

ICANN Failed to Prescribe or Enforce Appropriate Remedial Action

I. Introduction

This Complaint relates to the Public Interest Commitment Dispute Resolution Proceeding (PICDRP) filed against the .FEEDBACK registry operator. This Complaint is filed against the ICANN contractual compliance department (“Compliance”).

On March 16, 2017, the ICANN department issued a registry agreement breach notice to the .FEEDBACK registry operator based on the findings of the PICDRP Panel.

The breach notice failed to prescribe specific and appropriate remedial action in response to breaches of Specification 11.3(c) of the .FEEDBACK Registry Agreement (“RA”). ICANN failed to provide any explanation or rationale demonstrating how the purported remediation plan submitted by TLS adequately addressed the findings of the PICDRP Panel and the accompanying ICANN breach notice, particularly with respect to violations of Specification 11.3(c) of the .FEEDBACK RA. Such actions run contrary to general practice within ICANN new gTLD objection and dispute processes which set forth specific available remedies. ICANN’s actions also stand in violation of Bylaws commitments toward transparency, accountability, and conformity with international law.

II. Background Facts

A. The .FEEDBACK PICDRP Complaint

On October 24, 2016, a coalition of brand owners and trade associations filed a PICDRP complaint against Top Level Spectrum, Inc. (“TLS”), the registry operator of the .FEEDBACK new gTLD. In short, this complaint alleged that TLS:

- Repeatedly changed its own policies and marketing programs in a confusing, unclear, nontransparent manner, and with discriminatory intent.
- Self-allocated, or reserved for allocation to third parties acting in concert with TLS, numerous domain names corresponding to brands, many of which were held during the Sunrise period, thereby preventing them from being registered by the brand owner.
- Applied exorbitant and discriminatory prices for Sunrise registrations, reserved or self-allocated Sunrise-eligible names in order to withhold them from Sunrise registration and offer such domain names to others for “dirt cheap” during an Early Access Phase, and implemented a \$5,000 “trademark claims” fee to validate marks and discourage brand owners from attempting to recover domain names matching their marks from third parties.
- Mandated that all .FEEDBACK domains point to a live website where people can “give actual feedback,” even though TLS hired paid professionals to act as reviewers and write fabricated reviews to post on .FEEDBACK sites to give the false appearance that such

sites were places for trusted, legitimate commentary. TLS never disclosed that such reviews are not from actual customers, its role in soliciting and hiring paid reviewers, and the fact that the vast majority of such reviews (62%) come from identifiable users located in the Seattle, Washington area, in close proximity to TLS's headquarters.

- Changed its policies yet again to launch a marketing program called FREE.FEEDBACK, which resulted in TLS misappropriating brand owners' .COM WHOIS information and deceptively soliciting them to validate and renew .FEEDBACK domain names that brand owners never actually sought to register. The FREE.FEEDBACK program resulted in brand owners being targeted by phishing schemes through the scraped .COM registration data used in the deceptive FREE.FEEDBACK registrations.

As the .FEEDBACK PICDRP complaint detailed, these activities violated TLS's Public Interest Commitments ("PICs") as contained in its Registry Agreement ("RA") with ICANN. As a result, the complainants, other trademark owners, and consumer facing companies all suffered monetary loss and reputational harm as a result of TLS's deceptive acts and practices. The public has also suffered from TLS's misleading practices. The public has been misled and confused about the nature of the comments about numerous companies and their goods and services in the default mandatory websites hosted on the domain names registered in the .FEEDBACK TLD.

Accordingly, the .FEEDBACK PICDRP complaint requested that ICANN:

1. Conduct a comprehensive compliance review and investigation to evaluate TLS's compliance with its obligations under Specification 11 of the .FEEDBACK RA and its related policies and contracts. In particular, the compliance review should investigate the relationship between TLS and all other parties working in concert with, or controlled by TLS.
2. Appoint a Standing Panel to evaluate TLS's compliance with its obligations under Specification 11 of the .FEEDBACK RA. In view of the TLS's repeated, numerous, escalating and ongoing violations, this matter cannot be resolved by the Compliance department alone.
3. Investigate and immediately terminate all unsolicited domain names in the .FEEDBACK TLD that were fraudulently created with false WHOIS registration data through the FREE.FEEDBACK marketing campaign.
4. Award such relief as necessary to redress injury to the complainants and consumers resulting from TLS's violations of the PICs in the .FEEDBACK RA, including but not limited to, the refund of monies paid, and the disgorgement of ill-gotten monies, and the cancellation or free transfer of domain names implicating the complainants' trademarks to the complainants.
5. Take all steps necessary to remediate all past false and deceptive practices perpetrated by TLS and take measures to ensure future compliance with its PICs and all related

contractual obligations in .FEEDBACK and any other new gTLD, should ICANN approve any other gTLD TLS may seek to operate in the future; and

6. Award the complainants the costs of bringing the PICDRP action, as well as other additional relief as the Standing Panel or ICANN may determine to be just and proper.

On November 8, 2016, the .FEEDBACK PICDRP complaint successfully passed the ICANN Preliminary Review Process, designed to ensure that the complaint is complete and that the complainant is in good standing. On the same date, the Compliance department notified the complainants that their complaint was forwarded to TLS.

TLS and counsel for the complainants exchanged scheduling correspondence and conducted a mandatory teleconference requested by TLS on December 6, 2016. The teleconference did not satisfactorily resolve the matters raised in the .FEEDBACK PICDRP complaint.

On December 15, 2016, the complainants provided the Compliance department with a transcript from the same teleconference with TLS, and informed the Compliance department that the teleconference did not resolve the matters raised in the .FEEDBACK PICDRP complaint.

On the same day, Complainants understood that TLS provided a substantive written Response to the .FEEDBACK PICDRP complaint.

On January 27, 2017, the Compliance department decided to convene a Standing Panel, and notified the complainants.

On February 1, 2017, the complainants requested from ICANN a copy of the substantive written Response from TLS that had apparently been provided to ICANN on December 15, 2016, as well as additional information regarding the timing and composition of the PICDRP panel. On February 8, 2017, ICANN rejected the complainants' request for a copy of the written Response from TLS and declined to provide the requested information regarding the panel.

On February 14, 2017, the complainants made a second request for additional information about the composition of the PICDRP panel in order to assess potential conflicts of interest among the panelists. The complainants also reiterated the earlier request for details concerning the timeframe for a panel determination. Once again, in correspondence dated February 17, 2017, ICANN declined to provide this additional information.

On February 24, 2017, ICANN notified the complainants that it had granted a request from the PICDRP Panel to extend the deadline for delivery of its determination by fifteen (15) days.

B. The .FEEDBACK PICDRP Panel Determination and ICANN Breach Notice

The PICDRP Standing Panel issued a determination on March 14, 2017 (PIC Report ID: VNE-286-30027) and ICANN issued a corresponding breach notice addressed to TLS on March 16, 2017. On a preliminary procedural matter, the Panel determination explained that:

This is the first decision under the Public Interest Commitment Dispute Resolution Procedure without established precedent to draw upon for guidance, with numerous acts complained of and issues raised in the complaint, which appeared capable of application to the multiple specifications attached to the Registry Operator Agreement, as well as fraudulent acts requiring more particularity and evidence. Given the broad array of violations alleged and the substantial volume of materials submitted to the Panel, the Panel sought clarification and received confirmation from ICANN of the scope of its review. The scope of review is limited to evaluation of the applicable sections of Specification 11 raised in the Complaint, and on the policies established by the registry operator and its adherence to them.

ICANN never provided the complainants with any correspondence that it exchanged with the Panel on this subject.

The PICDRP Panel found the following to constitute breaches of RA Specification 11, PIC Section 3(c):

- Failure to properly announce and adhere to the 90-day notice requirement concerning the allocation of 5,000 domains matching top brands during Sunrise and self-allocation of at least one promotional name matching one of the world's largest media brands during Sunrise;
- Failure to adhere to the notice requirement for a change in policy when it introduced, during Sunrise, the "Early Access / Free Speech Partner Program";
- Failure to publish information about applicable fees relating to various .FEEDBACK programs, including the FEEDBACK SAAS platform, "Live Site" requirement opt-out, Sunrise, and Early Access Program;
- Failure to adhere to various requirements concerning the FREE.FEEDBACK program, including timely verifying registrant email addresses and cancelling registrations that have not been timely verified, using third party Whois data without authorization to generate unrequested registrations, and failing to include material terms in notifications about such registrations such as how to cancel unwanted registrations; and
- Failure to adhere to requirements prohibiting self-allocating or reserving domain names corresponding to trademarks during Sunrise, which contravenes TLS' own policies and is contrary to the object of Sunrise.

Comparatively, the breach notice from the Compliance department found the following to constitute breaches of the .FEEDBACK RA:

- Failure to operate the TLD in a transparent manner consistent with general principles of openness and nondiscrimination by establishing, publishing and adhering to clear registration policies.

The breach notice did not fully map to the violations found by the PICDRP Panel or contain any more specific detail regarding the Section 3(c) violation.

In order to cure the identified breaches, ICANN requested that TLS “provide ICANN with corrective and preventative action(s), including implementation dates and milestones, to ensure that TLS will operate the TLD feedback in a transparent manner consistent with general principles of openness and nondiscrimination by establishing, publishing and adhering to clear registration policies.”

C. Remedial Activity Following the ICANN Breach Notice

On April 5, 2017, ICANN notified the complainants that it considered the PICDRP complaint “closed.” According to the correspondence we received from ICANN Compliance, ICANN had found that “registry operator has resolved the finding of noncompliance and cured the items in the Notice of Breach” and that “registry operator has implemented a remediation plan which addresses the panel’s findings and includes establishing, publishing and adhering to clear registration policies.”

ICANN never provided complainants with any information regarding the actual corrective and preventative actions TLS allegedly took to come into compliance.

D. Additional Compliance and Dispute Resolution Action Regarding .FEEDBACK

After the PICDRP process formally concluded, Complainants discovered that the violations and frauds complained of in its PICDRP Complaint were continuing. Complainants had to bring this new information to Compliance’s attention. Subsequent additional compliance action was taken to address unverified yet persisting fraudulent registrations made through the FREE.FEEDBACK marketing program and by other means. Domain names registered, and unverified, in connection with the FREE.FEEDBACK marketing program appeared to have been deactivated.

Several thousand additional domain names had accordingly been deactivated, further evidencing continuing, intentional widespread failures by TLS to adhere to proper practices. Upon recent review, many of the previously deactivated names appear to have been reactivated. In addition, many brand owners were forced to file UDRP complaints to recover highly problematic .FEEDBACK domain names matching their trademarks. All of the UDRP complaints involving the .FEEDBACK TLD have resulted in the trademark owner prevailing and the UDRP panels ordering the cancellation or transfer of the domain names to the brand owners. This further evidences a pattern of bad faith registration and use of domain names within the TLD.

E. Attempts to Resolve the Matter

On October 30, 2017, counsel for the complainants met in person with the Compliance department during ICANN 60 in Abu Dhabi.

While Compliance department personnel acknowledged “mutual lessons learned” through the flawed .FEEDBACK PICDRP process, a mutually satisfactory resolution was not achieved – particularly in light of the substantial time and resources the complainants expended in connection with the PICDRP process, in good faith and relying on expectations that it would be a fair and impartial mechanism. It was also troubling to hear Compliance reiterate its assertion that fraudulent conduct perpetrated by registry operators falls outside of the contractual compliance mandate. In particular, Compliance personnel instead suggested that the complainants file other types of complaints or submit general correspondence about any new complaints via email.

Compliance also took no position in response to questions regarding its failure to serve PICDRP papers on all parties.

III. Arguments and Analysis

A. ICANN’s Breach Notice Failed to Recognize and Address the PICDRP Panel’s Findings of the Registry Operator’s PIC Violations.

The table below illustrates ICANN’s failure in its breach notice to address the specific violations of TLS’s PICs contained in Specification 11 Section 3(c) of the .FEEDBACK RA, as described in the PICDRP Panel determination.

<i>TLS violated Specification 11 Section 3(c) when it:</i>	
PICDRP Panel Determination	ICANN Breach Notice
Announced changes to its policies in the news media instead of through the 90-day notice requirement.	[Failed] to operate the top-level domain (“TLD”) feedback in a transparent manner consistent with general principles of openness and nondiscrimination by establishing, publishing and adhering to clear registration policies.
Failed to adhere to the notice requirement when it announced its “Free Speech Partner Program” during the Sunrise Period	
Lacked transparency in relation to its various fees (despite this determination, the Panel was silent in its ruling on the discriminatory pricing and deceptive marketing practices associated with these fees)	
Lacked transparency around the FREE.FEEDBACK website (despite this determination, the Panel failed to address the many past and current harms to brand owners from this scheme, which remains a live and active website today)	
Self-allocated or reserved domain names that correspond to trademarks during the Sunrise Period.	

As the above comparison illustrates, ICANN failed to clearly address all of the specific contractual PIC violations identified by the PICDRP Panel. Instead, ICANN's breach notice made a high level reference to the PICDRP Panel review and pointed TLS to refer to an attached vague summary of the violation and to refer to the PICDRP Panel report for details regarding the breach. Specifically, the attachment stated:

Section 3.c of Specification 11 of the RA requires registry operators to operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies. Top Level Spectrum's failure to operate the TLD feedback in a transparent manner, as described by the PICDRP Standing Panel's evaluation of this matter in the attached report, is a breach of Section 3.c. of Specification 11 of the RA.

Despite the Panel's clear findings of several PIC violations, ICANN failed to prescribe appropriate and concrete remedial action consistent with those findings. The breach notice merely required that TLS "Provide ICANN with corrective and preventative action(s), including implementation dates and milestones, to ensure that Top Level Spectrum will operate the TLD feedback in a transparent manner consistent with general principles of openness and nondiscrimination by establishing, publishing and adhering to clear registration policies."

All ICANN new gTLD dispute resolution procedures enumerate specific remedies. For example:

1. The Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) enumerates specific remedies in Section 18, including: requiring the losing respondent to pay complainant's fees in connection with the action; specific prohibitions on future infringing registrations; suspension against any future registrations in the TLD pending further cures or for a specified time period; and termination of the registry's RA.
2. The Registration Restriction Dispute Resolution Procedure (RRDRP) enumerates specific remedies in Sections 13.3 and 17, including requiring the losing respondent to pay complainant's fees in connection with the action; specific prohibitions on future registrations that do not comply with community-based limitations; suspension against any future registrations in the TLD pending further cures or for a specified time period; and termination of the registry's RA.
3. The String Confusion Objection (SCO) enumerates a specific remedy in New gTLD Applicant Guidebook (AGB) Module 3, Section 3.2.2.1, namely termination of the losing respondent's application (where the complainant is an existing TLD operator) or referral of both applications into a contention set (where the complainant is a competing applicant).
4. The Legal Rights Objection (LRO) enumerates a specific remedy in the flowchart appended to AGB Module 3, namely termination of the losing respondent's application.

5. The Limited Public Interest Objection (LPIO) enumerates a specific remedy in the flowchart appended to AGB Module 3, namely termination of the losing respondent's application.
6. The Community Objection (CO) enumerates a specific remedy in the flowchart appended to AGB Module 3, namely termination of the losing respondent's application.

Under the PICDRP, however, if the PICDRP Panel finds that the Registry Operator is not in compliance with its PICs, ICANN shall notify the Registry Operator via an enforcement notice, and the Registry Operator shall have 30 days to resolve the noncompliance and notify ICANN of the remedial measures taken. *See* ICANN, PICDRP § 4.5. If the Registry Operator does not resolve the non-compliance after receipt of ICANN's notice, ICANN will determine, in its sole discretion, the appropriate remedial measure, if any, and continue the enforcement process. *See id.* § 4.6.

Regardless, ICANN should have provided more explicit guidance and requirements in its breach notice as to the specific measures necessary to remediate the PIC violations found by the PICDRP Panel. It is unreasonable to allow the registry operator who was found in violation to craft its own remedial measures. This result is inconsistent with every other ICANN dispute resolution process, which all set forth specific remedies that can be applied in connection with a successful complaint, as well as with principles of due process.

Further, ICANN failed to account for how remediation adequately addressed all the contractual PIC violations observed by the PICDRP panel. ICANN has never shared or otherwise published TLS's remediation plan, nor provided any rationale for its decision that the plan cured the breaches in the breach notice against TLS.

Without having access to the remedial plan submitted by TLS, the complainants cannot fully assess whether it actually addresses each of the specific findings made by the PICDRP Panel that were found to violate PIC Section 3(c). However, based on the incongruent breach notice and ICANN's closing of the PICDRP complaint, and ongoing harmful activity by TLS, it does not appear that ICANN appropriately implemented the PICDRP Panel findings. Rather, ICANN has failed to prescribe specific and adequate remedial measures in connection with TLS's breaches of Specification 11 Section 3(c) of its RA.

B. ICANN's Failure to Prescribe or Enforce Appropriate Remedial Action Violates ICANN Bylaws Commitments Toward Transparency, Accountability, And Conformity With International Law.

The ICANN Bylaws commit the organization to “carry out its objectives in conformity with relevant principles of international law and international conventions ... through open and transparent processes.” *See* ICANN Bylaws, Commitments and Core Values, [Section \(a\)](#) (July 22, 2017). The ICANN Bylaws also provide that “ICANN [must] [m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly....” ICANN, Bylaws, art.

1.2(a)(v)-(vi). The Bylaws also require that ICANN “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness....” ICANN, Bylaws, art. 3.1. Finally, the Bylaws also require that ICANN “be accountable to the community....” ICANN, Bylaws, art. 4.1. These commitments apply equally to contractual compliance department personnel charged with overseeing PICDRP proceedings.

In essence, these principles are intended to ensure the right of each community participant to due process, which is enshrouded in relevant international and other applicable legal principles, intended to “minimize substantively unfair or mistaken deprivations.” *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (interpreting the Fifth and Fourteenth Amendments to the United States Constitution); *see generally, e.g.,* European Convention on Human Rights (generally enshrining due process of law principles); Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (same). The right to an impartial and neutral tribunal is an integral part of the right to due process. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). Providing the reasons for a determination and an indication of the evidence relied on (in other words, transparency) is another integral part of the right to due process. *See, e.g., Goldberg*, 397 U.S. at 271.

ICANN’s breach notice is incongruous with the PICDRP Panel determination, suggesting that ICANN did not neutrally, objectively, or fairly implement the determination. This is inconsistent with the due process right to an impartial and neutral tribunal (in this case, ICANN is effectively part of the tribunal because it is responsible for implementing the PICDRP Panel decision and issuing the breach notice). ICANN’s failure to prescribe any specific remedies, or provide an accounting of the sufficiency of the TLS remediation plan was not open and transparent, and falls far short of the due process right to rationale and an indication of the evidence relied on in determining the adequacy of the remediation. The complainants were further prejudiced by ICANN’s unilateral and premature decision to close the PICDRP.

ICANN’s acts ultimately undermine stakeholders’ trust in the PICDRP process and harm the public interest. If this practice is perpetuated by Compliance, it threatens to undermine the value of the PICDRP as a viable and trusted method of dispute resolution.

ICANN must take corrective action to fix this for complainants and participants in future PICDRP proceedings.

IV. Conclusion and Requested Relief

For all of the foregoing reasons, we respectfully request that the ICANN Complaints Office and the Office of the General Counsel:

1. Provide a detailed explanation of ICANN’s actions to oversee and monitor the initial and ongoing implementation of the remediation plan and ensure it has actually cured the past breaches, curtailed ongoing breaches, and prevented further breaches of TLS’s PICs and other obligations under the .FEEDBACK RA;

2. Disclose TLS's remediation plan submitted in response to the ICANN breach notice and PICDRP Panel report;
3. Disclose ICANN's response to and implementation of the remediation plan, including a detailed explanation of steps taken to ensure the plan satisfied the PICDRP panel decision and breach notice, and a detailed explanation of ICANN's rationale for why the plan adequately addressed the panel decision and breach notice; and
4. To prevent this problem in the future, ICANN should also perform a request for proposal to identify an independent third party administrator for the PICDRP, with a mandate to develop supplemental rules that, among other things, fill in gaps in the existing PICDRP, including requirements concerning proper implementation of panel decisions through ICANN breach notices, and specific requirements around ICANN's responsibility to provide particular pre-determined remedies. Alternatively, ICANN should provide a specific written commitment to consult with the community to develop and implement gap-filling measures directly within the PICDRP itself to correct ambiguities and deficiencies including, but not necessarily limited to: sharing of all documents with all parties during PICDRP proceedings including any registry remediation plan; pre-determined or enumerated applicable remedies and a requirement for the PICDRP Panel to recommend specific remedies in individual cases; a requirement for ICANN to prescribe specific remedies in the context of a PICDRP-related breach notice based on the PICDRP Panel recommendations; and an opportunity for the complainants to evaluate and comment on the remediation plan and whether it adequately addresses the PIC violations.

Future participants in PICDRP proceedings may be affected by certain of the requested relief. The complainants and the registry operator in the .FEEDBACK PICDRP may also be affected by certain of the requested relief.

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Respectfully submitted,

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