

Review of ICANN public comment period re: phased allocation in dot-jobs¹

EXECUTIVE SUMMARY

A public comment period was opened by ICANN on 15 June 2010 to seek input on a change to the contract for the dot-jobs top-level domain (Proposal 201005). The comment period was open for one month and received 274 individual comments: 35 in favour of the change, two with mixed views and 237 against.

The comment period closed on 15 July, a summary and analysis produced by ICANN staff was published on 2 August and a Board decision on the matter was taken in favour of the proposal on 5 August.

A review of this public comment period, the broader public comment process within ICANN, and the summary and analysis of comments presented to the Board on 5 August to assist its decision-making, leads to the following conclusions:

- The ICANN Board and by extension the global Internet community has not been well served by an inadequate public comment process in this case. Important questions raised during the comment period were overlooked and Board approval of the proposal was at best premature.
- ICANN staff wrongly applied the same procedures as previous, less controversial, issues. This resulted in a summary and analysis that was neither thorough nor comprehensive. Hundreds of comments from professional groups appear to have been disregarded, and their input wrongly identified as reflecting little more than a dispute between two organizations.
- Staff analysis of comments failed to identify a number of concerns that have impact beyond the proposal itself, and, through subsequent approval of the Proposal, on the global Internet community.
- A tight timeline, with Board review and decision scheduled just two weeks after the close of the comment period, exacerbated an already flawed approach and removed any chance of rethinking the process in order to properly review input received.
- The ICANN Board should undertake a review of not only this comment period but also the organization's wider public comment and consultation processes if it wishes to receive well-considered, informed and impartial advice on the issues brought before it in future.

¹ The .JOBS Charter Compliance Coalition commissioned Kieren McCarthy to provide this independent analysis. Neither the Coalition nor its members or agents exercised editorial control over the work product.

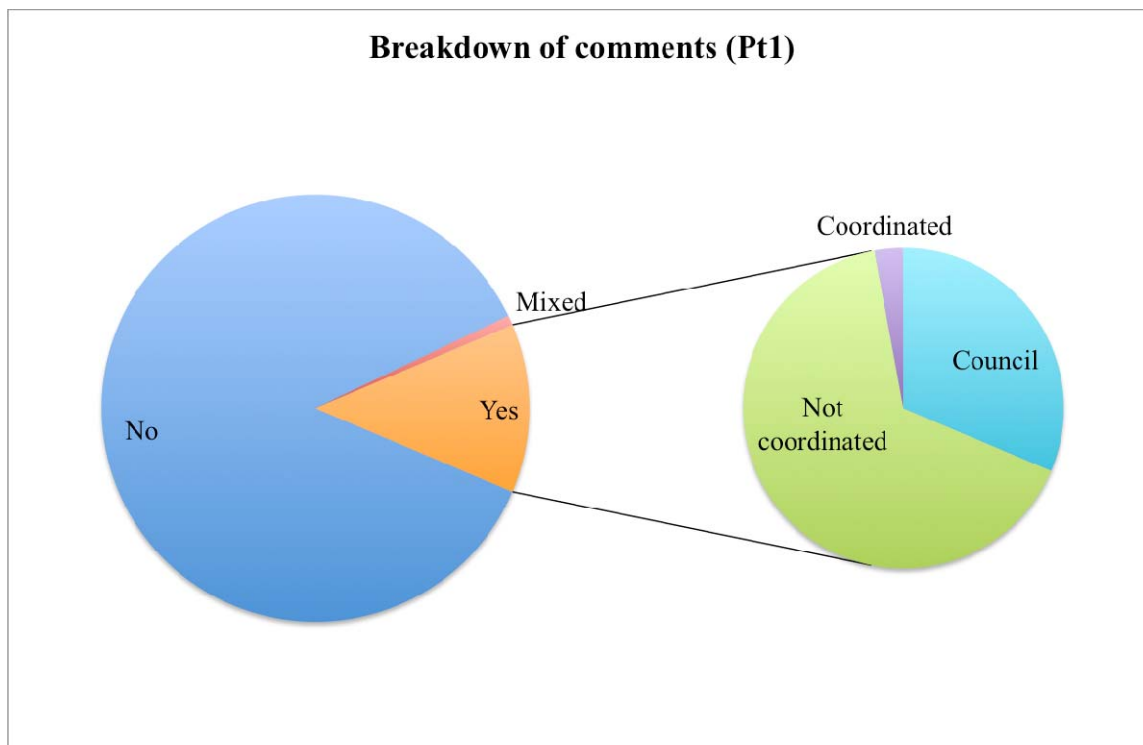
Summary of comments to Proposal 201005

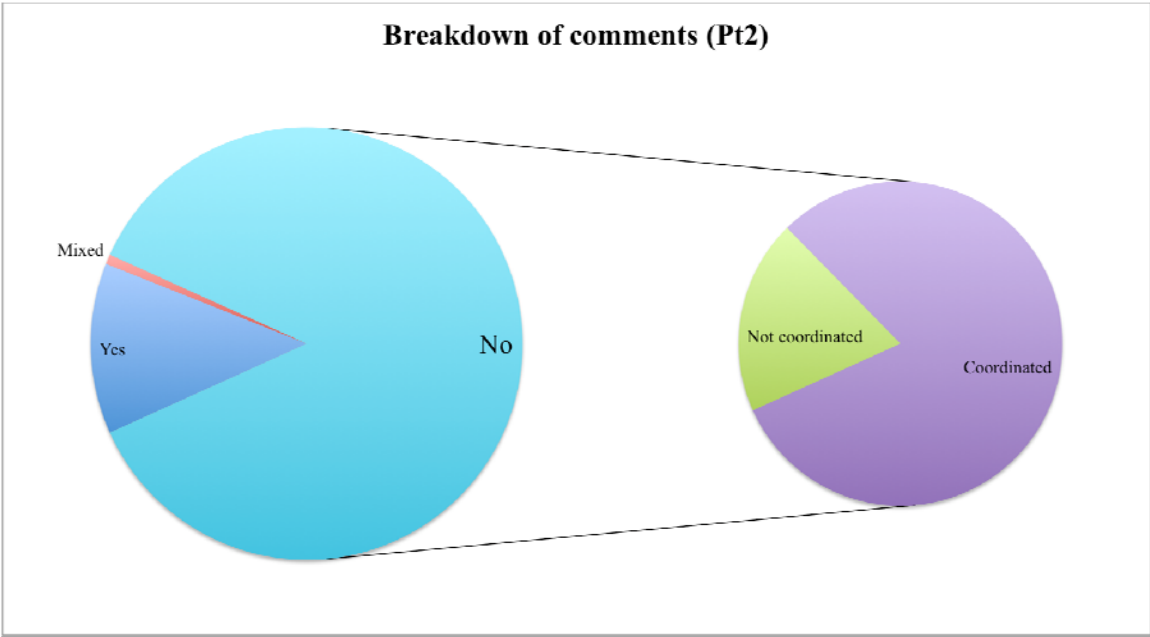
Eliminating repeat posts, there were 274 individual comments made to the public comment period for Proposal 201005, a Phased Allocation Program for the dot-jobs top-level domain, run by EmployMedia LLC.

Of those comments: 35 comments (13 percent) were in favour of the proposal; two had mixed views (1 percent) and 237 (86 percent) were opposed. Of the 274 responses, 243 or 89 percent came from affected parties.

There were a number of coordinated letter-writing campaigns specifically for the comment process: two by those in favour of the proposal, and three against. Of 191 coordinated responses (representing 70 percent of all responses); nine were in favour of the proposal (5 percent) and 182 (95 percent) against.

Of the comments in favour of the proposal, 11 (31 percent) came from individuals on the Advisory Council that had already formally approved the proposal.





In favour

Of those in favour of the proposal, the main arguments were presented:

- **Approval of Advisory Council.** Of the 35 ‘yes’ responses, 17 (49 percent), argued that since the specific group of individuals set up to approve policy for dot-jobs has already approved the proposal, ICANN should accept the recommendation.
- **Innovation.** Seven respondents (20 percent) argued that the proposal would provide an innovative model for the dot-jobs top-level domain.
- **Structure.** Six respondents (17 percent) argued that the proposal would give dot-jobs a better, improved structure (for example jobs would be made available according to geographic location or profession).
- **Survey.** Five respondents (14 percent) pointed to a survey created by the dot-jobs sponsoring organization, SHRM, and the dot-jobs PDP Council, that demonstrated support for the proposal as an argument for approving the proposal (the survey was supplied to ICANN as part of Proposal 2010005).
- **Small business.** Five respondents (14 percent) argued that the proposal would benefit small businesses (since they would gain greater awareness through a generic dot-jobs domain rather than their own company dot-jobs domain).

Mixed

- **Slow down.** Both respondents that did not explicitly approve or disapprove of the proposal argued that the process of approval needed to slow down. One argued that the dot-jobs proposal was different to previous registry approvals² and needed to be looked at more closely; the other argued that the process needed to include more voices before any approval³.

Against

Of those against the proposal, the main arguments were presented:

- **Damage to existing business.** Of the 237 respondents that were against the proposal, 224 (95 percent) argued that it would damage their business (due to the creation of thousands of new generic job boards).
- **Contract renegotiation.** 199 (84 percent) respondents argued that the proposal rewrites specific contractual obligations that dot-jobs signed up to when it was awarded the top-level domain i.e. the proposal goes far beyond a new registry service.
- **Damage to gTLD process.** 104 respondents (44 percent) argued that approval would have a damaging impact on the upcoming new gTLD process (for new Internet extensions), particularly community-led proposals (because the dot-jobs proposal effectively turns the top-level domain from a sponsored domain to a generic top-level domain).
- **Lack of support.** There were 98 respondents (41 percent) that argued the proposal did not have the support of the top-level domain's sponsorship community.
- **Lower value of existing dot-jobs domains.** Five percent of respondents (11) argued that the proposal would devalue existing dot-jobs domains through the rapid introduction of large numbers of new domains.
- **Monopoly.** Nine respondents (4 percent) argued that the proposal provided the dot-jobs registry, Employ Media, with an effective monopoly on dot-jobs domains.

It should be noted that a number of additional arguments were provided in responses from the International Association of Employment Web Sites (IAEWS)⁴ and Monster Worldwide⁵.

² <http://forum.icann.org/lists/jobs-phased-allocation/msg00245.html>

³ <http://forum.icann.org/lists/jobs-phased-allocation/msg00226.html>

⁴ <http://forum.icann.org/lists/jobs-phased-allocation/msg00185.html>

⁵ <http://forum.icann.org/lists/jobs-phased-allocation/msg00253.html>

Review of ICANN summary/analysis of comments

Staff summary

On 2 August 2010, 18 days after the close of comment period, ICANN's staff posted a three-page summary and analysis of the comment period⁶.

The first page provided background to the issue, with the two subsequent pages presenting ICANN's summary and analysis of comments. The summary identifies the coordinated letter-writing campaigns but does not provide respondent numbers. It also highlights repeat responses to the comment period.

Quotes are pulled from, in total, six responses, all of which focus on claim and counter-claim between the main proponents of arguments on either side of the proposal. The first page of summary/analysis provides opposing quotes (from the International Association of Employment Web Sites (IAEWS) and Employ Media) with respect to the argument that the proposal would negatively impact the new gTLD process. It also focuses on the membership issues surrounding both organizations.

The second page pulls quotes from other submissions that highlight: the approval of the proposal by the dot-jobs Advisory Council; a lack of transparency on the part of the sponsoring organization (SHRM) and the argument that the proposal has greater impact than has been recognized; the earlier refusal of a dot-jobs domain to a job board company - a situation that will be reversed if the proposal is approved; and the argument that large numbers of new job boards with dot-jobs domains would damage existing businesses.

A total of 22 respondents are identified as being in support of one or other side. The summary notes that a list of contributors will not be appended due to the large number of postings but notes that each response was "reviewed individually to confirm its content".

The summary ends with a note that it will be provided to ICANN Board for consideration alongside the proposed amendment to the dot-jobs agreement at its meeting in three days' time, 5 August 2010.

Review of staff summary

In comparing the staff summary and analysis with the number and depth of responses to the public comment period, it is impossible not to note a significant disparity between the two.

The summary is very brief and does not reflect the depth of comments provided by a large number of organizations and running to hundreds of pages of correspondence. In some cases, complex arguments are reduced to single lines of text; in others, omitted altogether.

⁶ <http://forum.icann.org/lists/jobs-phased-allocation/pdfBmX8RcQSFa.pdf>

No attempt is made to separate out lines of argument made by the 274 unique respondents and there is no effort to quantify the support that each argument received. Most problematic is that lack of a useful effort to analyze or investigate the content of the responses. Overall, the review was cursory.

The lack of a full review is implicitly acknowledged and explained away by the assertion that most responses were in response to a letter-writing campaign and largely identical. The unusually high number of comments is also framed as a dispute between a single association and the dot-jobs sponsoring organization. Unfortunately this broad-brush analysis is not borne out by a more detailed analysis.

The high-level, and very brief summary is not sufficiently thorough for an organization that wishes to be accepted as the overseer of a global domain name system. The failure to provide a comprehensive review can negate and even undermine the public comment process itself.

Worse, since the summary and analysis is highlighted as the only supporting document that will be provided to the ICANN Board prior to a decision, its failures have a far greater impact on the ability of the organization to act as an impartial and professional overseer.

Coordinated responses

The 182 coordinated responses against the proposal are treated disparagingly and their contents almost overlooked altogether, despite a note near the start of the summary that “a review of the most common form submissions” would be included. This approach is not coherent given the widely accepted and acknowledged role of online petitions in the modern Internet era.

An examination of the coordinated responses reveals clear effort and intent on the behalf of the sender, the vast majority of who can be readily identified as affected parties. The responses are also directly relevant to the issue under consideration (as opposed to, say, a response that argued there should be no new Internet extensions, or that the Internet has a damaging impact on society).

It is safe to assume that most if not all of the senders of coordinated responses expected to have their response given due consideration, and may even have assumed that by signing up to a coordinated response that their points would be heard *more* clearly.

In disregarding all of these responses *because* they were almost identical to one another, ICANN is setting a dangerous precedent – and one that is also inconsistent with previous comment periods. Previous high-profile examples of where coordinated responses played a significant role include the dot-xxx application and the idea of introducing “expressions of interest” for new generic top-level domains.

At a minimum, the organization should have agreed and publicly available procedures for dealing with coordinated responses, rather than rely on ad hoc judgments. Such procedures also need to be provided to potential respondents in advance so they have warning of how their responses will be treated.

Inconsistent treatment

While the coordinated responses against the proposal are not given adequate consideration, the opposite is true for coordinated responses that constituted 26 percent of the comments supporting the proposal (nine in total, with three from Advisory Council members).

Several versions of the same response were provided by members of the dot-jobs Advisory Council⁷ that had already personally approved the proposal.

Most significantly, the senders of the form letter failed to identify themselves as Advisory Council members (breaking ICANN's own consultation principles⁸), the senders' organizations were listed as being in support of the overall proposal, and accounted for 7 of the 22 respondents that are specifically mentioned in the summary and analysis.

The staff summary and analysis did not notice or note the failure of the Advisory Council members to properly identify themselves.

Red flags

ICANN's staff should have become immediately aware that this comment period needed to be treated differently and with far greater attention than is usual. Most clearly, the comment period received nearly 50 times the average number of comments than this type of public comment period attracts.

The Registry Services Evaluation Process (RSTEP) is a separate process for Internet registries to request new services and, where relevant, changes to their agreements with ICANN to make them possible. They are usually dealt with between ICANN staff and Board and the registry itself; in many cases there is no public comment period at all.

Of 40 RSTEPS over the past four years, only 14 have had public comment periods, several having two. Of the 18 total comment periods, only three have ever received more than 10 comments. And not since 2007 has an RSTEP comment period attracted more than six comments.

Therefore when it became clear that the comment period for Proposal 201005 had attracted more than 250 responses, it should have been immediately obvious that a more substantive review was needed. Instead, staff applied the same process as with other RSTEP requests, resulting in a wholly inadequate response that fails to give sufficient weight to warnings and concerns raised by a large number of professional organizations.

Introverted process

⁷ <http://www.universe.jobs/advisory-council.html>

⁸ "Require that all comments be tagged with the sender's name and any relevant affiliation": <http://www.icann.org/en/transparency/acct-trans-frameworks-principles-23jun07.htm#consul>

The summary and analysis process suffers from being acutely introspective and reflects comments from only a small number of respondents. This approach may be effective in cases where there is limited dispute, but is inadequate when applied to more complex situations. It should never be the case that the Board is asked to vote on something when concerns raised in its public comment period have yet to be reviewed or addressed.

Several of the arguments made by respondents clearly require external review, meaning ICANN's staff needs to hold their own investigation outside of the written comments to determine what the situation is.

There is a limited effort within the summary and analysis to establish a truth between conflicting accounts, but that effort suffers badly from restricting itself to material within the comments themselves (for example, a response by the applicant to earlier concerns is taken at face-value). Where there is no additional information within the comments themselves, the concern is simply left open-ended and unanswered.

A simple Internet search on the issue would have uncovered a significant amount of external and expert commentary on Proposal 201005 that would have provided vital context. One specialist publisher in the field even wrote in to the comment period to highlight its expert opinion on the matter⁹. No mention of that response is made in the summary and analysis.

By failing to identify the need to identify, investigate and respond to serious concerns expressed in the course of the comment process, the summary and analysis is neither thorough nor comprehensive and so fails in its purpose.

Presumption of approval

It is easy to discern from the process a presumption of approval in the RSTEP process, with the requirement on others to prove their case against a given proposal.

In the four years and 40 RSTEP procedures that have been run through, only the first (in 2006) was not approved. Moreover, many of the steps in the RSTEP process are resolved internally between ICANN staff and the Technical Evaluation Panel before the end result is put out to public comment.

In this situation, there is an understandable bias for approval. However the process fails when the same team that has drafted proposed contract changes is then expected to review public comments that argue against approval. This situation may not have mattered with previous uncontroversial changes, but in this case the summary and analysis appears to have suffered from the lack of a fresh perspective.

⁹ <http://forum.icann.org/lists/jobs-phased-allocation/msg00206.html>. ERE Media is a trade publisher that "has been observing the evolution of the .jobs TLD since its inception... and reporting extensively on the proposed amendment at our website." Its customers represent both sides of the dot-jobs debate (i.e. HR professionals as well as job boards). Its broad conclusion is that sponsoring organization, SHRM, "has failed in its oversight responsibilities as the sponsor of the .jobs TLD."

Autopilot

The obvious conclusion to draw from the failings of the summary and analysis is that the comment process itself is running on autopilot, meaning that the approach, style and timing of the process was pre-determined and there is no process in place to change course when the situation demands it.

The summary and analysis is clearly rushed. It fails to adequately account for either the breadth or depth of comments. It boils down complex argument to a form that loses most if not all of its meaning. It fails to investigate beyond the comments themselves the serious concerns of hundreds of professional organizations. And it fails to acknowledge that since the process in place is incapable of processing such a large response that the most obvious solution is to stop and look to a different process.

The timeline for RSTEP Proposal 201005 was impossibly tight given the degree and level of response. The comment period ended on 15 July. A decision on the issue was added to the agenda of the 5 August Board meeting, published on 29 July - four days before the summary and analysis was published on 2 August. The Board then took a decision based on that summary just three days later.

This process may have worked adequately for previous non-contentious RSTEP comment periods but was wholly unsuitable in this case.

ICANN should be in a position to notice and respond appropriately when a comment period reveals an unusually high degree of disagreement, or raised a significant number of concerns, especially any that threaten to have an impact beyond the immediate issue. And it should be able to react accordingly.

What the public comment period demonstrated in this case is that the organization's comment process itself is not fit for purpose since it is lacking in agreed procedures and guidelines, and relies on ad hoc procedures fitted in around rigid timelines.

The public comment process is an integral part of ICANN's decision-making, as well as consistently put forward as the main mechanism for making the organization's work transparent and accountable to global Internet users. The failure of the comment process in this case in turn raises serious questions about ICANN's ability to properly fulfill its oversight role of the domain name system.

Unanswered questions

The comment period highlighted a number of bigger questions, none of which have been adequately addressed. The three most significant are reiterated below:

- Is RSTEP the correct process for the proposed change?

It is notable that RSTEP processes are rarely controversial but in this case there were hundreds of comments as well as angry exchanges.

One of the biggest arguments against approving Proposal 201005 is that it does far more than provide a new registry service; in effect, it rewrites the original sTLD contract, upending previously agreed rules about dot-jobs domains.

Should the proposal have been accepted through RSTEP? And are the current guidelines open to future abuse, particularly with hundreds of new gTLDs expected to appear in the next year?

- Does this proposal unnecessarily blur the lines between sTLDs and gTLDs?

The sponsored top-level domain (sTLD) process was specifically designed over several years to act differently to the generic top-level domain (gTLD) process. Each sTLD would serve a limited group of people, and be overseen by a sponsoring organization.

Proposal 201005 blurs that distinction by removing almost all barriers to its sponsoring organization while retaining sTLD controls over domain approval, and – according to many that will subsequently become eligible to be members – damaging their businesses.

While ICANN may see this as the best way forward, it is deserving of far greater and more considered thought and discussion than one line in a summary and analysis paper.

The summary and analysis misses the point that many respondents wished to make about the impact on the new gTLD process – that if the rules can be changed with little or no public discussion, then the distinctions currently drawn in the new gTLD process (particularly with respect to “community” top-level domains) may become meaningless.

- Did Employ Media / SHRM provide for meaningful input into their processes?

Beneath arguments about membership there lies a larger question: did Employ Media (the registry) and SHRM (the sponsoring organization) allow for meaningful input into Proposal 201005 before it was approved by its Advisory Council and put forward to ICANN.

According to a number of respondents (and external voices) the process used by the dot-jobs sponsoring organization to consider the proposal was purposefully skewed in order to achieve the desired result. Even if that turns out not to have been the case, ICANN is duty-bound to investigate charges that the company that is under contract has played by the rules before it accepts changes to that contract.

When there is a clear financial incentive for a company to make changes, it is all the more imperative that the only body that is in an oversight position – ICANN – carries out that

oversight role, particularly when it receives public accusations of foul play through its own comment processes.

The purpose of ICANN's public comment periods

Every significant piece of work ICANN produces goes through a period of public comment, typically a month, so that the broader Internet community has an opportunity to comment. Often one document will go through several stages of review and revision before being finalised.

The process of publishing documents at all significant stages and for almost every action is frequently quoted as the main mechanism by which the organization is made accountable for its actions and a clear indication that it acts in a transparent manner. Public comment periods are open to all, from those directly impacted by the work to any Internet user.

Aside from ensuring that ICANN's work is visible to all, and that anyone at all can comment on that work, public comment periods provide a vital check and balance for the organization itself.

Since ICANN's decision-making processes attempt to include all those impacted by the Internet – from governments to businesses to engineers to ordinary Internet users – the public comment periods allow disparate groups the opportunity to review the work of others that they may not normally interact with.

Public comment periods also provide ICANN's Board with a final check on issues before them, supplying useful information and analysis prior to their vote.

The case for reform

Despite the overwhelming importance of public comment periods for ICANN, or perhaps because of it, there remains a significant lack of explanatory information, procedures or guidelines regarding the process itself.

There is no agreement on when a public comment period can be created, or for what. There are no agreed rules or procedures for opening comment periods, or closing them. Deadlines vary widely, and even where specified, are frequently changed. There is no common method for summarizing input, no procedures for dealing with different types of input, and no processes for ensuring the end results are considered.

There are no guidelines for how input should be provided, nor agreement on what constitutes important input and what constitutes less important input. There is no method or system to differentiate types of public comment period, or different types public comment (such as coordinated letter-writing campaigns). And there is no reporting or reviewing mechanism to account for public comment, demonstrate its impact, or explain subsequent actions.

Unsurprisingly, there have been many calls for reform of the public comment process in the past two years.

- During ICANN’s Improving Institutional Confidence consultation in 2008 and 2009, an improved public comment process was identified at several¹⁰ stages¹¹ as being important to the organization’s effectiveness.
- The ICANN Board’s Public Participation Committee discussed improving the public comment process both privately and at public meetings in 2009 and 2010 in Sydney¹², Seoul¹³ and Nairobi¹⁴.
- The At Large Advisory Committee produced a paper in 2009 outlining problems with the public comment process and suggesting reforms¹⁵.
- ICANN’s general manager of public participation highlighted issues with the public comment process and in 2009 strongly recommended a review of it in his leaving report¹⁶.
- The Affirmation of Commitments that ICANN signed with the US government in 2009 contains two¹⁷ clauses¹⁸ that specifically refer to increased expectations of the public comment process.
- And the public comment process was the subject of much discussion and suggestions for improvement to the Accountability and Transparency Review Team earlier this year¹⁹.

Despite the calls for reform, the public comment process remains unchanged, even using out-dated and ineffective mailing software to administer the dozens of public comment periods that ICANN opens and closes each year.

With the number of public comment periods increasing each year, and the new gTLD process expected to provide the organization with more and broader public input than ever before, it is becoming increasingly important for ICANN’s public comment process to be reviewed and reformed.

The failure of the public comment process in the case of Proposal 201005 is a clear example of the importance of getting things right, and of what problems lie ahead if the process isn’t reformed to more properly serve the organization, its Board, and global Internet users.

¹⁰ <http://www.icann.org/en/jpa/iic/second-comment-period-summary.htm#input>

¹¹ <http://www.icann.org/en/jpa/iic/third-comment-period-summary.htm>

¹² <http://syd.icann.org/node/4089>

¹³ <http://sel.icann.org/node/7090>

¹⁴ <http://nbo.icann.org/node/8950>

¹⁵ https://st.icann.org/alac-docs/index.cgi?alac_statement_on_the_public_consultation_process_al_alac_st_0509_3

¹⁶ <http://www.icann.org/en/participate/gmpp-leaving-report-25nov09-en.pdf>

¹⁷ <http://www.icann.org/en/announcements/announcement-30sep09-en.htm#4>

¹⁸ <http://www.icann.org/en/announcements/announcement-30sep09-en.htm#7>

¹⁹ http://forum.icann.org/lists/atrt-questions-2010/pdfL_twt3LFwZ.pdf

ICANN would be well advised to use this comment period, among others, to review failings in its system and introduce improvements, enhancements and, where necessary, wholesale reform, of its public comment and consultation processes.

Conclusions

A review of the comment period for Proposal 201005, and the overall public comment process in ICANN, has arrived at the following conclusions:

- ICANN's staff was caught off-guard by the number and depth of comments for the Proposal 201005, especially given the non-controversial nature and low response rate of previous RSTEP processes.
- Staff subsequently failed to recognise the need for a greatly enhanced response in this case and wrongly applied the same procedures as with previous cases. This resulted in a summary and analysis that was neither thorough nor comprehensive. Hundreds of comments from professional groups appear to have been disregarded, and their input wrongly identified as reflecting little more than a dispute between two organizations.
- The summary and analysis of comments failed to identify a number of concerns that have impact beyond the proposal itself, and, through subsequent approval of the Proposal, on the global Internet community.
- A tight timeline attached to the process, with Board review and decision scheduled just two weeks after the close of the comment period, exacerbated an already flawed approach and removed any chance of rethinking the process in order to properly review the input received.
- The ICANN Board should undertake a review of not only this comment period but also the organization's wider public comment and consultation processes if it wishes to receive well-considered, informed and impartial advice on the issues brought before it in future.
- Several important questions remain outstanding from the public comment process which ICANN would be best advised to review and consider at the next available opportunity, particularly in expectation of an increase in public input in 2011.
- There have been numerous calls over the past two years for the public comment process to be reviewed and reformed. The failure of the process in this case, which led to an immediate Board decision, is the clearest indication so far that ICANN needs to develop standard rules, procedures and guidelines for what is a crucial component of the organization's decision-making process.