

## WP2: Categorizing Public Comment Replies

### Section: Reconsideration Process Enhancement

#### Aims

The goals of this categorization exercise were:

- i) To identify common topics that those who submitted replies wished to discuss, so that WP2/CCWG can organise itself to discuss these topics;
- ii) To show the relative popularity of each topic as an item for discussion, so that WP2/CCWG can prioritise its focus accordingly;
- iii) To collect the comments on a given topic together, and separate them from unrelated comments, so that when WP2/CCWG discusses an issue it has readily before it all the feedback received on that issue
- iv) To ensure that items that were new to CCWG and which did not receive much attention were captured, so that these additional ideas were not excluded from consideration categorising

#### Methodology

The reviewer read the Public Comment Replies<sup>1</sup> and sought to identify broad topics or issues to which particular comments were addressed. These topics were drawn broadly, and value neutral as to the position taken on the topic.

#### Outcome

The process produced a number of themes for WP2/CCWG to discuss, plus several random comments not widely mentioned.

Most commenters who addressed the reconsideration process supported proposed measures for improvement, with some expressing specific support for “improvement,” “strengthening,” and/or “expanding scope.” Others mentioned recommendations for improvement specifically targeted at one facet or other (or more) of the process. Once commenter (JPNIC (211)), however, suggested that improvements in the reconsideration process may be left for WS2.

Those indicating support in the manner indicated above were: auDA (198), DBA (199), AFRALO (201), AFNIC (203), IA (204), eco (205), RySG (206), JH (207), BC (208), USCIB (209), LINX (210), JPNIC (211), IPC (212), CDT (215), USCC (216), CENTR (219), NIRA (220), Sivasubramanian M (comment posted June 13), and DotMusic (comment posted June 13).

Breakdown of comments follows:

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<sup>1</sup> The starting point for this exercise was the summary of public comment replies supplied by staff support, not the original replies themselves.

| Main topic area                          | Sub-topic area   | Number commenting on this topic |
|--|--|---------------------------------|
| Enhance Overall Process                  |  | 19                              |
|  | Clarify RR/IRP distinctions; consider integration  | 1                               |
|  | Consider addressing RR in WS2  | 1                               |
| Ombudsman Role                           |  |                                 |
|  | Ombudsman do preliminary review  | 10                              |
|  | ICANN legal staff not involved in preliminary review   | 6                               |
|  | Policy issues to go directly to BGC  | 1                               |
| Composition of Board Reviewers/Conflicts |  |                                 |
|  | Not review decisions in which member participated  | 2                               |
|  | Rebuttal right   | 3                               |
|  | Conflict-of-interest audit   | 1                               |
|  | Full board votes   | 1                               |
| Review Standards                         |  |                                 |
|  | “Relevant” vs. “material” – keep “material”  | 4                               |
|  | “Relevant” vs. “material” – use “relevant”   | 1                               |
|  | Material information change  | 1                               |
|  | Definition of “material” harm  | 1                               |
|  | Review of external panel decisions   | 1                               |
|  | Clarify distinctions between board and staff actions   | 1                               |
| Standing                                 |  |                                 |
|  | Participation in policy process  | 5                               |
|  | Is RR a requirement for IRP standing?  | 1                               |
| Deadlines/Timelines                      |  |                                 |
|  | Expanded filing deadline   | 2                               |
|  | Narrowed decision timeline   | 1                               |
|  | Deadline flexibility due to extraordinary circumstances  | 1                               |
|  | Deadlines are sufficient   | 1                               |
| Transparency                             |  |                                 |
|  | Transcript/recording of Board discussions  | 2                               |
|  | Full documentation of BGC dismissals   | 1                               |
|  | Better DIDP  | 3                               |
|  | Independent RR body may be needed  | 1                               |
| Other Comments                           |  |                                 |
|  | Other solutions needed for RR results than board member(s) removal                                 | 1                               |
|  | Avoid frivolous/vexatious RRs  | 1                               |
|  | Legal fees financial burden unfair to ICANN board  | 1                               |
|  | Disputes involving Internet number resources should not be covered in RRs (or IRP for that matter) | 1                               |

Scope of topics

## Enhance Reconsideration Request (RR) Process

There were no commenters who specifically declared themselves as being against changes/improvements to the RR process, most expressly support it.

- One commenter, however, indicated that clarification is needed between the RR and IRP processes, saying differences are neither explained nor self-evident. The commenter suggested consideration should be given to integrating RR into the IRP program.
- Another commenter requested more clarification on why RR must be addressed in WS1. The commenter noted other accountability measures in WS1 and said RR may well be considered as WS2 if it should become contentious.

## Ombudsman Role

There were a number of commenters who recommended an expanded role for the ICANN Ombudsman. Under this topic two specific sub-themes emerged:

- First, that the Ombudsman undertake a preliminary-review role with respect to RR petitions; and,
- Second, that the Ombudsman displace ICANN legal staff in this role (i.e. that legal staff not have a role in this respect).
- One commenter agreed that the Ombudsman should do the initial review without ICANN legal staff doing an initial substantive review, but said that issues regarding policy should instead go directly to the BGC.

## Composition of Board Reviewers/Conflict of Interest Checks

A number of commenters argued for changes in this area, including:

- Establish a requirement that board members not sit in review of decisions they made;
- Perform an annual audit of Board for relevant conflicts-of-interest;
- One commenter asked that the full board vote on final RR determinations.

## Review Standards

A number of commenters suggested changes in areas where the RR standard of review is involved, including:

- The standards regarding the Board's reliance on false or inaccurate "relevant" information – some commenters wanted to retain the "material" standard instead of the CCWG's suggested change to "relevant."
- A commenter wanted to amend one of the above standards (insofar as reliance is concerned) to include actions/inactions taken on reliance on information that, subsequent to the action/inaction, materially changed.
- A commenter requested a definition of "materially affected" or "materially harmed," including whether this involves economic harm or is broader.
- A commenter's request for clarity as to how RRs handle disputes concerning decisions made by external panels (including discrepancies in results among multiple external panels).

- A commenter suggested trying to make the difference between board action/inactions vs. staff action/inaction easier.

## Standing

- Some commenters said that RR petitioners should have in some manner participated in the policy development process in order to file an RR concerning such policy (not to “stand on sidelines” as policy is developed and then argue against that policy in an RR).
- Another commenter asked if RR is a requirement before one could bring an IRP (thus related to IRP standing).

## Deadlines/Timelines

- Some commenters urged a filing deadline for RR petitions that is more generous than 30 days.
- Another thought the 120 deadline for a board decision was too long, proposing 90 days.
- Another commenter felt that these deadlines (including decision deadlines) should have a provision for extension in the event of extraordinary circumstances.
- One commenter specifically said timeframes and deadlines are sufficient.

## Transparency

A number of commenters urged more transparency in RR proceedings, including:

- Give RR petitioner option to have transcript/recording of substantive Board discussions of case;
- Require full documentation of BGC’s dismissal of any RR.
- Allow RR petitioners to rebut BGC’s final recommendation (without raising new issues) prior to final Board decision;
- Greater responsiveness by ICANN’s DIDP (document disclosure policy).

## Other Comments

- Financial arrangements: One commenter said that ICANN board bearing burden of legal fees seems unfair.
- One commenter said that in light of the CCWG proposal only empowering the community to remove board members the requirements for RR are not enough – other punitive measures/solutions should be considered.
- Another noted importance that RR process not be capable of use in a frivolous or vexatious way.

## Appendix: Index of comments received

This appendix indexes the Public Comment Summary so that individual comments on a particular topic can be found quickly.

| Topic                              | Commenter | Ref | Notes/extract |
|------------------------------------|-----------|-----|---------------|
| Clarify RR/IPR distinctions        | LAB       | 222 |               |
| Consider addressing RR in WS2      | JPNIC     | 211 |               |
| Ombudsman to do preliminary review | auDA      | 198 |               |
|                                    | AFNIC     | 203 |               |

|  |          |     |   |
|--|----------|-----|---|
|  | IA       | 204 |   |
|  | BC       | 208 |   |
|  | USCC     | 216 |   |
|  | INTA     | 217 |   |
|  | USCIB    | 209 |   |
|  | IPC      | 212 |   |
|  | CDT      | 215 |   |
|  | DotMusic |     | <a href="http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfzpy1fnCZN9.pdf">http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfzpy1fnCZN9.pdf</a> |
| ICANN Legal not involved in preliminary review               | auDA     | 198 |   |
|  | IA       | 204 |   |
|  | BC       | 208 |   |
|  | USCC     | 216 |   |
|  | USCIB    | 209 |   |
|  | CDT      | 215 |   |
| Policy issues direct to BGC                                  | BC       | 208 |   |
| Board mbrs not review actions they were involved in          | DCA-T    | 202 |   |
|  | DotMusic |     | See URL above   |
| Rebuttal right   | DCA-T    | 202 |   |
|  | IPC      | 212 |   |
|  | DotMusic |     | See URL above   |
| Conflict of Interest Audit                                   | AFNIC    | 203 |   |
| Full Board vote required                                     | BC       | 208 |   |
| Reliance on "Relevant" vs. "Material" Info (keep "material") | IA       | 204 |   |
|  | BC       | 208 |   |
|  | GG       | 213 |   |
|  | USCC     | 216 |   |
| ... Use "relevant"   | DotMusic |     | See URL above   |
| Material info change following board/staff action            | INTA     | 217 |   |
| Definition of material harm                                  | USCIB    | 209 |   |
| Review of external panel decisions                           | ALAC     | 221 |   |
| Clarify distinctions   | CRG      | 200 |   |

|  |               |     |  |
|--|---------------|-----|--|
| board/staff actions  |               |     |  |
| Policy participation for standing  | BC            | 208 |  |
|  | IA            | 204 |  |
|  | USCIB         | 209 |  |
|  | GG            | 213 |  |
|  | USCC          | 216 |  |
| Is RR a precondition for filing IRP?   | CRG           | 200 |  |
| Expanded filing deadline   | CENTR         | 219 |  |
|  | IPC           | 212 |  |
| Narrowed decision timeline   | CENTR         | 219 |  |
| Timelines flexibility for extraordinary circumstances                        | ALAC          | 221 |  |
| Timelines are sufficient   | NIRA          | 220 |  |
| Transcript/recording board discussions                                       | DCA-T         | 202 |  |
|  | IPC           | 212 |  |
| Better DIDP  | CDT           | 215 |  |
|  | IPC           | 212 |  |
|  | DotMusic      |     | See URL above  |
| Full documentation BGC dismissals  | BC            | 208 |  |
| Other solutions needed for RR results than board member(s) removal           | JH            | 207 |  |
| Avoid frivolous/vexatious RRs  | .nz           | 218 |  |
| Legal fees burden unfair to ICANN board                                      | NIRA          | 220 |  |
| Internet number resources have and should retain separate dispute mechanisms | RIR Community |     | <a href="http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfWAmYiASmx0.pdf">http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/pdfWAmYiASmx0.pdf</a> (posted June 12) |