

May 10, 2013

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VIA E-MAIL

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

**Re: Response to GAC Advice for .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.*

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

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

Respondent:

Applicant Name	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.