

PETITION FOR RECONSIDERATION OF BOARD ACTION

TO: reconsider@icann.org

CC: Mr. Dennis Jennings, Chair, Ms. Rita Rodin Johnston, Mr. Ray Plzak, and Mr. Ram Mohan

From: The .JOBS Charter Compliance Coalition

Date: 20 August 2010

The **.JOBS Charter Compliance Coalition** (the “Coalition”) hereby submits this request for reconsideration (“Reconsideration Request”) of the Board of Directors (the “Board”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”) approval on 5 August 2010 (the “Action”) of Employ Media’s Phased Allocation Program (the “Program”) to permit registration of names at the second level in the .JOBS TLD for purposes inconsistent with the .JOBS Charter.

The members of the Coalition include: 1) AHA Solutions (American Hospital Association); 2) the American Society of Association Executives; 3) the American Staffing Association; 4) CareerBuilder, LLC; 5) the International Association of Employment Web Sites; 6) eighteen individual members of the International Association of Employment Web Sites; 7) Monster Worldwide, Inc.; 8) the Newspaper Association of America; and 9) Shaker Recruitment Advertising & Communications. Contact information for the Coalition and for individual Coalition members is provided on **Attachment 1**.

EXECUTIVE SUMMARY

- The ICANN Board’s Action should be reversed because, contrary to Employ Media’s assertion, the Phased Allocation Program violates the .JOBS Charter. The amendment approved by the .JOBS PDP Council on June 3, 2010 does not give Employ Media the authority to change the Charter, and even if it had, any such change should be the subject of careful consideration by the ICANN Board based on broad input from the ICANN community and affected parties.
- Members of the Coalition and the businesses they represent will be materially and adversely harmed by the by the expansion of the .JOBS space beyond employers without any of the customary and usual protections against abusive and infringing registrations, and by the absence of any voice in the policies that will govern their registrations in .JOBS.
- Third parties around the world will be harmed by the expansion of the .JOBS space beyond employers without any of the customary and usual protections against abusive and infringing registrations.
- The Board’s Action should be stayed during the pendency of this Reconsideration process, to avoid irreparable harm to members of the Coalition, the businesses they represent, and third parties globally.
- In approving the .JOBS expansion, the ICANN Board failed to consider material information in its possession. An independent analysis commissioned by the Coalition demonstrates that the ICANN staff Summary and Analysis of Comments for Phased Allocation in .JOBS, which formed the basis for the Board’s consideration of the proposed modification, failed to adequately account for either the breadth or depth of comments and 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, including members of this Coalition.

THE BOARD'S ACTION SHOULD BE REVERSED BECAUSE EMPLOY MEDIA'S PHASED ALLOCATION PROGRAM VIOLATES THE .JOBS CHARTER

The Coalition petitions ICANN's Board Governance Committee (the "Committee") to recommend reversal of the Board's Action on the grounds that the Phased Allocation Program violates the .JOBS Charter and as such exceeds the authorization granted to Employ Media by the .JOBS PDP Council. The Coalition further asks the Committee to recommend that clearly defined and publicly available procedures should be established to consider future requests that have the affect of amending the Charter of a sponsored Top Level Domain (sTLD).

While Employ Media denies that its "Phased Allocation Program" (the "Program") amends the .JOBS Charter, the request (the "Application") submitted to the Registry Services Technical Evaluation Panel ("RSTEP") is inconsistent with the .JOBS Charter. The Charter does not permit an entity, including an independent employment site operator, to register .JOBS domains at the second-level except in furtherance of their own human resources management goals. The Application, however, specifically indicates that third parties, including independent job site operators, will now be permitted to use second level registrations to "*enable an expansion of their product and service offerings in new/innovative ways.*" Accordingly, the Phased Allocation Program violates the .JOBS Charter.

The following analysis clearly supports and demonstrates this assertion:

1. The .JOBS Charter limits registration of a second-level domain within the .JOBS TLD to members of the Society for Human Resource Management ("SHRM"), or persons engaged in human resources management practices meeting specified criteria.¹
2. Accordingly, under the .JOBS Charter, an independent job site operator is not permitted to register second-level domains in .JOBS except in furtherance of its own human resources management goals. This is clearly set forth in the .JOBS Charter and reflected in the .JOBS Registry Agreement:

... your .jobs domain in the companyname product category ... *must be used for human resources ("HR") related purposes*, and particularly for the purpose of promoting the HR interests of the Company ... You ... may not: Use your .jobs domain to post third-party information, such as job listings for other companies. ***This means that you can not have a job board at your .jobs domain which contains listings for jobs outside of your Company.***²

Employ Media has rejected applications for registrations in .JOBS by independent employment web site operators seeking to use such registration to offer their products and services.

3. Employ Media's Application asserts that it will solicit RFPs for use of non-"companyname" registrations "*so long as such plans are consistent with the .JOBS Charter.*"³ Contrary to its assertions, Employ Media's Program does not simply eliminate the requirement for "companyname" domains: Rather, as the Application *affirmatively and explicitly* indicates, the Program will remove the Charter limitations on second level registrations by permitting independent job site operators – who are neither

¹ A cursory review of the .JOBS Charter may appear to permit registration by any entity that supports the Society for Human Resource Management ("SHRM") Code of Ethics. That is simply not the case. See .JOBS Registry Agreement of 5 May 2005 (the "Registry Agreement"), App. S. Part 1, Para. IV. The .JOBS Charter permits the Sponsor (the SHRM) to establish "stricter" requirements for permitting registrations. Registry Agreement, App. S. Part 1, Para. V.

² .JOBS Application and Registration Agreement, App. D: Usage Agreement.

³ Application at 1.

members of SHRM nor engaged in human resources management practices – to expand “*their product and service offerings*” into the .JOBS TLD.⁴

4. Employ Media insists that the Phased Allocation Program does not amend the .JOBS Charter:

“EmployMedia informed ICANN that it did not view the proposal as a change to the Charter for the sTLD or the policy-making process set forth in Appendix S.”⁵

“The definition and scope of the .JOBS community is not changed in any way by the RSTEP request – it is neither being broadened or restricted, and remains unchanged since the inception of .JOBS.”⁶

5. In fact, however, the Phased Allocation Program described in the Application is demonstrably inconsistent with the .JOBS Charter. On the one hand, the .JOBS Charter does not permit independent employment site operators to register domains in the second-level within the .JOBS TLD except in furtherance of their own human resources management goals. On the other hand, the Phased Allocation Program Application clearly indicates that the Program will permit independent employment site operators to use second level registration to “*enable an expansion of their product and service offerings in new/innovative ways.*”⁷ Thus, absent a Charter amendment, the Phased Allocation Program violates the .JOBS Charter.

6. The amendment approved by the .JOBS PDP Council on June 3, 2010 does not give Employ Media the authority to change the Charter. The PDP Council resolution authorizing Employ Media to implement the Program permits registrations that are consistent with the .JOBS Charter: “*... all such policies, practices or business rules are amended to allow Employ Media, at Employ Media’s discretion (provided that Employ Media maintains adherence to the .JOBS Charter), to provision, allocate, register ... reserve and remove from reserve, all such non-‘companyname’ domain names.*”⁸

7. Even if the PDP Council had authorized Employ Media to seek a change in the .JOBS Charter, any such change should be the subject of careful consideration by the ICANN community and the ICANN Board.

MEMBERS OF THE COALITION ARE ADVERSELY AFFECTED BY THE BOARD’S ACTION

The Coalition, each of its members, and – in the case of the association members – the large, small, for-profit, and not-for-profit businesses they represent, are significantly and adversely affected by Employ Media’s plans to circumvent the .JOBS Charter. The products and services offered by Coalition members and the businesses they represent include significant online employment-related services. For example:

- The members of the Newspaper Association of America (“NAA”) represent newspapers in the U.S. and around the world – dailies and weeklies, community-based and

⁴ Application at 10 (“*Independent job site operators in other TLD’s may be affected by the introduction. Some have indicated a positive interest to submit an RFP if such were made available. Others have indicated that the proposed registry service could enable an expansion of their product and service offerings in new/innovative ways.*”).

⁵ ICANN Summary and Analysis of Comments for Phased Allocation in .JOBS available at:

<http://forum.icann.org/lists/jobs-phased-allocation/pdf2EWlbbPMGp.pdf>. NOTE: This argument is possible only because the .JOBS Charter fails to recite affirmative statements set out in other parts the Registry Agreement that specify that the Charter itself prohibits “all registrations which are not trade names or commonly-known names.” App. S, Part VII, Section II: Community Value Criteria.

⁶ Employ Media comment on Phased Allocation Program.

⁷ *Id.* at 10.

⁸ *Id.* at 1.

nationally focused, in large cities or small towns. NAA is a national trade association representing more than 2,000 newspapers, accounting for nearly 90 percent of the daily circulation in the United States. According to recent research by comScore, on behalf of NAA, local newspaper websites rank on top of the list of all sources for credibility and trustworthiness – as well as being the most informative place for consumers to find local content of all types, including classified advertising content. In addition, NAA offers a “Newspaper CareerBank.”

- The American Society of Association Executives (“ASAE”) is the membership organization and voice of the association profession. Founded in 1920, ASAE now has more than 22,000 association CEOs, staff professionals, and industry partners and consultant members. CareerHQ.org – which began operating online in 1999, is ASAE’s career center and the premier job board for association partnership of job boards run by Societies of Association Executives.
- The American Staffing Association (“ASA”) is the national trade association for the U.S. staffing industry. ASA members account for 85% of U.S. staffing industry sales and operate some 14,000 offices throughout the nation. Two million Americans go to work for U.S. staffing companies every business day. ASA members provide a wide range of employment services and solutions, including temporary and contract staffing, recruiting and permanent placement, outplacement and outsourcing, training, and human resource consulting.
- AHA Solutions, Inc. (“Solutions”) is a subsidiary of the American Hospital Association (“AHA”) and manages AHACareerCenter.org, for its member hospitals and job seekers looking for careers in the health care field. AHACareerCenter.org is an affiliate job board in the National Healthcare Career Network, a network of more than 200 health care associations across the country.
- VetJobs is the leading Internet job board for the 10.5 million military veterans currently in the work force, the 200 thousand active duty military personnel who transition each year, the over 400,000 members of the National Guard and Reserve who return to the United States each year from extended deployments, and their family members. VetJobs.com is owned and operated by veterans for veterans. It is exclusively sponsored by the Veterans of Foreign Wars of the United States and has garnered more veteran service organization endorsements than any other site, including the Vietnam Veterans of America, the Naval Reserve Association, and the Veterans of Modern Warfare.
- Internet Employment linkage, Inc. d/b/a HigherEdJobs (“HigherEdJobs”), is the leading source for jobs and career information in academia. During 2009, more than 2,600 colleges and universities posted over 55,000 faculty, administrative and executive job postings to the company’s website. HigherEdJobs.com, which began operating in 1996, is visited over two million times each month by 700,000 unique visitors.
- The International Association of Employment Web Sites is the trade association for the global online employment services industry. Its members power or operate over 60,000 employment-related sites worldwide. They include job boards and career portals

operated by commercial enterprises, newspapers, radio and television stations, trade and professional magazines and journals, professional associations and societies, college and university alumni organizations and veteran and diversity affinity groups as well as social media sites, job ad aggregators, job ad distribution companies, platform providers and content development companies specializing in employment.

Members of the Coalition and the businesses they represent will be harmed by the absence of any voice in the policies that will govern their registrations in .JOBS.

In offering their products and services, neither the Coalition members identified above nor any other Coalition member is part of the .JOBS Sponsored Community, nor does the .JOBS Charter permit them to offer their products and services through a .JOBS domain. Employ Media now proposes – without consultation with affected parties and without providing any of the mechanisms for affected parties to protect their trademark interests that DAG IV requires of all new gTLD operators – to open .JOBS to registrants for the purpose of providing the products and services offered by Coalition members and the businesses they represent.

Employ Media frankly admits in its Application that the needs and interests of online employment service providers such as the Coalition members and the businesses they represent were not considered in connection with the proposed expansion of the .JOBS TLD: *“As .JOBS is a sponsored TLD with a defined community, and as the ICANN/Employ Media .JOBS registry agreement contains a mechanism for effectuating change for the Community via the .JOBS PDP, Employ Media saw little benefit in substantial outreach to other constituency/stakeholder groups.”*⁹

Members of the Coalition and the businesses they represent will be directly and adversely affected by the fact that, as non-members of the .JOBS Sponsored Community, they must bear the costs of, but will have no meaningful voice in the development of, .JOBS policies and procedures.¹⁰ This issue was identified by the independent evaluation team (“S&OJET”) tasked by ICANN to review sTLD applications in March of 2004, which asked Employ Media to provide additional information as to “how the new sTLD would create a new and clearly differentiated space, and satisfy needs that cannot be readily met through the existing TLDs.”¹¹ Employ Media responded by emphasizing the narrow community to be served and the value of a TLD that reflected the “relationship of employer and job seeker”:

The marriage of a TLD with the focus of employment recruiting offers differentiation for the employer organization, the distinct Community tasked with this mission, and the general Internet Population.Jobs is an innovative naming tool, to reside at the top level, to marry the company name directly to its employment opportunities that provides a resource locator far more closely related to the historical relationship of employer and job seeker. The marriage correctly falls under the jurisdiction and mission of the HR community, on behalf of the employer organization. ... This is a differentiating factor of the .jobs TLD...¹²

⁹ Application at 4.

¹⁰ The .JOBS PDP Council consists of 8 “HR professionals.”

<http://www.shrm.org/about/news/Pages/ExpansionDotJobs.aspx>

¹¹ Status Report on the New sTLD Application Process, Appendix C (Applicants’ Responses to Questions) available at: <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppC.pdf>

¹² Id.

Ultimately, the evaluators remained concerned about the mis-match between the narrow community identified by the applicant (the HR function of employers) and the very broad .JOBS string. They concluded:

[T]he string suggested is broader than the described community. We recommend that, in the first instance, the application could be improved if a narrower string was used, for example, .shrm or .employ. As an alternative, we recommend that the applicant broaden their base of support to include other groups and individuals that one would normally associate with the broad term “jobs.”¹³

Employ Media neither narrowed the proposed string nor broadened its community beyond employers. Notwithstanding that decision, Employ Media now proposes to have the PDP Council, which is operated by an organization that is well respected – *as an organization of human resources professionals* - set policy for the operation of top level domains offering a wide variety of employment-related products and services for purposes that greatly exceed the scope of the .JOBS community of human resources professionals.

Members of the Coalition and the businesses they represent will be harmed by the expansion of the .JOBS space beyond employers without any of the customary and usual protections against abusive and infringing registrations.

The .JOBS Charter expansion will take place well in advance of the adoption of any of the DAG IV mechanisms as consensus policies. Accordingly, independent employment service providers like the Coalition members and the businesses they represent will not be able to avail themselves of mechanisms acknowledged by ICANN to be appropriate in connection with expansion of the top level domain space. Rather, the only mechanisms available to members of the Coalition and the businesses they represent will be (1) defensive registrations in the .JOBS TLD, (2) ongoing monitoring of registrations in .JOBS, and (3) costly proceedings to remove abusive and infringing registrations in .JOBS. HigherEdJobs, for example, owns the rights to the HIGHEREDJOBS trade name and service mark, including HIGHEREDJOBS.COM, Registration No. 2,688,003; HIGHEREDJOBS.COM (stylized), Registration No. 2,781,127; HIGHEREDJOBS (stylized), US. App. Ser. No. 77/950,871; and HIGHEREDJOBS, US. App. Ser. No. 77/950,843. Earlier this year, HigherEdJobs asked the .JOBS Sponsoring Organization in writing whether trademark rights would be respected in connection with the Program, but has not received a response.

The .JOBS Registry Agreement acknowledges that expansion of the TLD space creates significant concerns:

*Additionally, it is noted that a major concern of other TLD's, namely trademark infringement, is of lesser concern as such relates to the .jobs TLD. **As the Charter ...prohibits all registrations which are not trade names or commonly-known names**, few (if any) applications for trademark.jobs will get through Employ Media's screening process. This means that there will be little pressure on current trademark holders to believe that they have to defensively obtain all of their “trademark.jobs.” ... Of note, however, is the effect on likelihood of confusion of a .jobs sTLD. Namely, due to restrictions set forth in this proposal, a registration in the .jobs sTLD will be associated with an employer, and more particularly the HR aspects of an employer.¹⁴*

¹³ Status Report on the New sTLD Application Process, Appendix D (Evaluation Reports) available at: <http://www.icann.org/en/tlds/stld-apps-19mar04/PostAppD.pdf>

¹⁴ .JOBS Registry Agreement, App. S, Part VII. Section 2 (Community Value Criteria).

The Program completely reverses the commitments made by Employ Media in the process of applying for the .JOBS sponsored top level domain. Had Employ Media proposed to operate .JOBS as an employment theme-park rather than as a TLD for direct employers to register their company names, independent employment web sites could have and would have had the opportunity to register their opposition to the sTLD application. At a minimum, they could have and would have had an opportunity to ensure that the interests and concerns of independent employment site operators received meaningful consideration in the policy formulation process for .JOBS and to ensure that Employ Media's launch of .JOBS provided typical protections against abusive registrations (e.g., a Sunrise period), which were deemed unnecessary in light of the promised registration restrictions.

APPROVAL OF THE PHASED ALLOCATION PROGRAM ADVERSELY AFFECTS OTHERS

Approval of the Program undermines the credibility of ICANN's commitments in connection with the introduction of new "community-based" gTLDs. The Board's Action establishes the precedent for a new gTLD applicant to propose to serve a specified "community" in a specified way and, if for some reason its business plans do not work out, turn itself into a "theme-park" TLD by eliminating the registration limitations that allowed it to win ICANN Board approval in the first place.

Even if the Committee accepts Employ Media's claim that the Phased Allocation Program does not constitute a Charter amendment – notwithstanding the clear internal inconsistencies – the Board's Action fails to address the intellectual property considerations raised by the proposed service. Employ Media's application for .JOBS, and Appendix S of the Registry Agreement, state that trademark infringement is of "lesser concern" because the Charter prohibits all registrations which are not trade names or commonly-known names. Because .jobs was limited in its scope, protection against cybersquatting and other typical threats posed to trademark owners was virtually self-executing, and as such, none were included in the initial agreement.

Approval of the Phased Allocation Program greatly expands the potential for abusive and infringing registrations. Yet ICANN has approved this expansion without requiring Employ Media to establish even the most basic of mechanisms to ensure that trademark holders have adequate and effective tools to protect their intellectual property rights. ICANN has clearly recognized that expansion of the TLD space imposes costs on trademark owners and has incorporated numerous trademark protection mechanisms for new gTLD applications and administration of the eventual registries. **Sadly, none of these protections will be available in connection with the expansion of .JOBS.**

THE BOARD'S ACTION SHOULD BE STAYED PENDING RECONSIDERATION

We request that the Board Governance Committee stay Employ Media's launch of the Phased Allocation Program pending its review of this Reconsideration Request. Immediately following ICANN's approval of the Application, Employ Media issued a call for "Expressions of Interest" in operating industry, occupation, geographic and dictionary names within the .JOBS sponsored TLD. The Expression of Interest ("EOI") period began immediately following the Board's Action, and according to the Employ Media website will run for *less than three weeks* – through Tuesday, August 24, 2010. Employ Media has announced its intention to initiate a Request for Proposal ("RFP") period immediately thereafter. The Board's Action gives Employ Media authority to begin auctioning and permitting first-come first-served registrations of regional, sectoral, and other non-company names at the second level.

Accordingly, Coalition members and the businesses they represent must take immediate and costly steps to protect their rights and prevent abusive registrations in .JOBS.

The .JOBS expansion contemplated by the Phased Allocation Program raises fundamental questions about respect for and enforcement of the commitments made by applicants for sponsored top level domains, and due process rights of individuals and entities directly and adversely affected by Charter expansions. The Board's Action creates worrisome precedent for Charter amendments in other sponsored top level domains, and raises numerous questions about ICANN's ability and/or willingness to enforce registration limitations associated with new community-based gTLDs.

The questions presented by this Reconsideration Request are significant and deserve careful consideration. Additionally, implementation of the Phased Allocation Program without any provision for the prevention of abusive registrations will impose significant costs and burdens on members of the Coalition, the businesses they represent, and trademark holders around the globe. Commencement of second level registrations under the Phased Allocation Program process may create enforceable interests in non-company name registrations at the second-level of the .JOBS TLD, making it extremely difficult to undo the harm to members of the Coalition and others affected by the Action. To preserve the integrity of ICANN's accountability mechanisms, including the Reconsideration process established by ICANN's Bylaws, it is imperative that the Board Governance Committee suspend Employ Media's authority to implement the Phased Allocation Program pending action on this Reconsideration Request.

THE BOARD FAILED TO CONSIDER MATERIAL INFORMATION IN ITS POSSESSION

The ICANN Staff Summary and Analysis of Comments for Phased Allocation in .JOBS, which formed the basis for the Board's consideration – only three days later – of the proposed modification, was clearly rushed. It failed to adequately account for either the breadth or depth of comments and 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, including members of this Coalition. While the coordinated responses against the proposal are not given adequate consideration, the opposite is true for responses made in favor of the proposal. Several versions of the same response were provided by members of the dot-jobs Advisory Council¹⁵ that had already personally approved the proposal. Despite containing the same content and, most significantly, the senders of the form letter failing to identify themselves as Advisory Council members (breaking ICANN's own consultation principles¹⁶), 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 Coalition has commissioned an independent evaluation, attached hereto as Attachment 2, that details the deficiencies in the staff's "summary" of the comments submitted. Board members relying on the staff summary of the comments submitted in response to the Employ Media Application necessarily failed to consider significant information regarding this Application.

THE INADEQUACY OF THE STAFF SUMMARY, UPON WHICH THE BOARD RELIED, RAISES SIGNIFICANT QUESTIONS ABOUT THE VALIDITY OF ICANN'S PUBLIC COMMENT PROCESS

¹⁵ <http://www.universe.jobs/advisory-council.html>.

¹⁶ "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>.

As indicated in Attachment 2, Staff analysis of comments on the Phased Allocation Program 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. As the independent reviewer observes, “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.” The Affirmation of Commitments executed by ICANN and the Department of Commerce obligates ICANN to continually assess and improve “the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof).” This Reconsideration Request provides a test of ICANN’s fidelity to that commitment.

Attachment 1

Contact Information for the Coalition:

The .JOBS Charter Compliance Coalition

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2. American Society of Association Executives

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4. CareerBuilder, LLC

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5. International Association of Employment Web Sites

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Participating Members of the International Association of Web Sites:

- AccountingJobsToday.com
- Adicio, Inc.
- American institute of Physics
 - American Association of Physics Teachers
 - American Physical Society
 - Science and Technology of Materials, Interfaces, and Processing
 - IEEE Computer Society
- ApartmentCareers.com
- Arbita, Inc.
- Boxwood Technology
- CollegeRecruiter.com
- Dice Holdings, Inc.
 - Dice.com
 - eFinancialCareers.com
 - AllHealthcareJobs.com
 - RigZone.com
 - ClearedJobs.com
- HigherEdJobs.com
- Indeed.com
- Jobing, Inc.
- JobsinLogistics.com
 - AllRetailJobs.com
 - TopUSAJobs.com

- JobsinTrucks.com
- JobTarget, Inc.
- LatPro.com
 - DiversityJobs.com
- NaviSite, Inc.
- onTargetjobs, Inc.
 - RegionalHelpWanted.com
 - BizJournals.com
 - BioSpace.com
 - HEALTHeCAREERS.com
 - Hcareers.com
- SalesGravy.com
- VetJobs.com

6. Monster Worldwide, Inc.

Attention: Lise Poulos
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7. Newspaper Association of America

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8. Shaker Recruitment Advertising & Communications

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Attachment 2:

Review of ICANN public comment period re: phased allocation in dot-jobs¹⁷

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.

¹⁷ 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.

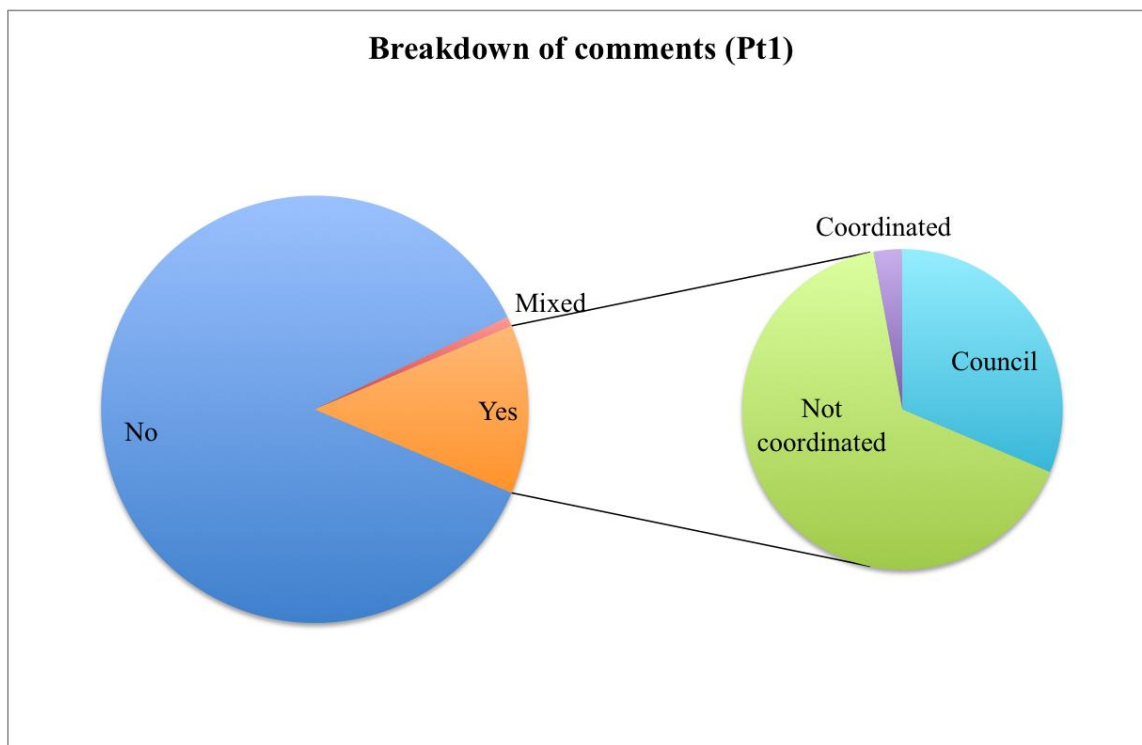
Summary of comments to Proposal 201005

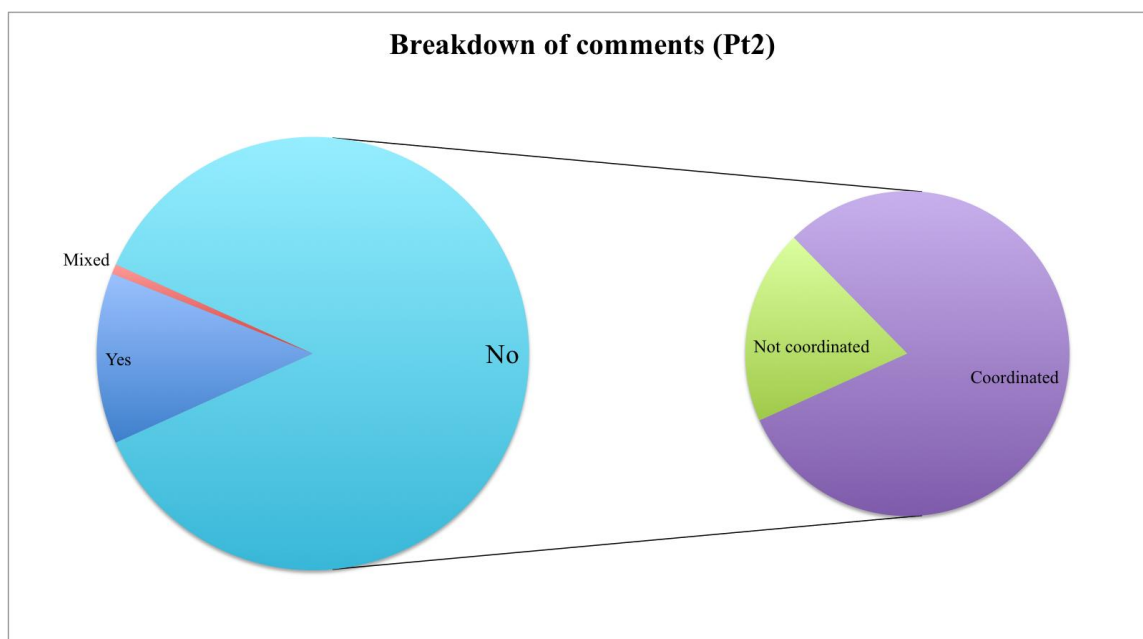
Eliminating repeat posts, there were 274 individual comments made to the public comment period for Proposal 201005, a Phased Allocation Program for the dot-jobs top-level domain, run by EmployMedia LLC.

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 approvals¹⁸ and needed to be looked at more closely; the other argued that the process needed to include more voices before any approval¹⁹.

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)²⁰ and Monster Worldwide²¹.

¹⁸ <http://forum.icann.org/lists/jobs-phased-allocation/msg00245.html>

¹⁹ <http://forum.icann.org/lists/jobs-phased-allocation/msg00226.html>

²⁰ <http://forum.icann.org/lists/jobs-phased-allocation/msg00185.html>

²¹ <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 period²².

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.

²² <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 Council²³ 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 principles²⁴), 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

²³ <http://www.universe.jobs/advisory-council.html>

²⁴ "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 matter²⁵. 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.

²⁵ <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 several²⁶ stages²⁷ 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 Sydney²⁸, Seoul²⁹ and Nairobi³⁰.
- The At Large Advisory Committee produced a paper in 2009 outlining problems with the public comment process and suggesting reforms³¹.
- 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 report³².
- The Affirmation of Commitments that ICANN signed with the US government in 2009 contains two³³ clauses³⁴ 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 year³⁵.

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.

²⁶ <http://www.icann.org/en/jpa/iic/second-comment-period-summary.htm#input>

²⁷ <http://www.icann.org/en/jpa/iic/third-comment-period-summary.htm>

²⁸ <http://syd.icann.org/node/4089>

²⁹ <http://sel.icann.org/node/7090>

³⁰ <http://nbo.icann.org/node/8950>

³¹ https://st.icann.org/alac-docs/index.cgi?alac_statement_on_the_public_consultation_process_al_alac_st_0509_3

³² <http://www.icann.org/en/participate/gmpp-leaving-report-25nov09-en.pdf>

³³ <http://www.icann.org/en/announcements/announcement-30sep09-en.htm#4>

³⁴ <http://www.icann.org/en/announcements/announcement-30sep09-en.htm#7>

³⁵ 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.