



March 7, 2013

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

Re: USTelecom Opposition to Certain Closed gTLD Applications

The United States Telecom Association (USTelecom)¹ is pleased to submit these comments to the Internet Corporation for Assigned Names and Numbers (ICANN) in its proceeding regarding applications submitted for closed, generic Top Level Domains (gTLDs). Absent substantial changes to the applications, USTelecom is opposed to the introduction of the closed gTLDs identified in Exhibit 1.

Certain of the closed gTLDs should be denied due to inherent conflicts of interest that create both the incentive and ability for the Applicants to operate them in a manner that forecloses registration opportunities to their competitors in the same space. These gTLD applications were submitted by Applicants who compete alongside USTelecom's members in the telecommunications and information services marketplace. Each of the applied-for gTLDs are generic terms that describe products and/or services in competitive markets identical to those offered by USTelecom members.

In addition, these closed gTLDs contravene principles that ICANN must take into consideration under the 2009 Affirmation of Commitments as it contemplates expanding the top-level domain space. Specifically, ICANN has committed to ensuring that any such expansion will adequately address the issues of increased competition and consumer protection prior to the introduction of new gTLDs. If granted in their current form, the referenced gTLD applications will violate these key principles.

For each of these reasons, ICANN should deny the identified gTLDs.

I. ABSENT SUBSTANTIAL CHANGES, ICANN SHOULD DENY THE APPLICATIONS OF CERTAIN CLOSED GTLD APPLICATIONS.

Absent substantial changes to the underlying Applications, USTelecom maintains that the closed gTLD applications identified in Exhibit 1 should be denied by ICANN. During ICANN's comment period regarding the gTLD applications, USTelecom identified 15 closed gTLD

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. In addition to providing the infrastructure and network services that make the Internet possible, many of USTelecom's member companies are holders of substantial intellectual property rights, including trademarks and brand names that are recognized and trusted by consumers around the globe.

applications that raised significant competitive concerns.² Since then, the Governmental Advisory Committee (GAC) released several early warnings on the applied for gTLDs, nine of which addressed the closed gTLD applications identified by USTelecom. The concerns raised through the GAC process are identical to those raised by USTelecom in its original opposition.

A. Proposed Closed Registry gTLD Applications Have an Inherent Conflict of Interest

The owners of the proposed gTLD registries opposed by USTelecom – all of which compete in the telecommunications and/or information services marketplace – will have a clear conflict of interest through their ownership of the referenced gTLD registries. The gTLD applications are being proposed as ‘closed’ registries, meaning that the Applicant has direct control over each registrant and how each second-level domain name may be registered and used. Moreover, Applicants will be in a position to deny second-level domain name registrations to competitors within the same marketplace.

The operation of telecommunications and information services-related gTLDs by competitors in the TLD space raises substantial conflict of interest issues. For example, cloud computing is emerging as one of the most vibrant competitive industries in today’s marketplace. Analysts expect that spending on public cloud services will increase 20 percent in 2012, to \$109 billion from \$91 billion in 2011. By 2016, such expenditures could nearly double, to \$207 billion.³ Of the two applications submitted as closed registries for the .cloud gTLD, one was submitted by an affiliate of Amazon.com, Inc. (Amazon), and another was submitted by Charleston Road Registry, Inc. (Google).⁴ The exclusive control of the .cloud gTLD by either of two of the largest companies in the cloud computing area would enable them to feasibly foreclose entry into the gTLD space by either emerging or existing competitors.

Identical concerns are raised with respect to several of the proposed closed gTLD registries covering voice applications; such as .call, .data, .mobile, .phone, and .talk. Three of these gTLD applications (.data, .mobile and .phone) were submitted by Dish DBS Corporation (Dish), which is a major wireless spectrum holder in the United States. According to one recent report, Dish Network wants to “launch a stand-alone wireless business that would offer mobile broadband, text and voice services,” in order to compete against current providers of such

² See, ICANN website, Welcome to the New gTLD Application Comments Forum (available at: <https://gtldcomment.icann.org/>) (visited February 27, 2013).

³ See, Hardy, Quentin, New York Times Bits Blog, *Information Technology Spending to Hit \$3.6 Trillion in 2012, Report Says*, July 9, 2012 (available at: <http://bits.blogs.nytimes.com/2012/07/09/information-technology-spending-to-hit-3-6-trillion-in-2012-report-says/>) (visited February 27, 2013).

⁴ See e.g., ICANN gTLD Application ID 1-1099-17190, Response to question 9(b) (stating that Google Inc. is the parent company of Charleston Road Registry Inc. (available at: <http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1428>) (visited February 27, 2013).

service.⁵ Similarly, Google has proposed to operate the .talk gTLD as a closed registry, despite the fact that it has millions of subscribers to its Google Voice product, and recently entered the United States domestic market as a facilities-based provider of information services.⁶

A single entity should not be permitted to operate a closed registry for such telecommunications and information services domain names given the generic connotation of these terms and the established industry and consumer usage of this wording. Furthermore, the presumptive renewal of the registry contracts after ten years for continued operation as a closed registry would provide the registry operator with a perpetual right to use generic industry terms in violation of intellectual property laws and principles from around the world.

B. The Proposed Closed Registry gTLDs Conflict With ICANN's Stated Principles of Competition and Consumer Trust.

In addition to the inherent conflicts of interest from the operation of the proposed gTLD registries, their implementation by ICANN will contravene key principles outlined in the 2009 Affirmation of Commitments between ICANN and the Department of Commerce.⁷ The Affirmation of Commitments states that as ICANN “contemplates expanding the top-level domain space,” it must ensure that issues regarding “competition [and] consumer protection” will be “adequately addressed prior to implementation.”⁸

As previously noted, the exclusive control of certain closed gTLDs by competitors in specific markets (e.g., cloud computing) would enable them to feasibly foreclose entry into the gTLD space by either emerging or existing competitors. It is possible that many competitors – perhaps even all – could be precluded from purchasing second level domain names that are based on generic gTLDs reflecting competitive marketplaces.

For example, Dish DBS Corporation, which has applied for the .data, .dtv, .mobile and .phone application – and aggressively competes in each – has stated in the Application for each gTLD that second-level domain registrations will be restricted to “only Applicant, affiliated entities and authorized business partners.”⁹ A separate application submitted by Google for the

⁵ Vuong, Andy, Denverpost.com, *Dish Network aims for smarter phones, simpler bills*, April 18, 2012 (available at: http://www.denverpost.com/business/ci_20420637/dish-network-aims-smarter-phones-simpler-bills) (February 27, 2013).

⁶ See, Eligon, John, *Google Unveils Superfast Internet in Kansas City, Mo.*, New York Times, July 26, 2012 (available at: <http://bits.blogs.nytimes.com/2012/07/26/google-unveils-superfast-internet-in-kansas-city-mo/>) (visited March 5, 2013).

⁷ See, Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, September 30, 2009 (available at: http://www.ntia.doc.gov/files/ntia/publications/affirmation_of_commitments_2009.pdf) (visited February 27, 2013) (*Affirmation of Principles*).

⁸ *Affirmation of Principles*, p. 4, ¶9.3.

⁹ See, Application of Dish DBS Corporation, .data, Section 18(b)(iv), Application ID 1-2009-38008 (posted June 13, 2012) (available at: <https://gtdresult.icann.org/application->

.cloud gTLD, contains similarly restrictive conditions, stating that “only Google and its affiliates will be eligible to register domain names within the gTLD,” and “at no time during the life of the registry will [Google] plan to offer domain name registrations to third-parties.”¹⁰ Moreover, the .cloud gTLD is “exclusively intended for use in connection with Google’s services.”¹¹

The generic nature of the gTLDs identified by USTelecom in Exhibit 1 coupled with their proposed operation as closed registries should raise serious competitive questions for ICANN. Approval and delegation by ICANN of such closed registries would result in a lessening of consumer choice on the Internet. Rather than fostering competition in discrete areas, the use of closed models by Applicants for certain gTLDs will instead limit competition.

Moreover, consumers may mistakenly believe that domain names are the principal and/or sole or authorized location on the Internet for those telecommunications and internet services. Given the inherent association between these closed registries and telecommunications and information services currently widely provided in the marketplace by a large number of providers, consumers may mistakenly believe that second level domain names are the principal and/or sole location for such products and/or services on the internet. Consumers may not realize that in fact, all the goods, services and information provided within these closed registries, are only offered or managed by a single company.

This same concern about granting exclusive rights in a generic term to a sole provider was raised by leading intellectual property authority Thomas McCarthy of the McCarthy Institute for Intellectual Property and Technology Law, in comments in this proceeding.¹² Professor McCarthy concluded that should these closed, generic gTLDs be approved, consumers may mistakenly believe they are using a gTLD that allows for competition, when in reality the gTLD is closed and the apparently competitive products are being offered by a single entity.”

[result/applicationstatus/applicationdetails/112](https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/112)); Application of Dish DBS Corporation, .dtv, Section 18(b)(iv), Application ID 1-2084-81667, (posted June 13, 2012) (available at: <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/51>); Application of Dish DBS Corporation, .mobile, Section 18(b)(iv), Application ID 1-2012-89566, (posted June 13, 2012) (available at: <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/109>); Application of Dish DBS Corporation, .phone, Section 18(b)(iv), Application ID 1-2011-80942, (posted June 13, 2012) (available at: <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/110>) (all websites visited March 5, 2013).

¹⁰ Application of Charleston Road Registry Inc., .cloud, Section 29.6, Application ID 1-1099-17190, (posted June 13, 2012) (available at: <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1428>) (*Google .cloud Application*).

¹¹ *Google .cloud Application*, Section 18(b)(ii)(1).

¹² *See*, Comments of David J. Franklyn and J. Thomas McCarthy of the McCarthy Institute for Intellectual Property and Technology Law, Feb. 26, 2013 (available at: <http://forum.icann.org/lists/comments-closed-generic-05feb13/msg00034.html>) (visited March 5, 2013).

Moreover, he maintains that such a result would allow the generic gTLD owner “to gain exclusive recognition as the provider of a generic service, something that is prohibited by trademark law.” Such results would contravene ICANN’s gTLD program goal of fostering competition and would violate its commitment under the Affirmation of Commitments to promote competition and consumer protection.

Although USTelecom opposes grant of the gTLD applications in their current form, ICANN could alternatively ensure that applicants for closed gTLDs set forth clear parameters for registration that should be a binding part of any application. Any such parameters should be clearly delineated, and transparent to consumers. Professor McCarthy for example, states that rather than approving closed, generic gTLDs, ICANN could restrict second-level registrations to entities on a neutral basis; for example, by limiting registrants for .bank to certified banks. Much in the same way that sponsored top-level domains (*e.g.*, .gov) are restricted to entities meeting certain criteria, closed gTLDs could be structured in a similar manner. In appropriate circumstances, for certain closed, generic gTLD applications at issue, ICANN could instead consider this alternative.

II. CONCLUSION

USTelecom appreciates this opportunity to provide ICANN with comments on the implementation of its gTLD program. ICANN should take the steps necessary to address concerns surrounding closed gTLD applications. Should you have any questions, please feel free to contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin G. Rupy", with a long, sweeping flourish extending to the right.

Kevin G. Rupy
Senior Director, Law & Policy

USTelecom Exhibit 1

List of Closed Registry gTLD Applications

Closed Registries

<u>String</u>	<u>Applicant</u>	<u>Application ID</u>
ANTIVIRUS	Symantec Corporation	1-1027-34295
CALL	Amazon EU S.Ã r.l.	1-1315-29734
CLOUD	Amazon EU S.Ã r.l.	1-1315-79670
CLOUD	Charleston Road Registry Inc.	1-1099-17190
COMPARE	iSelect Ltd	1-1088-79872
DATA	Dish DBS Corporation	1-909-89547
DTV	Dish DBS Corporation	1-2084-81667
DVR	Hughes Satellite Systems Corporation	1-2000-89466
MAIL	Amazon EU S.Ã r.l.	1-1316-17384
MOBILE	Amazon EU S.Ã r.l.	1-1316-6133
MOBILE	Dish DBS Corporation	1-2012-89566
PHONE	Dish DBS Corporation	1-2011-80942
SECURITY	Symantec Corporation	1-1027-69486
TALK	Amazon EU S.Ã r.l.	1-1317-29107
TALK	Charleston Road Registry Inc.	1-1417-17579
