

Turner Broadcasting System, Inc. Comment on GAC Safeguards

On April 11, 2013, the Governmental Advisory Committee (“GAC”) issued its Beijing Communiqué, in which it provided advice to the ICANN Board (“the Board”) on various matters regarding new gTLDs. Since then, the Board’s New gTLD Committee has solicited comment on how to address one specific aspect of the Beijing Communiqué: namely, the safeguards that the GAC advised the Board to apply to broad categories of new gTLDs, as outlined in section IV.1.b and Annex I of the Beijing Communiqué (the “GAC Safeguards”). In response to that request, Turner Broadcasting System, Inc. (“Turner”) writes to express its support for the GAC Safeguards. While Turner also agrees with other aspects of the Beijing Communiqué (including, for example, the GAC’s common-sense advice that the Board “reconsider its decision to allow singular and plural versions of the same strings”), because the Board has solicited comment only on the GAC Safeguards, Turner will limit this comment to that part of the GAC’s advice.

First, Turner agrees with the GAC that the GAC Safeguards are needed “to reinforce existing processes for raising and addressing concerns” in the new gTLD space. Turner shares the GAC’s apparent skepticism that existing safeguards will be scalable given the larger-than-anticipated number of new gTLD applications. As such, it was reasonable for the GAC to have concluded (as many others have concluded) that a structure that was built to support 20, or 50, or 200, or even 500 gTLDs would need to be “reinforced” to support over 1000. To conclude otherwise is no less negligent than to pack 1000 passengers in a ship stocked with life jackets for only 500.

Second, the GAC Safeguards are narrowly tailored to provide the “reinforcement” that is needed to buttress the new gTLD program, and to fight the potential harms that the GAC identified in its Beijing Communiqué, such as the increased risk of cybersquatting and other infringement presented by the new gTLDs. By requiring: 1) WHOIS verification; 2) Terms of Use for registrants that include prohibitions against trademark or copyright infringement; 3) periodic security checks; 4) documentation of WHOIS verification and security checks; 5) a mechanism for making complaints regarding WHOIS accuracy or domain name abuse; and 6) consequences, including domain name suspension, for the provision of inaccurate WHOIS information or the use of a domain name in breach of applicable law, the GAC Safeguards will mitigate that risk. That will in turn reduce the attendant risk of consumer confusion, which will increase consumer confidence in the new gTLD space.

Third and finally, Turner notes that there is little conceivable downside to the Board’s adoption of the GAC Safeguards. As the Board is aware, under Article XI, Sections 2(1)(j) and (k) of the ICANN Bylaws, the advice of the GAC “shall be duly taken into account,” such that if the Board decides to take an action that is not consistent with GAC advice, it shall so inform the GAC and “state the reasons why it decided not to follow that advice.” Turner can think of no legitimate reason that the Board might offer for not following the GAC’s advice here. While some have argued that the GAC Safeguards represent significant last-minute changes to the gTLD Applicant Guidebook, Version 2012-06-04 (the “Guidebook”), such that their adoption would somehow injure

applicants' reliance interest thereon, this reliance argument has no merit, for at least three reasons.

First, the reliance argument assumes that the GAC Safeguards are somehow last-minute. They are not. In its June 17, 2012 letter, the GAC notified the Board:

Given the delays to the gTLD application process, the timing of upcoming ICANN meetings, and the amount of work involved, the GAC advises the Board that it will not be in a position to offer any advice on new gTLD applications in 2012. For this reason, the GAC is considering the implications of providing any GAC advice on gTLD applications. These considerations are not expected to be finalized before the Asia-Pacific meeting in April 2013.

Thus, the timing of GAC Safeguards should come as no surprise. Nor should their substance. As long ago as March of 2007, the GAC stated, in § 2.10 of its "Principles Regarding New GTLDS," that "A new gTLD operator/registry should undertake to implement practices that ensure an appropriate level of security and stability both for the TLD itself and for the DNS as a whole, including the development of best practices to ensure the accuracy, integrity, and validity of registry information." The GAC was not alone in this regard. For example, in March of 2012, the Coalition for Online Accountability proposed safeguards which mirror the GAC Safeguards.¹ Likewise, in September of 2012, Turner proposed safeguards of its own for the .KID/.KIDS new gTLD strings; those were derived from other new gTLD applications, and also mirror the GAC Safeguards.² Nothing in the GAC Safeguards is new, or unexpected, or last-minute.

Second, the reliance argument assumes that it was somehow reasonable for applicants to operate as if the Guidebook could never be changed. It was not. The Guidebook explicitly states in § 1.2.11 that ICANN "reserves the right to make reasonable updates and changes to the Applicant Guidebook at any time, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process." If the Board is to proffer a reason as to why it will not adopt the GAC Safeguards, the claim that the Guidebook was meant to be immutable cannot be it.

Third, the reliance argument assumes that new gTLD applicants will suffer some sort of detriment if the Board adopts the GAC Safeguards. They will not. Per the Communiqué, certain of the GAC Safeguards are to be applied across-the-board, while others are to be applied to certain categories of sensitive strings linked to specific regulated or

¹ See http://www.onlineaccountability.net/pdf/2012_Mar06_EnhancedSafeguards.PDF.

² See <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/9503>. The fact that the GAC Safeguards mirror those proposed by Turner – which were lifted directly from various new gTLD applications – belies any argument that the GAC Safeguards are administratively infeasible. They are at least feasible enough that some applicants thought to include them in their applications.

professional sectors.³ Even if something like periodic WHOIS verification is not a practice that an applicant was planning to implement on its own, if it is something that *all* applicants (or at least all applicants in a given sector) will be required to implement, it makes no sense to argue that any *one* applicant will be injured by having to do so relative to any other.⁴

In sum, there are good reasons for the Board to follow the GAC's advice regarding the GAC Safeguards, which represent a thoughtful response to the GAC's legitimate scalability concern, which Turner shares. There is no good reason not to. The Board should welcome the GAC advice.

Turner thanks the Board in advance for its consideration of our comment. If you have any questions or need more information, please contact us.

Respectfully submitted,

Todd D. Williams
Counsel
Turner Broadcasting System, Inc.
One CNN Center
Atlanta, GA 30303

³ Turner appreciates, however, that some safeguards may have less relevance to some new gTLD applications than to others. For example, an application for a non-generic closed gTLD, in which the applicant will be the only registrant, may not pose the same need for periodic WHOIS verification as other applications. An expeditious dialogue between the Board and the GAC should clarify this point.

⁴ To the extent that new gTLD applicants argue that they will be put at a competitive disadvantage relative to *legacy* gTLDs like .com that do not have to implement the GAC Safeguards, that is a fair point, and suggests that the GAC Safeguards should be applied to all gTLDs, including .com. But that same argument would have applied to something like thick WHOIS, which was required for new gTLDs but not for .com, and is in any event no argument against the Board implementing the GAC Safeguards for new gTLDs.