might be

opened so that all beneficiaries of these protections that we're currently discussing and that potential come into existence, can use the new RPMs so that they could use these curative or reactive reactions in cases where identical strings are taken by unlawful or by illegitimate registrations by third parties or even similar strings.

So that's the good news. There's also some common ground in that the reserved names list as it's currently being deployed by ICANN, would not be the appropriate tool. Those who have read communication by various organizations requesting protection, including the Board and the GAC at times have spoken of the reserved names list. But the problem with the reserved names list is that even the organizations entitled to certain designations would not be able to use them unless they go through a quite cumbersome (unintelligible) procedure.

So what we're looking at is some sort of modified reserved names list or some other tool. And there's one approach that seems to have a considerable number of supporters in the working group that is in favor of using something parallel or at least, you know, close to what we know now as the Trademark Clearinghouse, and not to copy it because the Trademark Clearinghouse is clearly primarily for the purpose of trademarks.

But the idea is to have something that consists of two elements, one of which is central repository where eligible strings can be entered by eligible parties after a vetting process, and then to add services on top of that that could be used by registries and registrars.

We are now in the process of further defining what such processes could look like and what the remedies would be whether it would be blocking or whether it would be a certain type of notice, but so that registrations could move forward, or whether some other special treatment would be given to those registration requests.

There also is some consider of common ground that exemption procedures are needed to that the protection mechanisms that we might come up with as a recommendation would only prohibit unauthorized third party use, but that legitimate registrations by third parties would still be possible.

The complexities is - or the level of complexity that has recently been added to our discussions is that some participants of the working group have understood our charge, not only to be confined to organizations names and acronyms, but that they also perceive it to include similar strings, both at the top as well as second level. So there is a request to protect certain names at the top level, to open the strings up to a same similarity review, but then also to prohibit unlawful third party registrations at the second level.

And if you take that and digest that for a moment that would actually would open our discussion to deal with not only exact match strings, but also strings that contain the exact match. For example in the format of key word plus exact match, or exact match plus key word, and even strings that consist of or contain a variation of the exact match. That would mean that a type of name or an organization that could get protections itself would need to undergo special treatment as well as strings that contain type of variations or other variations of the organization names and acronyms.

So that makes our discussion more and more complex, and we also need to deal with contention sets of eligible parties with legitimate third parties.

I think I'm going to leave it at that. What would really be great for the group is to see response from General Council in the very near future because we get back to the point that those requesting or some of those requesting protections just insist on the legal protection itself being sufficient to approve protections while others in the group think that this is not the case.

With the respect to the February 28 deadline, as Jonathan pointed out, there was a comparable or potentially (unintelligible) at the end of January where the GNSO Council asked whether there were any concerns with respect to the global public interest or the security and stability of the DNS. And in that case, since the Council on the 20th of December has made a decision on the IOC and RCRC names including the temporary protections, this question was sufficiently answered.

And my idea or my thought was that since this resolution has been made in the absence of a full community consultation through the PDP, and since the GNSO Council obviously has provided implicitly statement to the board that there were no such concerns pending the outcome of the PDP, I would have proposed that we give the February 28th deadline the same treatment insofar that we state that the community work is still going on, and that we will only know by the end of the PDP whether there are such concerns.

When we discussed this issue during yesterday's working group call, there were statements made though that advice that the Council should deal with this in a different way, i.e. not just say that we're going to deal with this as we did with the January 31st deadline.

And the points that were made there were that there is a rule of PDP within ICANN and that we might say that we're in a midst of a process at this moment. And that it would be against the public interest for the Board to create new expectations of entitlements to protections before such time that either the working group finishes its work or the issue was actually pressing which could be the case. For example, if the launch of the new gTLD was actually was in front of our doors.

And since there is still a couple of months time, the recommendation was that the GNSO Council could say that in the public interest we would be working or continuing our work on this and there is no need for an emergency decision and that we would keep the Board updated on the progress that we made - that we make.

Jonathan Robinson: Can you hear me? Thanks Thomas, that's pretty comprehensive. I know some councils will feel that's a lot of information and especially on what is a very tight schedule which is now tighter for our call.

I mean the essence of this is one that it's thorough and comprehensive and quite challenging working with them in the working group. And two, that we do need to respond to the Board and there's a nexus point around that response as to whether we say we are successfully getting on with it and we accept the short term reservation of these names. Or indeed, whether we challenge that in some way.

So I think I've asked Thomas to prepare a draft response to the Board for comment and input by the Council which I think he'll circulate. Some Thomas will lead the initiative on this.

Are there any comments on the response of the Board in particular? I don't want to get dragged into a conversation of the work of the working group, that we do have a deadline to respond to the Board. So you can make comments now, although in the interest time, I would like to take this (unintelligible) on the list as soon as possible.

Any comments? I don't see any hands up. Would anyone like to comment or respond now or would you like to see Thomas's draft? I assume you want to see the draft of the letter to the Board and be aware of this issue. The read nab of it is a view on whether their names are given temporary protection in advance of the PDP outcome of not.

Have I phrased that accurately Thomas?

Thomas Rickert: I was all ready - yes you did.

Jonathan Robinson: Thank you very much. Seeing no hands in the chat and given the time pressures on the call, I'm going to move us on then.

David Cake: Jonathan, this is David. If I could just speak very briefly.

Jonathan Robinson: David, please do.

David Cake: I did just really briefly want to say at this point I'm not particularly - I certainly would feel that the case for preliminary reserving of names

seems to be premature to me. So that's pretty much all that I wanted to say.

Jonathan Robinson: Thanks David. Well let's get that out in the chat because there's two bases on which you might say that. And you might say that one, that it's premature given where we are in the new gTLD timetable and if gTLD were to launch tomorrow, it would not be premature. And two, it's premature in the advance of the outcome of the PDP. And there's clearly a difference between those two, and we'll have to make sure that we air that properly prior to responding.

David Cake: Absolutely, but I don't think we've yet made the case that there's likely to be a particularly strong reservation for those names in the - particularly, I think we're going to end up with names, though in some of these names we incline to think that these are things like UNICEF which aren't likely to be applying to anyone else.

So there actually are a few that are going to be clashed with other uses. I mean the obvious one that comes to mind is the World Health Organization.

We can't - we're not going to be in a process where we're illicit the World Health Organization reserve or use of the word who. So we're not going to, you know, it's going to be complicated.

Jonathan Robinson: Understood; all right. Well let's not get into too much into that detail now, but we do need a response and I do appreciate your input on that.

All right, I'm going to move us on to the next item which is a new item and that's the issue of closed generic TLDs. Now here the Board - this is an interesting example where the Board is seeking a form of policy advice on a relatively if not very short timetable for the Council. And to my mind, there's really a couple of issues it throws up.

I did ask Marika to give us a brief update as to the background on this, and then I think we can have some discussion. So let me see if Marika, you or any other member of staff are available to just briefly set the scene.

Marika Konings: This is Marika. We actually have Karen Lent on that will provide that update.

Jonathan Robinson: Thanks Marika.

(Karen Lent): Can you hear me Jonathan?

Jonathan Robinson: Yes (Karen).

(Karen Lent): Okay, thank you. I will give just a short introduction on this topic. As Jonathan noted, the GNSO was requested to provide policy guidance on this topic if it wishes to provide that. And then simultaneously there is a public comment period open now on this topic.

These two axes stem from a resolution that was passed by the new gTLD program committee of the Board earlier this month. The committee looked at this issue because of comments and concerns that were being expressed. There were some discussion about this at the Toronto meeting in the public forum and then there's subsequent

people and groups expressing concerns or asking questions about this.

So - and some of those were suggesting that ICANN should look at adopting new type of rules or using the code of conduct exemption, the registry agreement, to try to enforce or address some of what was being expressed as a concern.

A lot of this topic and the request for input on it really goes to definition. One of the kind of frequently asked questions that we've had about this is, "Well, can you tell me which applications these are - that are affected here."

So there have been, you know, people who are commenting on this, some of them have identified certain applications that they deem to be a concern and those very a little bit. There may be - for example - some of the examples given were an industry sector or a string that seems to be targeting a broad base. And then closed in the sense that the applicant is seen to be trying to use a generic term for his own benefit.

So in terms of, you know, how to define both of those aspects, the close - what's closed and what's generic, there really isn't a standard definition that everybody is working with. And so that's one of the points that was highlighted in the comments to the extent that there is a concern or an issue that's being addressed. How do we frame that and how do we set perimeters around that?

The policy recommendations for the new gTLD program don't have, you know, don't speak specifically to this issue. And so the committee

considered it important to understand the concerns that were being expressed. Some of them were expressing that in terms of impact on competition, interest concerns.

And so the committee did express in its rationale that if, you know, it wanted to have a deeper background on this and understanding of the views and concerns before making any decision.

And so the committee will consider the input of the GNSO if it chooses to give some as well as the comments and the additional analysis that is directed in the resolution.

I will turn it back over to you Jonathan. I have - I neglected to mention that I believe Chris Disspain is on the call is well. Chris helped - was involved in managing this issue through the committee. So be happy to answer any questions.

Jonathan Robinson: Thanks Karen. And yes, I understand Chris is on the call and may well turn it over to him in a moment.

I really want to flag one particular point. And this is - the request for the Council's input goes parallel with the public comment, and I think the Board has respectfully recognized that this may be challenging for the Council to comment on or that there are limitations to what the Council can do given its existing processes and the timeframes.

And so I would just make a note that if the GNSO wishes to respond, we have the opportunity to respond. We've been extended the courtesy to respond, but don't necessarily have to.

So Chris, I don't know if there's anything else you wanted to add. I appreciate you've on the call for an hour-and-a-half now and if there's anything that you would like to add in addition to what Karen said before we open it up to a little more discussion and try and move this point forward.

Chris Disspain: Thanks Jonathan and I need to say - excuse me. I need to say that it's been very interesting actually being on GNSO call, so thank you for the opportunity.

And we understand that it's not always for the GNSO Council to respond as a council to questions like this. But if there is a way of doing so that would be helpful, and I'm really happy to answer any questions that anybody has. Thanks.

Jonathan Robinson: Thanks Chris. I see Jeff's hand is up.

One point I would like to make to ensure we do think about whether this has been dealt with in any way in the past before, and perhaps that's something you're going to touch on anyway Jeff. But let me know, I'll hold the mike and give you an opportunity to contribute.

Jeff Neuman: Thanks Jonathan, and thanks Chris for being on the call. And yes Jonathan, that's precisely what I want to address.

This actually has been address before, not in as detailed as the question is being posed now. But the GNSO way back when in 2000, gosh, 7, 2006-2007-2008 before it passed its policy recommendations onto the Board, it actually did consider the issue of restricting TLDs in general.

So the very question that came up after the 2005 round where they only allowed sponsored TLDs, the very question the GNSO working groups considered and ultimately the Council considered, was whether you should require - and I know this is sort of a converse - but they considered whether you should continue to require sponsored TLDs or closed TLDs, different type of closed TLDs, but closed TLDs to go forward.

And the working groups on this issue and I was in one of them, decided very specifically that no, we did not want to control or limit in any way the innovation and ideas that could come forward from new TLD applicants to use TLDs - Top Level Domains - in a way that had not been done before. And any type of restriction would get in the way of that.

Ultimately, although nobody had thought in those terms at that point in time of a brand or a closed brand, the decision was very clearly made by the GNSO, and I think we need to point to it in its original policy, that it was not the idea of the GNSO nor should it be the responsibility of ICANN to restrict the use of TLDs in any manner. That was a clear policy decision.

In addition, when the vertical integration debates were going on, it's interesting now that people say, "Well, nobody expected these types, nobody could have foreseen these types of applications." But it's just not true.

In fact in the vertical integration debate, we extensively talked about brands having open verses closed TLDs, and it was acknowledged

that this was an acceptable consequence of the program. At that point in time, nobody brought up any issues except for the registry/registrar distribution issues. But nobody brought up any issues as to whether this should or shouldn't be allowed.

Also, many conversations with Kurt Pritz in open public meetings. There were many references to brands, applying for closed TLDs. Again, no discussion as to whether that was right or wrong, but it was an accepted fact.

And in fact I remember in several meetings I brought up, I asked specifically about the Kraft example, and it didn't apply. But I said, you know, "What if Kraft applied for (Dodd Food) and wanted it all by itself?" And the answer from ICANN staff was always, "Yes, that's acceptable. Yes, that's acceptable."

There's a value in precedent. And I think we need to stick to the precedent that we set in the past. I think ICANN has, especially in the latest few weeks, has gone back on a number of things that we have precedent for and I think that's got to stop. At some point, the Board, the new program, the new gTLD program committee needs to respect the value of precedent, needs to respect things going forward as initially planned and not continue to reopen issues that were all ready considered.

And I'm not just pointing out the closed verses open debate, but the new TLD agreement where ICANN has reintroduced the notion of unilateral right-to-amend which was in the first three drafts of the guide book in 2008 - sorry, 2009 and 2010. We formed a legal working group of members of the community and ICANN staff and board members.

We got rid of it in version four of the guidebook, and now three years later, four years later, it's back.

These things have to stop. At some point enough is enough, we have to move forward. We can't continue to reopen debates. And so again, without commenting on the substance, the GNSO doesn't have to say whether we like open or closed, but we do need to make a point that this issue was considered all ready. So thanks.

Jonathan Robinson: Thanks Jeff. I think that's very clear, your position is that we as a Council should respond - I'm hearing you say we should respond and that we should respond on the principle of reopening a discussion which believes has been dealt with by the policymaking process previously and therefore should not be reopened. And that should be a key point in the Council's response.

Chris, is your hand still up and would you like to make a point?

Chris Disspain: Yes, thank you Jonathan and my hand is up to precisely respond to Jeff; thank you. Jeff thanks; I appreciate what you're saying.

There's a point for comment that specifically asks about history, and I think that's something that the Council can usefully respond to which is to set out, you know, what the history is.

The only point that I would make is that - I don't know what the answer to this is, but I - it's worth you responding clearly if the Council can respond clearly.

There's a difference between it wasn't discussed and it was discussed and decided specifically not to prohibit, or it was discussed and no consensus was reached. And I think what the Board is looking for right now is a clear - if we can get it - is a clear understanding of the history of it. And if you can provide - if the council can provide that, that's very valuable. If you can say - we've discussed at this point, and examples are given and there was consensus that it shouldn't - there shouldn't be a distinction made, then that's very helpful.

Jonathan Robinson: Thanks, Chris, that's clear. So I'm hearing a single proposal from Jeff that states that we should respond in a certain way. We do respond, we respond in a certain way, which is being described, and we - so Jeff, do you want to add to that?

Jeff Neuman: Yes, I do, and I think that's helpful, Chris. Admittedly it's kind of hard to go back, you know, 2006 or 2007 archives and try to find specific examples. You know, other than - and again, this specific issue, closed versus open brand TLDs was not discussed at that point in time but the general notion of not restricting the use of TLDs - and some people, like, call them 'boutique TLDs' at that point in time - that was specifically discussed. And then as Volker pointed out on Adobe we called them 'single-registrar, single-user TLDs' in our vertical integration marketing group.

I think we can talk in generalities. We can talk some specifics. But, you know, it would obviously be a huge burden for us to individually go back and look through transcripts and other things other than people from those groups to step up and say "Oh yes, I remember talking about these types of issues." I think we can do that. But again, sometimes it's hard because you now have people that may have been

for it but now are against it because of certain competition, arguments or needs and - we'll do our best.

But yes, that's my proposal, Jonathan, is to go basically without commenting whether closed versus open are good or bad but more about the issue in general of restricting TLDs to certain kinds of uses and that was outright rejected. So thanks.

Jonathan Robinson: So I'm seeing three hands come up from David, Thomas Rickert - David Cake, Thomas Rickert and Alan Greenberg. I would like to close the discussion with the list of...

Ching Chiao: Hey Jonathan. Hey, Jonathan, could you plug me in the queue? This is Ching: I'm not in the Adobe team. Thank you.

Jonathan Robinson: ...Thomas, Alan and Ching. Ching, since we haven't heard from you why don't we hear from you first? And you may well have tried to put your hand up previously, so I'll put you ahead of others and I've got David, Thomas and Alan.

Ching Chiao: Thanks so much, Jonathan, and I would like to, I mean, I would like to make it very briefly: I strongly echo what Jeff has said. And I think - actually, without knowing the background of the - this issue being revisited - I mean the closed generic issue being revisited - I think the board or the new GTO committee also may wish to, you know, provide a rationale why this specific issue being brought up again, instead of to revisit all the GNSO recommendations in the past, including several recommendations which are selectively not being implemented by the ICANN staff in the past. I would like to point out very specifically the

IDN recommendation was not implemented at the GNSO - I mean, recommended in the year 2008.

So I think that at this point rather than really going into debate on whether we should do a closed stream or a quality another stream - I mean a restricted stream, we should take a step back towards on the board or the new GTO at the stat level tell us why this issue being selectively being selectively revisited instead of all the recommendations being revisited. I mean, just my two cents, here. Thank you.

Jonathan Robinson: Thanks, Ching. Let's move rapidly on to David, then.

David Cake: Thanks, Jonathan. Just - I mean, this certainly seems to be a very complicated issue that I've heard lots of arguments pro and con and certainly it's not one where NCSG has a unified view. But just looking at some of the historical discussion I have heard people - some people in our working group talking about that the - it was closed gTLDs certainly permitted, but that there were qualifiers on that.

You know, for example, there may be public interest concerns and so on. So I don't think it's as straight-forward an issue as 'permitted or not.' But certainly it does look like Jeff's idea of going carefully through the history and - you know, saying that we have already addressed this question and making it clear what the decision was is a sound one.

Jonathan Robinson: Thanks, David. Now Thomas.

Thomas Rickert: Thanks, Jonathan. I think there are two aspects of this question. One of which is certainly the history and past discussions and the outcome of past discussions in the GNSO. But we can point to that and we

should point to that, but to me the fundamental question is whether the council sees the need to revisit its former views.

Certainly, nothing keeps the council away - or the GNSO away, such a way from considering these questions and working on them, but as far as I understand they have not spoken to representatives of various groups inside the GNSO. I haven't heard anybody that wanted to reopen the book on that one. And so we might wish to add the result of maybe a test the waters on that to our response, which would then be twofold. One of which would be hinting at the historical data and two saying something about the current view of the council. So thank you.

Jonathan Robinson: Thanks for that addition. I'm going to wrap this conversation up, then, with Alan, please?

Alan Greenberg: Thank you very much. Both Jeff and Ching alluded to, I think, one of the critical issues here: that yes, a number of these issues were discussed and perhaps even decided by GNSO groups but the real decisions ended up being made by staff following each of the applicant guidebook discussions and even prior to that.

So, you know, the question of 'is food okay?' Sure it is. That was a staff decision which essentially - presumably evaluated these things with great detail and you - the board may well want to go back to the staff records of why did the final outcome end up like it was? Because in many cases the GNSO decision - the GNSO recommendations were not definitive and in some cases, as Ching alluded to, strong recommendations were not followed as a matter of implementation.

So it's not really just a question of 'what did the GNSO say?' it's 'how did these decisions get made despite discussion in the community and discussion which not everyone agreed to?' You know, it will - there's a good chance, I don't know what the outcome will be - that the (alack) will put in a statement saying that a large part of the at-large community supports restrictions and if we had ever had that discussion in substance, we probably would have said it earlier as well. Thank you.

Jonathan Robinson: That's great. Well, I think that's going to call the discussion. It's quite clear that there's a public comment period open for groups and individuals to put their own input in. I feel we've three points that have come out of that: we are going to need someone to lead on this, so I would like a volunteer either immediately in the chat to lead the dropping of this response, because it's clear to me that we do have a willingness and a desire to make a response to this request. So I'd love a volunteer and that can come on the list or in the chat.

And I'm going to then recognize that there's 15 minutes left on this call for which we have three or four items. I think the planning for Beijing is well under way, which is item 10. And I'm going to ask Mason to continue with that work together staff and pick it up on the list. I'm sure he can put a brief précis of where we're at and any questions.

Item 8 is important: this is the policy versus implementation discussion and this is going to be a substantial item on the agenda in Beijing, I suspect. And so the key question for the council, really, is 'do we as a council want to respond in some way - and in some substantive way - ahead of the Beijing meeting?' So I would like to ask if there's any

input in and around this issue of the Staff paper and policy versus implementation, and what the council might do ahead of that.

By the way, on the previous item I should have emphasized that in these fast-track process questions where the council asks for policy advice I'm just trying to remind council that as far as is possible to relay these back to your respective groups and get your group input on this as quickly as possible. So that was the point I neglected to make on this previous item.

Now back onto policy versus implementation: are there any comments as to how the council might respond or provide input - to the public comment or otherwise - ahead of Beijing? Marika, I'll just - David I know you have your hand up but let's here from Marika and then David over to you after that. Marika?

Marika Konings: This is Marika. I just need you to know that there's currently a public forum open on this item. We need to encourage input on this paper as well as other points of view in relation to this issue. With the idea being that the feedback received will feed into the session that we're planning for Beijing. And maybe also to note if there's anybody interested in being a part of organizing that session please let me know: we already have a couple of names of people who said they were interested in putting a session together.

The idea is we need to make that a cross-community discussion on this issue and hopefully be able to identify some very concrete next steps that either can take place on a community-wide basis or also identify steps or actions they want to take within their own communities

to address some of the issues that we've encountered with this discussion.

Jonathan Robinson: Thanks, Marika. That's a very good point. So Marika is looking for volunteers from within the council or the broader community to assist with planning and developing that session in Beijing. And in addition there is an opportunity for us to potentially respond to this as a council. I'm just going to see if there's any other comment or input on this topic at this stage.

Seeing none, I will move us on to the next item on the agenda then, which is the update that Barbara Roseman provided to us on the Whois (unintelligible) relay and reveal study. This one's part of a substantial set of studies and other worked in the Whois - in and around the Whois set - Whois issue. One thing that I would like to have answered briefly in this discussion - or at least raised a point is - how, given the commission of the Whois expert working group, how this links to other ongoing group in 'who is.' You may well be planning on to touch on that in any event, Barbara, but I think it's something we should touch on if you don't.

Let's see: I know you've sent something to the list. Let me give you the opportunity to talk with the council now and I'll way where we're at with this topic.

Barbara Roseman: Hi, thank you very much. This is following up from the Whois study four results and the - just to go over the findings of that, basically they've determined that a full study of Whois privacy and property reveal and relay could - if defined in such a way as to absolve the identified barriers of confidentiality and baggage data and such -

provide sum but not all of the data required by the GNSO council. This would be well-received by people on all side of the Whois information axis to date and if attention was paid to the issues that arose during the study that they think this would produce very good data.

Because there's the effort to sort of move forward on a privacy proxy accreditation process, there - you know, this the data that could come out of that survey could be a very helpful process. It would look at the questions at how we relay, reveal and requests are handled by proxy providers. It would identify the current prophecy that they're using and it would really just lay out the groundwork for what the existing set of circumstances are.

It's debatable whether this is something that should move forward before the expert group has even commenced their work. However, you know there was the recommendation by the board that any work that could be done parallel with that should not be halted just because the expert group has not yet started or completed their work.

I think that the question for the council here is whether there's enough information that would be gained from moving forward with a privacy proxy reveal and relay survey that would gather data about the existing state of things. Whether the value of that outweighs just waiting until the expert group has had a chance to do some of their work and present some findings in Beijing.

I think that either way this is probably a study that is worth doing on some level: it's just a question of the timing of it that would be, I think, open for discussion.

Jonathan Robinson: Thanks, Barbara. Thank you for being so brief in getting to that. So that's really the essence of the question. There is a potential for this council commission a study on the proxy privacy work and the question is, really, is we should be getting on with anyway as planned or should it be put - should we be no longer doing this work, or should we be putting it back in behind the expert working group. I see I've got a hand up from John Berard and then Jeff Neuman.

John Berard: Jonathan, this is John Berard and I (unintelligible) solution is to instruct the body to do two things: one was to continue working to enforce the current Whois requirements and the second was to empanel an expert group to consider the services evolution. I would view the moving forward on this study as being helpful to continuing to deliver on the current Whois environment. Certainly they are connected but they are not sequential. And so I would say we should move forward.

Jonathan Robinson: Thanks, John. Jeff, your hand is up: are there any points either in support of that approach or against it? Jeff, I'm not sure where you would like to come in on this: please go ahead.

Jeff Neuman: Yes, thanks and my question - my answer is an 'I don't know.' And the reason I don't know is it seems like I can't inform this expert group, and that this expert group is going to be working on this issue and going around the policy process, then I don't know. I don't know if it's worth it. It's a lot of money to spend on this.

I think it's a worthwhile survey but again the fact that now this expert group has been the fact that ICANN has now inserted a provision into the registry agreements that says 'regardless of what the GNSO community says we think, if the expert working group comes up with

recommendations and the expert working group and the board want to move forward with those recommendations, it gets automatically implemented against the registries and registrars ultimately.

So I'd like, you know, a meeting with Fahd and the board on this issue in Beijing before we decide to spend more money on these types of additional studies. I think this work is important, I think this work should be left to the GNSO and not to the expert working group. And if that's the case, then yes move forward, then. If we're just going to be worked around anyway through the REA and the expert working groups then no, we should not waste our money on this.

Jonathan Robinson: Yes, thanks. Again that provision has been proposed in the contract, it hasn't yet been agreed, right? That's a proposal that's some form of adherence to the outcome of the expert working group.

Jeff Neuman: Which is precisely why we need a meeting with Fahd and the board especially the new gTLD committee to talk about this in Beijing.

Jonathan Robinson: All right, that sounds like an action item: either act ahead of Beijing. Does anyone else want to pick up on this? I see Margie you had your hand up and I'll put you ahead of the queue in case there's material information that you're able to provide in this respect.

Alan Greenberg: And Alan also.

Jonathan Robinson: Yes, Alan, sorry, I see you...

Wendy Seltzer: And Wendy, please.

Jonathan Robinson: ...have you hands up but I want to hear from Margie so that it informs your viewpoint.

Alan Greenberg: That's fine.

Margie Milam: Yes, sure. I just wanted to highlight that the board resolution talks about the expert group as feeding into the PDP process. So from a staff perspective the preliminary issue report is currently being drafted and will likely be published before Beijing. And then, you know, it would go through that process. So in terms of relevance to the PDP it seems that the outcome of the study might be useful when the PDP kicks off. So I just wanted to clarify that.

Jonathan Robinson: So Margie your view is that the expert working group and potentially the study feed into the issue report and the PDP?

Margie Milam: Yes, that's correct, and that's how the preliminary issue report is being drafted. It's to participate that the work would feed into the PDP.

Jonathan Robinson: All right. I've got - we're got a tight timescale here. We've got Alan, Jeff and (unintelligible) has dropped out. But Alan and Jeff?

Alan Greenberg: All right, thank you. Part of what I was going to say was what Margie is said is the board's resolution - the expert working group - is to feed into a PDP. We've also heard that the discussions with - in the RAA group on accrediting privacy and proxy services is likely to lead into a PDP.

So unless we believe that the preliminary work done by the expert working group is likely to change the requirements of this study and change the specifications I see no reason to delay it. Let's get the

information: these studies take far longer than we ever expected.

We're still waiting for results for studies that were commissioned years and years ago. Let's get it off, let's get it going unless we really believe that the specifications will change substantially.

Jonathan Robinson: Yes, and then Jeff do you have something additional to...

Jeff Neuman: Yes, and in fact I hear what Margie said and I think that's great to know what is in the board resolution. And will emphasize that that is not in the proposed agreement. There is no mention of PDPs, there is no mention of that part of the board resolution. And in fact in discussion with the Registrars on the RAA, continuing that that was not mentioned either.

And again, I will not be in favor of moving forward on the study until we get that clarified, straightened up and out of the registry agreement. Again that's just a huge amount of money to waste and I think having a discussion with the expert group before we approve the money to do this very expensive - I agree beneficial - study, but not if it's just going to be worked around. So at this point is 'absolutely not, let's not move forward until we get complete clarification that this will indeed feed into a PDP and not directly into the agreement.

Jonathan Robinson: Well I'm thinking I'm hearing something that's not entirely inconsistent. We can both seek that clarity with the intention of moving ahead with the study, pending the clarification that you are advocating, Jeff. So I see those things - it's not an either or, I'm hearing an advocacy for moving ahead with the study but pending clarification on how these dots join with respect to the PDP and the study and so on.

Jeff Neuman: Well, sort of. Because I don't know the budget here, I don't know what we're planning on spending. I'd like to know a little more before we just say 'yes, go ahead with the study.' I think this should be a topic in Beijing. I think that by then we should hopefully have all the information we need, including the budget, including the commitment that it's not in the agreement, that it's going to go feed into PDPs: all of that stuff before we should definitively say yes to moving forward.

Jonathan Robinson: Okay, thanks Jeff. I'm going to draw that topic to a close. I suspect that the budget information and the scope of the study is already available. If it is, Barbara, please send that to the list. If it's not, please clarify that we have not yet set a budget for this. But I've a feeling it may already be defined.

In any event, we've heard - it sounds to me like there's a little bit of work to be done before we as a council agree to support the undertaking of that work. So we've got a little bit more to that.

So we've come to the final two minutes of the call and I've skipped over the planning for Beijing as I warned you I would earlier. Mason's going to update the list and we'll pick up on that. I know Alan had a request to raise an item under any other business. If there's anyone else with an item they'd like to raise under any other business please put your hand up in the queue after Alan. Alan?

Alan Greenberg: Thank you very much. I just wanted to highlight the continued delays on implementing the Pedner PDP and the ERRP. It's now being close to two years since the GNSO approved the recommendations. It's been 14 months since the board approved it and it's been over two months since the public commentary was closed.

You know, I'd like a report - I'd like to see a report to council from staff about what's going to happen here. I mean, a huge amount of community time was put into this and it's just going on and on forever. Thank you.

Jonathan Robinson: Right. We're really going to have to wrap this up in the next minute or two: I've got an input from Marika and I've got Jeff and Maria in the queue and I know Ching would like to say something. So I've got three councilors and a head and then I've got Marika. So Marika, Jeff, Maria, Ching?

Marika Konings: Again briefly just in response to Alan's question, I think it's closed. I think an announcement's coming in the next two weeks but I'll relay your message to the staff so they can provide an update to the council on the status of implementation of that. I do feel your frustration.

Jonathan Robinson: Thanks Marika. Jeff?

Jeff Neuman: I'll be very quick. Again, just a notion of sticking to precedent: I think that we should send a message and discuss it a little more in Beijing to the board to the program about sticking to precedent, not reopening issues that were closed four years ago. And that includes the changes to the registry agreement which includes the - like the unilateral way for ICANN to amend the agreement whether - regardless of whether the communities want it or if the registries want it. So I think we need to send that clear message that we can't just keep debating issues over and over again. Things need to be closed at some point in time. Thanks.

Jonathan Robinson: Maria.

Maria Farrell: Thanks, Jonathan. Quick update: before Christmas I made a complaint to the Ombudsman about the initiation and conduct of the trademark clearing house meetings and the lack of transparency around them. And I just wanted to update the council with I had a meeting with Fadi two weeks ago in the ombudsman during the non-contracted party house meetings.

And I know he's sure to tell this to people who were at that meeting as well and essentially he's kind of taken on board a lot of the points and wanted to work to make sure that we don't make that sort of mistake again. So he invited me to help to develop some, like I - articulate some of the community norms about how we run meetings transparently.

And I want to do that in a purely transparent way so I'm not quite sure how to do that. And Denise Michel on staff is helping out so I just wanted to put that to the council. I'll send a follow-up email: I would really greatly appreciate any input that anybody has to give and that's really it.

Jonathan Robinson: Thanks, Maria. I'm sure we'll do that. Any complaint beyond the Ombudsman is obviously very serious and I expect it to be taken seriously and it has, so that's good to know that that's moving towards a resolution. Ching, did you have something more you'd like to say? I'm aware I haven't included you because happened you aren't on Adobe.

Ching Chiao: I think I'll be quick. I mean just on the budget issue I've just heard your other councilor talking about the budget issue I mean who is the expert group. We have similar opinions for the expert group for the very (unintelligible) which also calls out ICANN - I mean, tremendous of an issue resources.

So I would like to put this on the record for the budget expert groups versus the - I mean the volunteer groups. How these two kind of methodology can be compared and what would be the efficiency of those two groups. Just for the record. Thank you.

Jonathan Robinson: Thanks, Ching. I'm very conscious of needing to bring this call to a close but I'm also conscious that some haven't been able to raise their hands and I'm aware that Wendy may be someone who unfortunately missed an opportunity to talk earlier. Wendy, do you still have something you'd like to contribute?

Wendy Seltzer: Yes, I just wanted to second Jeff's call for discretion in Beijing about changes to agreements. I think that's a very important piece for us to get on our agenda for something to discuss at the highest level.

Jonathan Robinson: That's where the (unintelligible) prior agreement and not revisiting issues that - substantial issues that appear closed. All right thanks everyone, we've more or less stuck to schedule. I appreciate the quality of the input, the tone of the input and it seems to me that we're going to have to go through this audio with a fine-toothed comb and pick out a number of actions, work with staff and the other council leadership, Mason, and we'll follow up to do that.

And we'll try and represent that as accurately as possible on the action list and keep the ball rolling on these various items. Thanks very much - particularly for those of you who got up early and for those of you who paid attention and contributed very well. We'll be talking with you on list and again at the council meeting in approximately one month's time. Thanks again, everyone.

((Crosstalk))

Man: And good morning to everyone in the States.

Man: Thank you, good bye.

END

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	670
Applicant Name	KBE gTLD Holding Inc
Application ID	1-1326-97308
Applied for TLD (string)	THEATER

Response:

January 17, 2014

Dr. Steve Crocker, Chairman of the Board
Mr. Fadi Chehade, President and CEO
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Key Brand Entertainment Inc. / KBE gTLD Holding Inc. Additional Response to GAC Category 2 Advice

Dear Dr. Crocker and Mr. Chehade:

We thank you for the opportunity to engage in a continued dialogue regarding our new gTLD applications. In consideration of the ongoing and most recent GAC Category 2 Advice (the “Advice”), we now respectfully provide an additional response to ICANN, the Board, the GAC and the New gTLD Program Committee (collectively, “ICANN”).

Key Brand Entertainment Inc. and its wholly-owned subsidiary, KBE gTLD Holding Inc., the applicant for .theater (collectively, “KBE” or “Applicant”), would like to preface this response by referencing our May 10, 2013 Applicant Response to GAC Advice issued in response to the GAC Beijing Communique (the “Beijing Response”). In the Beijing Response, Applicant provided our company background, described the objectives of our application and addressed specific portions of the GAC Beijing Communique, all of which continue to be germane to the Advice and this additional response.

KBE is the operator of the preeminent website for online Broadway and theater ticket sales and related services, content and information as well as one of the world’s leading developers, producers, presenters and distributors of live theater and stage shows. As owner and operator of the industry-leading broadway.com and theater.com websites as well as a robust portfolio of other Broadway- and theater-related domain names, KBE offers a full range of online services

GAC Advice Response Form for Applicants



and features, including consumer ticketing, group sales and complete editorial coverage of Broadway presentations in New York City and over 40 other markets. Additionally, through its Broadway Across America and Broadway Across Canada businesses, KBE serves as a leading Broadway producer and presenter of first-class touring productions in more than 40 cities across the United States, Canada, the United Kingdom and Japan. As such, KBE is one of the world's leading brands in the Broadway and theater industry with well-recognized global brands serving as authoritative sources for high-quality content, services, information and industry news.

Within this context, there are constant challenges that KBE and other legitimate industry participants face as operators of online content and sales properties and that the general public faces as consumers of their content and services. The most difficult of these is competition with unlicensed and unauthorized ticket sellers who impersonate legitimate third parties (e.g. shows, venues, actors, etc.) and, by leveraging their goodwill, drive traffic away from legitimate sources. These unscrupulous actors impersonate intellectual property rights holders and mislead the public. Their actions are extremely damaging to the shows and venues, legitimate ticket resellers, the theater industry, and ultimately and most importantly, the public as a whole. The problem is pervasive not only in the United States but globally. Policing it is increasingly difficult given the sophistication of infringers, counterfeiters and scalpers. The lack of enforcement of existing laws globally is complicated by the sheer number of shows, venues and other theater-affiliated stakeholders, all of whom are targets of infringers and counterfeiters. This practice is rampant in the theater industry and undermines and infringes upon the trademark and other intellectual property rights of legitimate constituents of the theater industry.

In operating its gTLDs as stated in its applications and in accordance with all ICANN guidance, directives and contractual obligations, including the Registry Agreement and all of the Specifications, KBE will serve a public interest goal by protecting intellectual property rights holders, the industry, and, most importantly, the general public from the above articulated predatory and harmful behavior. As a leading participant in the theater industry, KBE has historically served as a promoter and custodian of both the physical and digital space within which it and the theater community operate for the benefit of the public at large. KBE has been successful in the past at combatting the unauthorized and illegal practices that have damaged the general public in its wholesale interaction with the theater industry. KBE has served, and will continue to serve, a public interest goal by protecting the integrity and safety of that space for the public at large when interacting with the theater industry and its community as customers, partners and contributors.

In sum, KBE will undoubtedly "serve a public interest goal" by creating a cohesive digital space that strikes a tactful balance between providing quality, enjoyable and meaningful theater-related content, services and opportunities for community engagement while maintaining a safe, constructive and controlled environment that protects the public from the predatory and harmful behavior of infringers, counterfeiters and scalpers.

Lastly, Applicant feels it necessary to again articulate its position on the Advice within the context of the new gTLD program as a whole. As we have stated in the past, Applicant maintains its position that the Advice is inconsistent with the rules, policies and procedures contained in the Applicant Guidebook ("AGB") and the open multi-stakeholder process that created it. The AGB embodied the rules for application for new gTLDs and the iterative process of the AGB was documented along the way. The final AGB published prior to the application

GAC Advice Response Form for Applicants



window closing did not differentiate between open versus closed business models or mention “closed generics”. In fact, the debate leading up to the final version of the AGB, one which included extensive input from the ICANN community including GAC constituents, contemplated the validity of different registry and business models (e.g. sponsored, open, community, etc.) as well as the idea of restricting and even disallowing “closed generics”. Ultimately, the GNSO and the Board decided against creating such distinctions with the understanding that the business model and operation of the gTLD would be determined by the applicant. As long as the application passed evaluation pursuant to the AGB criteria and complied with the Registry Agreement, the business model and operating rules of that gTLD (including whether the applied-for string was to be “open” or “closed”) were to be determined by the applicant. KBE relied in good faith on the AGB and the authoritative guidance available to it at the time of application. KBE and all applicants have made significant investments and taken positions in reliance on that guidance, which if changed retroactively would negatively impact the new gTLD program, its applicants and ICANN.

Thank you for your time and consideration on this matter and we look forward to and hope for meaningful progress on these issues.

Sincerely,

Matt Kupchin
Co-CEO, Interactive Division

GAC Advice Response Form for Applicants



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Please note: This form will be publically posted.

Respondent:

Application Prioritization Number	1168
Applicant Name	IG Group Holdings PLC
Application ID	1-1332-82635 Additional Response to GAC Cat 2 Advice
Applied for TLD (string)	.broker

Response:

The Buenos Aires communiqué (<http://www.icann.org/en/news/correspondence/gac-to-board-20nov13-en>) raised no issues with respect to the .broker application.

In the GAC Beijing communiqué of April 2013 (<https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>) .broker was identified as subject to “Category 2” advice, being a generic term for which an exclusive access registry model was proposed.

We already notified ICANN of our intention to submit a change request to our application for .broker, changing it from "exclusive access" to "non-exclusive access" (or "open"), whereupon the GAC Category 2 advice will no longer apply (note Page 5 of the NGPC response to the GAC advice on Sept 2013 <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-28sep13-en.pdf>).

The application will then be consistent with Clause 3(d) of Spec 11 of the latest amended draft of the new gTLD Registry Contract dated November 20, 2013, enabling us to proceed to contract with ICANN.

GAC Advice Response Form for Applicants



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Please note: This form will be publically posted.

Respondent:

Application Prioritization Number	701
Applicant Name	Viking River Cruises
Application ID	1-1691-43949
Applied for TLD (string)	.CRUISE

Response:

We continue to be troubled by the “de facto” policy changes as it relates to closed generics. Viking River Cruises reasonably relied on the decisions made during the ICANN policy-making process leading up to the New gTLD Application period whereby, there was no prohibition on the ability of applicants to pursue closed generic gTLDs. We contend that if ICANN is unwilling to allow these types of registries to proceed as planned, that ICANN must at least provide an enhanced refund to applicants for these gTLDs. We propose a full refund of the \$185,000 application fee or in the alternative, a 70% refund. Applicants should not be penalized for following the rules and an enhanced refund would at least partially compensate them for the significant investment of time, money and staff resources to pursue these types of applications.

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	1873
Applicant Name	The Goodyear Tire & Rubber Company
Application ID	1-1884-1217
Applied for TLD (string)	.TIRES

Response:

In responding to this request, we would like to reference our initial response to the GAC Category 2 Advice from the GAC Beijing Communique, which was submitted to ICANN on May 8, 2013, where we stated, in part, that “...we believe operating .tires as a closed registry will serve the public interest by enabling only Goodyear and its affiliates to utilize second-level names to provide authorized, legitimate and accurate content, products and services.” As a result, consumers could be assured that any product or service purchased and/or information obtained on or through a .tires domain would meet the rigorous safety standards of the Goodyear Tire & Rubber Company and all applicable regulatory standards.

We continue to be troubled by the “de facto” policy changes as it relates to closed generics. The Goodyear Tire & Rubber Company reasonably relied on the decisions made during the ICANN policy-making process leading up to the New gTLD Application period whereby, there was no prohibition on the ability of applicants to pursue closed generic gTLDs. We contend that if ICANN is unwilling to allow these types of registries to proceed as planned, that ICANN must at least provide an enhanced refund to applicants for these gTLDs. We propose a full refund of the \$185,000 application fee or in the alternative, an 70% refund. Applicants should not be penalized for following the rules and an enhanced refund would at least partially compensate them for the significant investment of time, money and staff resources to pursue these types of applications.

GAC Advice Response Form for Applicants



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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.

January 6, 2014

Deborah M. Lodge
202-457-6030
dlodge@pattonboggs.com

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 Corporation¹ 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”) Communiqué 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” letter³ 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>.

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operate their TLDs as exclusive access registries, *i.e.* “Closed Generic”⁴ strings. Your Advice Letter also identified eleven strings⁵ 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

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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

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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>.

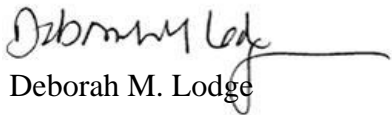
⁷ http://www.ntia.doc.gov/files/ntia/tia_comment_040212.pdf.

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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
Hughes Satellite Systems Corporation

May 10, 2013

Deborah M. Lodge
202-457-6030
dlodge@pattonboggs.com

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 Corporation¹ 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.

Dr. Stephen Crocker and Mr. Fadi Chehadé
May 10, 2013
Page 2

Hughes welcomes the six safeguards³ 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

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

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](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.

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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

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/>.

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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

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.

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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

²⁹ See Manne.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

PATTON BOGGS^{LLP}

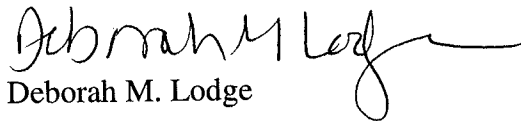
Dr. Stephen Crocker and Mr. Fadi Chehadé

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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 Communiqué 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.

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	1429
Applicant Name	Dish DBS Corporation
Application ID	1-2009-38008
Applied for TLD (string)	.DATA

Response:

Please see attached.

January 6, 2014

Deborah M. Lodge
202-457-6030
dlodge@pattonboggs.com

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: DISH DBS Corporation’s comments on the Buenos Aires GAC Communiqué

Dear Dr. Crocker:

On behalf of the applicant, DISH DBS Corporation¹ and its affiliated entities (collectively “DISH”),² I am writing to provide DISH’s response to ICANN’s recent request (“Request”) for comments on the Buenos Aires Governmental Advisory Committee (“GAC”) Communiqué 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” letter³ 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.

¹ DISH is a market innovator in the provision of satellite television, audio programming, and interactive television services to commercial and residential customers in the United States. DISH, through its affiliates, is a global satellite services provider, and developer of hybrid video delivery technologies, including streaming and video-on-demand services. DISH intends over the coming decade to provide internet, video and telephone services to consumers for both home and mobile applications.

² For purposes of disclosure, DISH applied for thirteen new generic top level domain (“gTLD”) strings: .DISH, .MOVIE, .BLOCKBUSTER, .DIRECT, .LATINO, .DATA, .OLLO, .PHONE, .MOBILE, .LOCKER, .OTT, .DOT and .DTV. Some of DISH’s 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>.

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Your Letter further indicates that 174 of these applicants responded that they would not operate their TLDs as exclusive access registries, *i.e.* “Closed Generic”⁴ strings. Your Advice Letter also identified eleven strings⁵ 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.” DISH is an applicant for three of these eleven strings -- .Mobile, .Phone, and .Data (“DISH TLDs”). To date, however, DISH has not been contacted by the ICANN staff regarding the public interest goals for the DISH TLDs. However, if this current Request is part of the ICANN staff’s outreach, DISH has previously provided and herewith again provides reasons below why it believes that the DISH TLDs will serve public interest goals.

1) The Applicant Guidebook (“AGB”) does not prohibit “Closed Generic” applications.

DISH reiterates all of the arguments in its prior correspondence to the ICANN board dated May 10, 2013 (enclosed). Specifically, DISH 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. DISH 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. DISH 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) DISH’s applications for the DISH TLDs serve a public interest goal.

In its gTLD applications, including its applications for the DISH TLDs, DISH 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, DISH stated *inter alia* that:

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

“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 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, DISH also provided the following response to Q.18 (b) in its TLD applications:

“[One of t]he goal of [DISH 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...[DISH] intends to utilize the [DISH TLDs] ... with the goal of further securing the collection and transmission of personal and other confidential data ...”

The above examples demonstrate DISH’s 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 DISH is able to operate these gTLDs on a restricted access basis, with access defined by specified criteria and affiliations.

If DISH had not applied for the DISH TLDs, DISH 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. DISH intends to operate the DISH TLDs to reduce such problems. By controlling the criteria for registering second-level domains in the DISH TLDs, DISH will be able to reduce the risk of Internet users being deceived and defrauded by unauthorized third parties. Allowing DISH to set the rules for the DISH TLDs is the only practical way to increase the screening ability of the Registry and keep the DISH TLDs unadulterated, thereby increasing consumer confidence and trust.

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

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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 DISH realized during the new gTLD application process that the ICT associations were not planning to register for domains, such as the DISH TLDs, to protect the internet community. DISH felt compelled to act. DISH invested its own resources in new gTLD applications for the DISH TLDs 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) DISH is willing to discuss potential resolution steps with ICANN for the .Mobile, .Phone and .Data strings to satisfy the GAC's Category 1 and 2 safeguards.

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

- 1) Whether ICANN would permit DISH to amend its applications for the DISH TLDs to permit registration by a defined yet still limited cross-section of the Internet community to protect Internet consumers.
- 2) Whether ICANN would permit DISH to convert the DISH TLDs applications from standard applications to community applications to satisfy the GAC's Category 1 and 2 safeguards.
- 3) Other options that may be available to DISH for the DISH TLDs to satisfy the GAC's Category 1 and 2 safeguards without eroding any of DISH's rights.

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

⁶ DISH's 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.

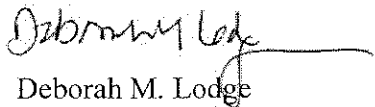
PATTON BOGGS LLP

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The above response is intended to continue the discussion regarding possible solutions to the "closed generic" issues as they may pertain to the DISH gTLD applications. DISH remains 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
DISH DBS Corporation

May 10, 2013

Deborah M. Lodge
202-457-6030
dlodge@pattonboggs.com

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 .MOBILE (1-2012-89566), .MOVIE (1-1920-39242),
.DATA (1-2009-38008) and .PHONE (1-2011-80942)**

Dear Dr. Crocker and Mr. Chehadé:

Dish DBS Corporation¹ and its affiliated entities (collectively “Dish”)² welcome this opportunity to provide a response to the recent Governmental Advisory Committee (“GAC”) Communique dated 11 April 2013 (“Communique”). Dish reserves the rights to amend any

¹ Dish is a market innovator in the provision of satellite television, audio programming, and interactive television services to commercial and residential customers in the United States. Dish, through its affiliates, is a global satellite services provider, developer of hybrid video delivery technologies, provider of home movie and video game rental services by DVD-by-mail, streaming and video-on-demand. With its recent bid for Sprint Nextel Corporation and its commitment to diversifying and updating its technology portfolio, Dish intends over the coming decade, to provide internet, video and telephone services to consumers for both home and mobile applications.

² For purposes of disclosure, Dish applied for thirteen new gTLD strings: .DISH, .MOVIE, .BLOCKBUSTER, .DIRECT, .LATINO, .DATA, .OLLO, .PHONE, .MOBILE, .LOCKER, .OTT, .DOT and .DTV. Some of Dish’s applied-for TLD strings may be affected by this response.

LetterheadFooter

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

Dish welcomes the six safeguards³ proposed by the GAC in the Communique, and where those matters are within its control, Dish remains committed to strongly considering the recommendations during their implementation of the Dish applied-for gTLD strings.

II. CATEGORY 1 – CONSUMER PROTECTION, SENSITIVE STRINGS AND REGULATED MARKETS

Dish welcomes the GAC's recommendations for this category, and where those matters are within its control, Dish remains committed to strongly considering the recommendations during their implementation of the .MOVIE and .DATA TLDs. Further, Dish remains committed to public interest goals that affect the Internet community, including but not limited to addressing 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. As a result of the above public interest concerns, Dish shall consult with regulatory bodies in the industry, such as the Coalition for Online Accountability (COA)⁴ to identify appropriate regulator entities for the .MOVIE and .DATA TLDs.

III. 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)

³ “WHOIS verification and checks,” “Mitigation abusive activity,” “Security checks,” “Documentation,” “Making and Handling Complaints” and “Consequences.”

⁴ COA has drafted a set of policy recommendations that are endorsed by many other international organizations representing the creative industries. See <http://www.onlineaccountability.net/>.

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.⁵ No evidence supports this claim.⁶ These claims appear to be based on a review of the existing TLDs, which are open.⁷ “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.⁸ This innovation may further result in significant competitive and consumer benefits.⁹

Some of these new business models will likely rely on a business’s ability to choose between running an open or closed TLD.¹⁰ There is no reason to deter these new business models, as

⁵ See <http://www.icann.org/en/news/announcements/announcement-2-05feb13-en.htm>.

⁶ 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).

⁷ 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).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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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.¹¹

Closed generic TLDs essentially do not exist today, so there is no experience to draw on to assess the best way to use them.¹² 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.¹³

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.¹⁴ To the extent that ICANN allows synonyms to be used as gTLDs the potential competitive issues become even more remote.¹⁵ The market for TLDs does not present particular competitive risks, and there is no a priori reason for ICANN to intervene prospectively.¹⁶

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.¹⁷ 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.¹⁸

If a market can be defined as the use of a particular gTLD, then the market is so small as to be meaningless.¹⁹ Showing abuse within this market will be challenging, at least in the US,

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See* Lenard.

¹⁶ *See* Manne.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

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.²⁰ 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.²¹

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The domain name service (“DNS”) space is vast.²⁴ 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 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.²⁵ 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.²⁶ There is no evidence for the claim that market dominance inherently flows from the control of a

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

generic domain name by an applicant who sells products or services that can be described by a generic name.²⁷

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.²⁸ These policies suggest that “all applicants should be evaluated against transparent and predictable criteria, fully available **before initiation of the process.**”²⁹ (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

The competitive environment for gTLDs would be further aided by permitting “closed generic” TLDs, because competing companies could purchase thematically similar gTLDs.³⁰ 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.³¹

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

²⁷ See <http://www.internetgovernance.org/2012/09/19/generic-top-level-domains-who-should-own-book/>.

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³⁰ See Manne.

³¹ *Id.*

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approving “closed generic” TLDs.³² Such a model could “put direct competitive pressure on established gTLDs or could expand the market in new directions.”³³

D) ICANN IS NOT THE BEST FORUM TO DEAL WITH ANTI-COMPETITION 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.³⁴ 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.³⁵ Moreover, even the GAC lacks the institutional capacity to act in place of the FTC or DOJ or competition authorities in other countries.³⁶

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 gTLD program, “enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction.”³⁷

Sincerely,



Deborah M. Lodge

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 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 Communiqué for the full list of advice on individual strings, categories of strings, and strings that may warrant further GAC consideration.

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Respondent:

Applicant Name	Dish DBS Corporation
Application ID	(1-2012-89566), (1-1920-39242), (1-2009-38008), and (1-2011-80942)
Applied for TLD (string)	.MOBILE (1-2012-89566), .MOVIE (1-1920-39242), .DATA (1-2009-38008) and .PHONE (1-2011-80942)

Response:

Please see attached.

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	1764
Applicant Name	Dish DBS Corporation
Application ID	1-2011-80942
Applied for TLD (string)	.PHONE

Response:

Please see attached.

January 6, 2014

Deborah M. Lodge
202-457-6030
dlodge@pattonboggs.com

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: DISH DBS Corporation’s comments on the Buenos Aires GAC Communiqué

Dear Dr. Crocker:

On behalf of the applicant, DISH DBS Corporation¹ and its affiliated entities (collectively “DISH”),² I am writing to provide DISH’s response to ICANN’s recent request (“Request”) for comments on the Buenos Aires Governmental Advisory Committee (“GAC”) Communiqué 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” letter³ 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.

¹ DISH is a market innovator in the provision of satellite television, audio programming, and interactive television services to commercial and residential customers in the United States. DISH, through its affiliates, is a global satellite services provider, and developer of hybrid video delivery technologies, including streaming and video-on-demand services. DISH intends over the coming decade to provide internet, video and telephone services to consumers for both home and mobile applications.

² For purposes of disclosure, DISH applied for thirteen new generic top level domain (“gTLD”) strings: .DISH, .MOVIE, .BLOCKBUSTER, .DIRECT, .LATINO, .DATA, .OLLO, .PHONE, .MOBILE, .LOCKER, .OTT, .DOT and .DTV. Some of DISH’s applied-for TLD strings may be affected by this response.

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Dr. Stephen Crocker
January 6, 2014
Page 2

Your Letter further indicates that 174 of these applicants responded that they would not operate their TLDs as exclusive access registries, *i.e.* “Closed Generic”⁴ strings. Your Advice Letter also identified eleven strings⁵ 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.” DISH is an applicant for three of these eleven strings -- .Mobile, .Phone, and .Data (“DISH TLDs”). To date, however, DISH has not been contacted by the ICANN staff regarding the public interest goals for the DISH TLDs. However, if this current Request is part of the ICANN staff’s outreach, DISH has previously provided and herewith again provides reasons below why it believes that the DISH TLDs will serve public interest goals.

1) The Applicant Guidebook (“AGB”) does not prohibit “Closed Generic” applications.

DISH reiterates all of the arguments in its prior correspondence to the ICANN board dated May 10, 2013 (enclosed). Specifically, DISH 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. DISH 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. DISH 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) DISH’s applications for the DISH TLDs serve a public interest goal.

In its gTLD applications, including its applications for the DISH TLDs, DISH 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, DISH stated *inter alia* that:

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

Dr. Stephen Crocker

January 6, 2014

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“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 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, DISH also provided the following response to Q.18 (b) in its TLD applications:

“[One of t]he goal of [DISH 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...[DISH] intends to utilize the [DISH TLDs] ... with the goal of further securing the collection and transmission of personal and other confidential data ...”

The above examples demonstrate DISH’s 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 DISH is able to operate these gTLDs on a restricted access basis, with access defined by specified criteria and affiliations.

If DISH had not applied for the DISH TLDs, DISH 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. DISH intends to operate the DISH TLDs to reduce such problems. By controlling the criteria for registering second-level domains in the DISH TLDs, DISH will be able to reduce the risk of Internet users being deceived and defrauded by unauthorized third parties. Allowing DISH to set the rules for the DISH TLDs is the only practical way to increase the screening ability of the Registry and keep the DISH TLDs unadulterated, thereby increasing consumer confidence and trust.

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

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January 6, 2014
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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 DISH realized during the new gTLD application process that the ICT associations were not planning to register for domains, such as the DISH TLDs, to protect the internet community. DISH felt compelled to act. DISH invested its own resources in new gTLD applications for the DISH TLDs 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) DISH is willing to discuss potential resolution steps with ICANN for the .Mobile, .Phone and .Data strings to satisfy the GAC's Category 1 and 2 safeguards.

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

- 1) Whether ICANN would permit DISH to amend its applications for the DISH TLDs to permit registration by a defined yet still limited cross-section of the Internet community to protect Internet consumers.
- 2) Whether ICANN would permit DISH to convert the DISH TLDs applications from standard applications to community applications to satisfy the GAC's Category 1 and 2 safeguards.
- 3) Other options that may be available to DISH for the DISH TLDs to satisfy the GAC's Category 1 and 2 safeguards without eroding any of DISH's rights.

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

⁶ DISH's 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.

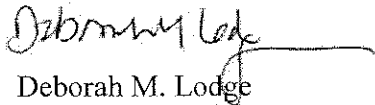
PATTON BOGGS LLP

Dr. Stephen Crocker
January 6, 2014
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The above response is intended to continue the discussion regarding possible solutions to the "closed generic" issues as they may pertain to the DISH gTLD applications. DISH remains 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
DISH DBS Corporation

May 10, 2013

Deborah M. Lodge
202-457-6030
dlodge@pattonboggs.com

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 .MOBILE (1-2012-89566), .MOVIE (1-1920-39242),
.DATA (1-2009-38008) and .PHONE (1-2011-80942)**

Dear Dr. Crocker and Mr. Chehadé:

Dish DBS Corporation¹ and its affiliated entities (collectively "Dish")² welcome this opportunity to provide a response to the recent Governmental Advisory Committee ("GAC") Communique dated 11 April 2013 ("Communique"). Dish reserves the rights to amend any

¹ Dish is a market innovator in the provision of satellite television, audio programming, and interactive television services to commercial and residential customers in the United States. Dish, through its affiliates, is a global satellite services provider, developer of hybrid video delivery technologies, provider of home movie and video game rental services by DVD-by-mail, streaming and video-on-demand. With its recent bid for Sprint Nextel Corporation and its commitment to diversifying and updating its technology portfolio, Dish intends over the coming decade, to provide internet, video and telephone services to consumers for both home and mobile applications.

² For purposes of disclosure, Dish applied for thirteen new gTLD strings: .DISH, .MOVIE, .BLOCKBUSTER, .DIRECT, .LATINO, .DATA, .OLLO, .PHONE, .MOBILE, .LOCKER, .OTT, .DOT and .DTV. Some of Dish's applied-for TLD strings may be affected by this response.

LetterheadFooter

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

Dish welcomes the six safeguards³ proposed by the GAC in the Communique, and where those matters are within its control, Dish remains committed to strongly considering the recommendations during their implementation of the Dish applied-for gTLD strings.

II. CATEGORY 1 – CONSUMER PROTECTION, SENSITIVE STRINGS AND REGULATED MARKETS

Dish welcomes the GAC's recommendations for this category, and where those matters are within its control, Dish remains committed to strongly considering the recommendations during their implementation of the .MOVIE and .DATA TLDs. Further, Dish remains committed to public interest goals that affect the Internet community, including but not limited to addressing 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. As a result of the above public interest concerns, Dish shall consult with regulatory bodies in the industry, such as the Coalition for Online Accountability (COA)⁴ to identify appropriate regulator entities for the .MOVIE and .DATA TLDs.

III. 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)

³ “WHOIS verification and checks,” “Mitigation abusive activity,” “Security checks,” “Documentation,” “Making and Handling Complaints” and “Consequences.”

⁴ COA has drafted a set of policy recommendations that are endorsed by many other international organizations representing the creative industries. See <http://www.onlineaccountability.net/>.

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.⁵ No evidence supports this claim.⁶ These claims appear to be based on a review of the existing TLDs, which are open.⁷ “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.⁸ This innovation may further result in significant competitive and consumer benefits.⁹

Some of these new business models will likely rely on a business’s ability to choose between running an open or closed TLD.¹⁰ There is no reason to deter these new business models, as

⁵ See <http://www.icann.org/en/news/announcements/announcement-2-05feb13-en.htm>.

⁶ 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).

⁷ 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).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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.¹¹

Closed generic TLDs essentially do not exist today, so there is no experience to draw on to assess the best way to use them.¹² 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.¹³

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.¹⁴ To the extent that ICANN allows synonyms to be used as gTLDs the potential competitive issues become even more remote.¹⁵ The market for TLDs does not present particular competitive risks, and there is no a priori reason for ICANN to intervene prospectively.¹⁶

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.¹⁷ 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.¹⁸

If a market can be defined as the use of a particular gTLD, then the market is so small as to be meaningless.¹⁹ Showing abuse within this market will be challenging, at least in the US,

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See* Lenard.

¹⁶ *See* Manne.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

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.²⁰ 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.²¹

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.²² However, any deception that arises under this scenario is already under the jurisdiction of the FTC or consumer protection regulators in other countries.²³

The domain name service (“DNS”) space is vast.²⁴ 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 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.²⁵ 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.²⁶ There is no evidence for the claim that market dominance inherently flows from the control of a

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See <http://www.internetgovernance.org/2012/09/19/generic-top-level-domains-who-should-own-book/>.

²⁵ See Applicant Guidebook v. 2012-06-04.

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

generic domain name by an applicant who sells products or services that can be described by a generic name.²⁷

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.²⁸ These policies suggest that “all applicants should be evaluated against transparent and predictable criteria, fully available **before initiation of the process.**”²⁹ (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

The competitive environment for gTLDs would be further aided by permitting “closed generic” TLDs, because competing companies could purchase thematically similar gTLDs.³⁰ 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.³¹

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

²⁷ See <http://www.internetgovernance.org/2012/09/19/generic-top-level-domains-who-should-own-book/>.

²⁸ See Applicant Guidebook v. 2012-06-04.

²⁹ 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.

³⁰ See Manne.

³¹ *Id.*

PATTON BOGGS LLP

Dr. Stephen Crocker and Mr. Fadi Chehadé
May 10, 2013
Page 7

approving “closed generic” TLDs.³² Such a model could “put direct competitive pressure on established gTLDs or could expand the market in new directions.”³³

D) ICANN IS NOT THE BEST FORUM TO DEAL WITH ANTI-COMPETITION 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.³⁴ 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.³⁵ Moreover, even the GAC lacks the institutional capacity to act in place of the FTC or DOJ or competition authorities in other countries.³⁶

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 gTLD program, “enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction.”³⁷

Sincerely,



Deborah M. Lodge

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See <http://newgtlds.icann.org/en/about/program>.

GAC Advice Response Form for Applicants



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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	Dish DBS Corporation
Application ID	(1-2012-89566), (1-1920-39242), (1-2009-38008), and (1-2011-80942)
Applied for TLD (string)	.MOBILE (1-2012-89566), .MOVIE (1-1920-39242), .DATA (1-2009-38008) and .PHONE (1-2011-80942)

Response:

Please see attached.

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	1004
Applicant Name	Dish DBS Corporation
Application ID	1-2012-89566
Applied for TLD (string)	.MOBILE

Response:

Please see attached.

January 6, 2014

Deborah M. Lodge
202-457-6030
dlodge@pattonboggs.com

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: DISH DBS Corporation’s comments on the Buenos Aires GAC Communiqué

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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.

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Dr. Stephen Crocker
January 6, 2014
Page 2

Your Letter further indicates that 174 of these applicants responded that they would not operate their TLDs as exclusive access registries, *i.e.* “Closed Generic”⁴ strings. Your Advice Letter also identified eleven strings⁵ 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.” DISH is an applicant for three of these eleven strings -- .Mobile, .Phone, and .Data (“DISH TLDs”). To date, however, DISH has not been contacted by the ICANN staff regarding the public interest goals for the DISH TLDs. However, if this current Request is part of the ICANN staff’s outreach, DISH has previously provided and herewith again provides reasons below why it believes that the DISH TLDs will serve public interest goals.

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

Dr. Stephen Crocker

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“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 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, DISH also provided the following response to Q.18 (b) in its TLD applications:

“[One of t]he goal of [DISH 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...[DISH] intends to utilize the [DISH TLDs] ... with the goal of further securing the collection and transmission of personal and other confidential data ...”

The above examples demonstrate DISH’s 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 DISH is able to operate these gTLDs on a restricted access basis, with access defined by specified criteria and affiliations.

If DISH had not applied for the DISH TLDs, DISH 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. DISH intends to operate the DISH TLDs to reduce such problems. By controlling the criteria for registering second-level domains in the DISH TLDs, DISH will be able to reduce the risk of Internet users being deceived and defrauded by unauthorized third parties. Allowing DISH to set the rules for the DISH TLDs is the only practical way to increase the screening ability of the Registry and keep the DISH TLDs unadulterated, thereby increasing consumer confidence and trust.

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

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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 DISH realized during the new gTLD application process that the ICT associations were not planning to register for domains, such as the DISH TLDs, to protect the internet community. DISH felt compelled to act. DISH invested its own resources in new gTLD applications for the DISH TLDs 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) DISH is willing to discuss potential resolution steps with ICANN for the .Mobile, .Phone and .Data strings to satisfy the GAC's Category 1 and 2 safeguards.

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

- 1) Whether ICANN would permit DISH to amend its applications for the DISH TLDs to permit registration by a defined yet still limited cross-section of the Internet community to protect Internet consumers.
- 2) Whether ICANN would permit DISH to convert the DISH TLDs applications from standard applications to community applications to satisfy the GAC's Category 1 and 2 safeguards.
- 3) Other options that may be available to DISH for the DISH TLDs to satisfy the GAC's Category 1 and 2 safeguards without eroding any of DISH's rights.

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

⁶ DISH's 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.

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The above response is intended to continue the discussion regarding possible solutions to the "closed generic" issues as they may pertain to the DISH gTLD applications. DISH remains 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
DISH DBS Corporation

May 10, 2013

Deborah M. Lodge
202-457-6030
dlodge@pattonboggs.com

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 .MOBILE (1-2012-89566), .MOVIE (1-1920-39242),
.DATA (1-2009-38008) and .PHONE (1-2011-80942)**

Dear Dr. Crocker and Mr. Chehadé:

Dish DBS Corporation¹ and its affiliated entities (collectively “Dish”)² welcome this opportunity to provide a response to the recent Governmental Advisory Committee (“GAC”) Communique dated 11 April 2013 (“Communique”). Dish reserves the rights to amend any

¹ Dish is a market innovator in the provision of satellite television, audio programming, and interactive television services to commercial and residential customers in the United States. Dish, through its affiliates, is a global satellite services provider, developer of hybrid video delivery technologies, provider of home movie and video game rental services by DVD-by-mail, streaming and video-on-demand. With its recent bid for Sprint Nextel Corporation and its commitment to diversifying and updating its technology portfolio, Dish intends over the coming decade, to provide internet, video and telephone services to consumers for both home and mobile applications.

² For purposes of disclosure, Dish applied for thirteen new gTLD strings: .DISH, .MOVIE, .BLOCKBUSTER, .DIRECT, .LATINO, .DATA, .OLLO, .PHONE, .MOBILE, .LOCKER, .OTT, .DOT and .DTV. Some of Dish’s applied-for TLD strings may be affected by this response.

LetterheadFooter

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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

Dish welcomes the six safeguards³ proposed by the GAC in the Communique, and where those matters are within its control, Dish remains committed to strongly considering the recommendations during their implementation of the Dish applied-for gTLD strings.

II. CATEGORY 1 – CONSUMER PROTECTION, SENSITIVE STRINGS AND REGULATED MARKETS

Dish welcomes the GAC's recommendations for this category, and where those matters are within its control, Dish remains committed to strongly considering the recommendations during their implementation of the .MOVIE and .DATA TLDs. Further, Dish remains committed to public interest goals that affect the Internet community, including but not limited to addressing 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. As a result of the above public interest concerns, Dish shall consult with regulatory bodies in the industry, such as the Coalition for Online Accountability (COA)⁴ to identify appropriate regulator entities for the .MOVIE and .DATA TLDs.

III. 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)

³ “WHOIS verification and checks,” “Mitigation abusive activity,” “Security checks,” “Documentation,” “Making and Handling Complaints” and “Consequences.”

⁴ COA has drafted a set of policy recommendations that are endorsed by many other international organizations representing the creative industries. See <http://www.onlineaccountability.net/>.

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.⁵ No evidence supports this claim.⁶ These claims appear to be based on a review of the existing TLDs, which are open.⁷ “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.⁸ This innovation may further result in significant competitive and consumer benefits.⁹

Some of these new business models will likely rely on a business’s ability to choose between running an open or closed TLD.¹⁰ There is no reason to deter these new business models, as

⁵ See <http://www.icann.org/en/news/announcements/announcement-2-05feb13-en.htm>.

⁶ 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).

⁷ 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).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

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.¹¹

Closed generic TLDs essentially do not exist today, so there is no experience to draw on to assess the best way to use them.¹² 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.¹³

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.¹⁴ To the extent that ICANN allows synonyms to be used as gTLDs the potential competitive issues become even more remote.¹⁵ The market for TLDs does not present particular competitive risks, and there is no a priori reason for ICANN to intervene prospectively.¹⁶

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.¹⁷ 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.¹⁸

If a market can be defined as the use of a particular gTLD, then the market is so small as to be meaningless.¹⁹ Showing abuse within this market will be challenging, at least in the US,

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See* Lenard.

¹⁶ *See* Manne.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

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.²⁰ 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.²¹

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.²² However, any deception that arises under this scenario is already under the jurisdiction of the FTC or consumer protection regulators in other countries.²³

The domain name service (“DNS”) space is vast.²⁴ 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 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.²⁵ 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.²⁶ There is no evidence for the claim that market dominance inherently flows from the control of a

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See <http://www.internetgovernance.org/2012/09/19/generic-top-level-domains-who-should-own-book/>.

²⁵ See Applicant Guidebook v. 2012-06-04.

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

generic domain name by an applicant who sells products or services that can be described by a generic name.²⁷

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.²⁸ These policies suggest that “all applicants should be evaluated against transparent and predictable criteria, fully available **before initiation of the process.**”²⁹ (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

The competitive environment for gTLDs would be further aided by permitting “closed generic” TLDs, because competing companies could purchase thematically similar gTLDs.³⁰ 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.³¹

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

²⁷ See <http://www.internetgovernance.org/2012/09/19/generic-top-level-domains-who-should-own-book/>.

²⁸ See Applicant Guidebook v. 2012-06-04.

²⁹ 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.

³⁰ See Manne.

³¹ *Id.*

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approving “closed generic” TLDs.³² Such a model could “put direct competitive pressure on established gTLDs or could expand the market in new directions.”³³

D) ICANN IS NOT THE BEST FORUM TO DEAL WITH ANTI-COMPETITION 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.³⁴ 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.³⁵ Moreover, even the GAC lacks the institutional capacity to act in place of the FTC or DOJ or competition authorities in other countries.³⁶

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 gTLD program, “enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction.”³⁷

Sincerely,



Deborah M. Lodge

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 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 Communiqué 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	Dish DBS Corporation
Application ID	(1-2012-89566), (1-1920-39242), (1-2009-38008), and (1-2011-80942)
Applied for TLD (string)	.MOBILE (1-2012-89566), .MOVIE (1-1920-39242), .DATA (1-2009-38008) and .PHONE (1-2011-80942)

Response:

Please see attached.

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	867
Applicant Name	Wal-Mart Stores, Inc.
Application ID	1-2064-74519
Applied for TLD (string)	GROCERY

Response:

Wal-Mart Stores, Inc. (Walmart) thanks ICANN for the opportunity to further address the proposed operation of the .Grocery gTLD. In developing the new gTLD program, ICANN envisioned a wide range of differing business models so that the market may determine which business models are most appropriate. This principle is incorporated into the Preamble to the gTLD Applicant Guidebook, which states that the program “will open up the top level of the Internet’s namespace to foster diversity, encourage competition, and enhance the utility of the DNS.”

It is important to emphasize at the forefront that the gTLD program does not prohibit so-called “exclusive access registries” operating under a “closed generic” business model. In fact, the gTLD Applicant Guidebook (Guidebook) expressly contemplates the possibility of such operations. Specifically, Section 6 of the Registry Operator Code of Conduct (Specification 9 to the New gTLD Agreement) permits registry operators to request an exemption from the Code of Conduct where three conditions are met: (i) all domain name registrations in the TLD are registered to, and maintained by, the registry operator for its own exclusive use; (ii) the registry operator does not provide any registrations to unaffiliated third parties; and (iii) application of the Code of Conduct is not necessary to protect the public interest. The first two criteria describe the same “exclusive access registries” that are the subject of the instant inquiry – registries maintained by the operator for its own use and not offered to unaffiliated third parties.¹

¹ Although the Section 6 exemption also could include .Brand TLDs, ICANN currently is contemplating whether to adopt a separate Specification 13 for .Brand TLDs which, among other things, exempts .Brand TLDs from complying with the Code of Conduct, rendering the Section 6 exemption moot as to those TLDs. This would leave closed generic registries as the only registries to which Section 6 of the Code of Conduct applies.

ICANN's Code of Conduct Exemption Process explains that, in most cases, satisfaction of these criteria (i.e., operating an "exclusive access registry") "will indicate the lack of a public interest concern because compliance with the Code of Conduct in such cases would only serve to protect the Registry Operator from itself."² Thus, by ICANN's own rules and procedures, Walmart's application for .Grocery presumptively serves the public interest. At the very least, Walmart respectfully suggests that the instant inquiry is premature; the analysis that ICANN proposes to undertake via the instant request is the same analysis required under the exception to Specification 9, which Walmart's application for .Grocery satisfies. Should ICANN nevertheless proceed to conduct this analysis at this time, satisfaction of the present inquiry should be considered by ICANN as automatically satisfying the exemption analysis under Specification 9.

Walmart's proposed application of the .Grocery TLD serves several public interest goals under standards adopted by ICANN and under other widely-recognized norms. Neither the instant request nor any prior statement by ICANN provides specific criteria for determining whether the proposed exclusive access model for a new TLD advances public interest goals. The only reference to the term "public interest goal" in the Guidebook is found in Section 3.2.5, which, in the context of the role of the Independent Objector, defines the term as acting "in the best interests of the public who use the global Internet." Under this standard, then, an exclusive access model serves a public interest goal if that approach is "in the best interests of the public who use the global Internet." The standard for evaluating a "public interest goal" is further illuminated by Article I, Section 2 of the ICANN Bylaws, which expresses as one of ICANN's core values: "Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."³ In light of the foregoing, Walmart responds to the instant inquiry with the understanding that, for this purpose, a "public interest goal" relates to activities that are in the best interests of the public who use the global Internet, particularly as it relates promoting competition in the registration and/or use of domain names.

The business model proposed in Walmart's application for .Grocery would further ICANN's mission of increasing competition in the registration and/or use of domain names. The ICANN Board has recognized that the new gTLD program is designed based on a "marketplace model that would enhance competition, opportunities for

² See ICANN, *Code of Conduct Exemption Process 2*, <http://newgtlds.icann.org/en/applicants/agb/ro-code-of-conduct-exemption-28oct13-en.pdf> (last visited Jan. 8, 2014).

³ This concept of equating competition with the public interest is consistent with United States communications law, which recognizes competition as one of three public interest goals along with localism and diversity. See, e.g., United States Federal Communications Commission, *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc. Applications For Consent to Assignment of Licenses from Subsidiaries of Belo Corp. to Subsidiaries of Sander Media, LLC and Tucker Operating Co., LLC*, Memorandum Opinion and Order, DA 13-2423 ¶ 22 (rel. Dec. 20, 2013), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1220/DA-13-2423A1.pdf.

innovation, and increase choice for consumers.”⁴ As a general rule, then, if the new gTLD program results in the delegation of registries with several different operating models, ICANN will have achieved its goal for the program. Importantly, ICANN’s core values speak to competition “in the registration of domain names,” not between domain names themselves. The issue, then, is not whether the proposed operation would foster competition for domains within a particular registry, but rather whether the proposed operation would foster competition in registration – *i.e.*, competition between registries. It is with this understanding that the ICANN Board previously determined that cross-ownership between registries and registrars “foster[s] greater diversity in business models and enhance[s] opportunities offered by new TLDs.”⁵ Walmart’s proposed operation of .Grocery is pro-competitive because: (1) the closed-generic business model will allow Walmart to provide a unique, secure marketplace in contrast with other TLDs focused solely on the sale of second-level domains; (2) Walmart will have an incentive to invest in the promotion of .Grocery to differentiate it from other TLDs and create an association between .Grocery and Walmart; and (3) myriad alternatives will remain available for competitors desiring to reach consumers on the Internet through use of alternative TLDs.

The benefits of operating .Grocery as a secure, controlled namespace are evident from Section 18(b)(i) of Walmart’s application. In contrast to unrestricted, unfiltered, and potentially unreliable consumer-targeted TLDs, Walmart’s .Grocery gTLD will: (1) provide a secure channel for Walmart to deliver information about grocery products and services to Internet users worldwide; (2) provide a platform for Walmart to deliver a broad assortment of quality merchandise and services at everyday low prices; (3) complement Walmart’s branding and brand protection strategies and lower Walmart’s overall costs by reducing the need for defensive registrations in other TLDs; (4) build consumer trust in products and services offered through the .Grocery gTLD; and (5) provide consumers with an easy and intuitive resource for locating information, products and services that they desire. An open registry, where a second level domain can be used in any manner by anyone willing to pay the applicable registration fee, cannot provide these same benefits.

Walmart understands that achieving these benefits requires a substantial investment in the promotion and operation of the .Grocery TLD, providing another competitive benefit of the proposed model for operation of .Grocery. By way of example, among the services and second level domain names that may be used by Walmart are produce.grocery, deli.grocery, health.grocery, and thanksgivingmeals.grocery. These domain names have no inherent value; rather, their value derives from an association in the minds of consumers between WalMart, the world’s largest grocer, and the .Grocery

⁴ See ICANN Board Notes on the GAC New gTLDs Scorecard 9-10 (4 Mar. 2011), available at <http://archive.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-04mar11-en.pdf>.

⁵ ICANN, *Adopted Board Resolutions* (5 Nov. 2010), available at <http://www.icann.org/en/groups/board/documents/resolutions-05nov10-en.htm>.

TLD. Walmart's investment in promoting .Grocery thus will benefit the gTLD program as a whole by creating awareness in the minds of consumers of the availability of alternatives to incumbent TLDs such .com, .net, and .org, and will encourage other registry operators to make similar investments in their TLDs and, in turn, in the success of the new gTLD program.

Finally, myriad alternatives will remain available for persons or entities who might be interested in a .Grocery second-level domain. Under common antitrust principles, courts look to the availability of substitutes, or the cross-elasticity of demand, as the starting point of any competition analysis.⁶ There are many alternatives for potential registrants to the .Grocery TLD. In addition to incumbent TLDs such as .com, .net, and .org, the new gTLD program also promises to spawn registries such as .food, .market, .shop, and .store. It follows that, if the new gTLD program achieves the goals set by ICANN for expansion of the domain name system, there will be no shortage of alternative gTLDs for potential registrants. In fact, Walmart's business model could encourage potential registrants to seek out these alternative TLDs, bolstering the new gTLD program and fulfilling ICANN's public interest goal of introducing and promoting competition in the registration of domain names.

The public interest benefits from Walmart's proposed operation of the .Grocery TLD extend beyond just promoting competition in the registration of domain names. Governments and other regulatory bodies frequently have recognized the benefits of providing secure and reliable commercial platforms, such as operation of .Grocery as proposed by Walmart, even at the expense of some intra-platform competition. Thus, courts have found that the public interest favors restricting unregulated competition in areas ranging from ambulance service⁷ to electrical service⁸ to taxicab service⁹. Just as additional competition in these fields ultimately would harm consumers by forcing them to distinguish between reliable and unreliable providers while reducing incentives for innovation, so too would operating .Grocery as an unrestricted registry make it more difficult, if not impossible, for consumers to distinguish between reliable and unreliable information while reducing the incentive for the registry operator or individual registrants to innovate.

The public interest in providing secure and reliable commercial platforms is particularly relevant when it comes to information disclosure. Although as a general matter courts have recognized the benefits of a "marketplace of ideas," where different views are

⁶ See, e.g., *United States v. E.I. du Pont de Nemours and Co.*, 351 U.S. 377, 393-96 (1956).

⁷ See *Gentry v. Howard*, 365 F. Supp. 567, 570 (W.D. La. 1973) (influx of unregulated competition not in public interest in safe, reliable ambulance service).

⁸ See *Howard Cnty. v. Potomac Elec. Power Co.*, 319 Md. 511, 528, 573 A.2d 821, 830 (1990) (recognizing "public interest of providing safe and reliable electrical service to larger areas").

⁹ See *Virgin Islands Port Auth. v. Virgin Islands Taxi Ass'n*, 979 F. Supp. 344, 352 (D.V.I. 1997) (exclusive taxicab franchise was appropriate "because the exclusive franchise ensured that all travelers at the airport would be provided reliable transportation").

entertained and the truth can rise to the forefront, courts have recognized a corresponding interest in the dissemination of truthful or trustworthy information.¹⁰ ICANN has recognized a similar interest in providing safe, reliable channels for information and preventing consumer confusion or misdirection when it approved existing closed models, such as .aero, .pro, .coop and others. The new gTLD program will introduce additional gTLDs that are restricted to serve a public interest, such as .bank, .lawyer, and .pharmacy.

Here, Walmart’s proposed operation of the .Grocery TLD will provide a channel for the distribution of useful, trustworthy information and products to the public who use the global Internet. By example, consumers searching for healthy foods on the Internet will currently find a plethora of untrustworthy computer generated or sponsored blog posts discussing healthy foods. Meanwhile, consumers visiting healthyfoods.grocery will understand that they are receiving reliable information about healthy eating from Walmart—a source they know and trust. This easily identifiable, reliable source of information will benefit consumers worldwide as they navigate the seemingly endless amount of information on the Internet and seek to distinguish among that information. At the same time, Walmart is just one of many voices, and given the alternatives referenced above, users will have ample access to competing sources of information.

As the foregoing demonstrates, Walmart’s operation of .Grocery as a closed registry is in the best interests of the public who use the global Internet. Nevertheless, Walmart’s application for a .Grocery gTLD contemplates the possibility of “opening” the gTLD in the future based upon market conditions and consumer adoption of new gTLDs. Finally, should ICANN promulgate a more concrete standard for assessing whether a proposed “exclusive access registry” serves a public interest goal or otherwise determine that Walmart’s application for .Grocery does not satisfy the applicable standard, Walmart requests the option to seek amendment of its application.

¹⁰ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 52 (1988) (false statements of fact “interfere with the truth-seeking function of the marketplace of ideas”); *Brown v. Hartlage*, 456 U. S. 45, 60-61 (1982) (false statements are not entitled to the same protection as truthful statements).

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	1849
Applicant Name	Bridgestone Americas Tire Operations, LLC
Application ID	1-2123-56973
Applied for TLD (string)	TIRES

Response:

Please see response attached

BRIDGESTONE
Bridgestone
Americas Tire
Operations,
LLC

10 East Firestone Blvd.
Akron, Ohio 44317

Thomas R. Kingsbury
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March 17, 2014

Dr. Steve Crocker, Chairman of the Board
Mr. Fadi Chehade, President and CEO
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Bridgestone Americas Tire Operations, LLC Response to GAC Category 2 Advice

Dear Dr. Crocker and Mr. Chehade:

We thank you for the opportunity to provide input into the ongoing Governmental Advisory Committee (“GAC”) Category 2 Advice regarding New gTLD applications, and in particular the GAC Communiqués of April 11, 2013 from Beijing and November 20, 2013 from Buenos Aires.

Bridgestone Americas Tire Operations, LLC (“BATO”) applied for the gTLD “.tires” with the clear intent to operate it as a private registry, as this was an option presented for the new gTLD’s under the ICANN guidelines. BATO has spent a considerable amount of time and money to prepare and apply for the .tires gTLD in accordance with the ICANN Applicant Guidebook. ICANN is now asking the applicants that indicated that their applied-for TLDs would be operated as exclusive access registries “how exclusive registry access for the applied-for TLD will serve a public interest goal.”

BATO is part of the Bridgestone Group. The Bridgestone Group is the world’s largest tire and rubber company. In addition to tires, the Bridgestone Group manufactures a broad range of diversified products that include industrial rubber and chemical products and sporting goods. The Bridgestone Group has over 180 manufacturing plants and R&D facilities in 25 countries and sells products into more than 150 countries worldwide.

The Bridgestone Group and BATO fully support a goal of serving the public interest with its operation of the .tires gTLD. Bridgestone’s corporate mission statement is “Serving Society with Superior Quality.” Thus, serving the public is one of the cornerstones of our company.¹

BATO is confident that its proposed use of the .tires gTLD will undoubtedly serve the public interest as stated in its application, and in accordance with all ICANN guidance, directives and contractual obligations. For example, Bridgestone indicated in its application in responding to question 18A. (Describe the mission/purpose of your proposed gTLD) that it intended to operate the gTLD to promote consumer trust, competition and consumer choice. Because the .tire gTLD will be operated in a centralized manner by the world’s largest tire and rubber company, consumers can access the domain’s content with confidence that the information being provided by the gTLD is accurate and trustworthy. The public interest is also served by increasing competition which will drive

¹ <http://bridgestone.com/corporate/philosophy/index.html>

existing and new TLD registry operators to make improvements in mechanisms to improve consumer trust of their TLDs.

Notwithstanding the above, BATO believes that the GAC advice is inconsistent with the rules, policies and procedures set forth in the Applicant Guidebook under which BATO submitted its .tires gTLD application.

In June 2011, ICANN's Board of Directors approved the Applicant Guidebook and authorized the launch of the New gTLD Program. The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains. <http://newgtlds.icann.org/en/about/program>.

The Guidebook goes on to state that "ICANN's work next focused on implementation: creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval." And "[t]his Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period."

So for over two-years ICANN revised the Guidebook extensively via public comment and consultation with the goal of providing a clear roadmap for applicants to reach delegation and Board approval, which included accepting "closed generic" gTLD applications.

Not only does the Applicant Guidebook provide for the registration of "closed generics," ICANN made a conscious decision to allow applicants to apply for "closed generics," to the point of confirming this, as noted in the Transcript GNSO Council Teleconference of 14 February 2013. During that Teleconference, Jeff Neuman states "[a]lso, many conversations with Kurt Pritz in open public meetings. There were many references to brands, applying for closed TLDs. Again, no discussion as to whether that was right or wrong, but it was accepted fact. And in fact I remember in several meetings I brought up, I asked specifically about the Kraft example, and it didn't apply. But I said, you know, 'What if Kraft applied for [.food] and wanted it all by itself?' And the answer from ICANN staff was always, 'Yes, that's acceptable. Yes, that's acceptable.'"

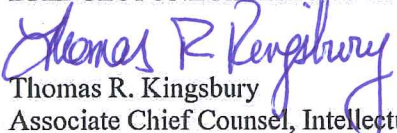
Thus, after allowing for closed generics in its Applicant Guidebook and confirming this position on at least one occasion, ICANN is now coming back to applicants for a response to the GAC Category 2 Advice.

BATO hopes that in evaluating whether to accept the GAC Category 2 Advice, ICANN also considers the significant amount of time, money and resources BATO and the other applicants who applied for "closed generics" have spent in preparing their applications in accordance with the ICANN published policies and procedures.

If ICANN ultimately decides that it is unwilling to allow closed generics to proceed, BATO would expect that ICANN will provide a full refund of its \$185,000 application fee in addition to some additional reasonable amount of money to compensate BATO for the significant amount of time and resources (including employee time and consulting fees) that it incurred to submit its .tires gTLD in good faith under guidelines published by ICANN.

Sincerely,

BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC


Thomas R. Kingsbury
Associate Chief Counsel, Intellectual Property