

ICANN Failed to Disclose a PICDRP Remedial Plan to Complainants

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 14, 2017, the Standing Panel in the .FEEDBACK PICDRP issued a determination identifying numerous registry agreement breaches. In turn, on March 16, 2017, the Compliance department issued a breach notification to the .FEEDBACK registry operator, which specifically prescribed “corrective and preventative action(s), including implementation dates and milestones, to ensure that [they will operate the TLD] in a transparent manner consistent with general principles of openness and nondiscrimination by establishing, publishing and adhering to clear registration policies.” On April 5, 2017, the Compliance department notified the .FEEDBACK PICDRP complainants that it considered the complaint “closed” because the “registry operator has resolved the finding of noncompliance” and “implemented a remediation plan which addresses the panel’s findings and includes establishing, publishing and adhering to clear registration policies.” Thereafter, the complainants in the .FEEDBACK PICDRP requested, and were denied by Compliance personnel, an opportunity to review a copy of any such remedial plan or learn why Compliance formally closed the PICDRP.

Compliance personnel did not provide any adequate explanation or rationale for the decision not to disclose the remedial plan provided by the .FEEDBACK registry operator. The PICDRP does not prohibit ICANN from disclosing any such remedial plan, or any other remedial measure taken by registry operators. Rather, the failure to disclose such information to the complainants runs contrary to international legal norms applied in alternative dispute resolution and civil proceedings throughout the world. Moreover, it stands in violation of Bylaws commitments toward transparency, neutrality 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.

This Complaint is submitted contemporaneously with a request pursuant to the Documentary Information Disclosure Policy.

III. Arguments and Analysis

A. Remedial Measures Are Supported, and Disclosed to Complainants, in Virtually Every Form of Dispute Resolution Around the World.

The availability of remedial measures to complainants and the disclosure of any remedial measures ordered, or agreed to, stand as undisputed and universal legal norms. Disclosure of remedial measures is designed to achieve multiple public interest goals: First, it ensures that each party to a dispute obtains a copy of all documents formally used in prosecuting or terminating the dispute. Second, it creates a rationally-assembled record of the resolution for each dispute for subsequent reference. Third, it instills fundamental notions of procedural transparency, as well as neutrality between the adjudicators and the parties in all dispute resolution processes. Fourth, and most importantly, disclosure of remedial measures provides notice of any prohibited acts with sufficient detail and clarity to distinguish them from permitted acts.

For reference, we have assembled illustrative examples concerning remedial measure requirements in various forms of international dispute resolution procedures.

i. *International Court of Justice*

The International Court of Justice (ICJ), also referred to as The Hague, is the primary judicial branch of the United Nations. Its rules explicitly permit parties to request equitable measures, provided that the ICJ must give notice to both parties, and due to political implications, it must give notice to the United Nations Security Council. *See* ICJ, Rules of Court, [Article 74 et seq.](#) (1978).

ii. *United States Federal Court*

In the United States, remedial measures ordered by federal courts are disclosed to all parties, typically as either permanent injunctions or consent decrees.

For example, permanent injunctions must “state the reasons why [they are] issued, state [their] terms specifically, and describe in reasonable detail ... the act or acts restrained or required.” *See* Federal Rules of Civil Procedure, Rule 65(d) (Dec. 1, 2016). Importantly, both parties must be made aware of any injunction if they were not present when it was issued. *See id.* at Rule 65(a)(1) (concerning preliminary injunctions).

Consent decrees, or consent judgments, are remedial agreements between litigants that are embodied in orders entered as judgments of the court, meaning that the court retains the authority to supervise the agreed upon remedial measures. Consent decrees are frequently used for court supervision over adherence to antitrust laws, consumer protection laws, or other regulatory requirements. Consent judgments must be entered by the court and served upon both parties. *See id.* at Rule 58(b)(2)(B).

Importantly, these rules are designed to permit the parties to identify any areas of non-compliance and bring them to the court’s attention, in order to ensure the harms to the prevailing party are actually cured.

iii. *Alternative Dispute Resolution*

In any arbitration between two or more parties, arbiters’ powers are derived from the language and intent of the applicable arbitration agreement. When such agreements are drafted broadly, arbiters have the inherent authority to award all forms of legal and equitable relief. *See e.g. Mogge v. District 8, Int’l Ass’n of Machinists*, 454 F.2d 510 (7th Cir. 1971).

This is particularly true where the applicable arbitration agreement incorporates the American Arbitration Association (AAA) rules, which expressly grant the arbitrator broad authority to award legal and equitable relief. *See* Commercial Arbitration Rules and Mediation Procedures, [Rule 47\(a\)](#) (Oct. 1, 2013) (“The arbiter may grant any remedy or relief that the arbiter deems just and equitable and within the scope of the agreement of the parties....”)

The International Centre for Dispute Resolution (ICDR), the international arm of the AAA, explicitly permits its arbitrators to “make any interim, interlocutory, or partial awards, orders, and rulings,” including “injunctive relief and measures for the protection or conversation of property.” *See* ICDR, International Dispute Resolution Procedures, [Articles 24 and 29](#) (June 1, 2014). Importantly, both parties must be made aware of any such award. *See id.* at Article 30.

When a matter is resolved through an adversarial process, like a dispute resolution procedure, both parties must understand the specific measures imposed on the party found in violation and the specific acts required to remediate such violations.

B. The PICDRP Explicitly Permits Remedial Measures, Does Not Prohibit Disclosure of Remedial Measures to Complainants, and Should be Interpreted to Require Disclosure to Complainants or Publication of the Remedial Measures.

The PICDRP explicitly permits ICANN “in its sole discretion,” to determine “the appropriate remedial measure, if any, and continue the enforcement process.” *See* ICANN, PICDRP, [Section 4.6](#) (Dec. 19, 2013). The PICDRP does not address disclosure or publication of appropriate remedial measures, either ordered by ICANN or taken by the registry operator. Thus, nothing in the PICDRP would rationally serve to prohibit disclosure of such remedial measures upon complainants. There is no logical reason why the PICDRP should be read differently than ICANN’s other dispute resolution procedures, or interpreted to prohibit ICANN from disclosing to the complainants, or more broadly publishing, the specific remedial measures in each case. On the contrary, it should be read to require such disclosure or publication of the remedial measures, for the reasons outlined in this Complaint.

C. Failure To Disclose or Publish Remedial Measures Violates ICANN Bylaws Commitments Toward Transparency, Neutrality, 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 ...” including decision making by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.” *See* ICANN Bylaws, Commitments and Core Values, [Sections \(a\) and \(a\)\(iv\)](#) (July 22, 2017). These commitments apply equally to Compliance personnel charged with overseeing PICDRP proceedings.

Failure to disclose applicable remedial measures required of PICDRP respondents who are found to have violated their PICs offends fundamental notions of transparency. In particular, complainants in the .FEEDBACK PICDRP were denied any ability to see the putative remedial plan implemented by the registry operator. This remedial plan may have contained admissions, introduced new and actionable evidence, or made false statements concerning operation of the .FEEDBACK registry operator, or other information vital to the appropriate resolution of the matter. More importantly, it almost certainly failed to address the various Public Interest Commitment violations identified by the .FEEDBACK PICDRP panel, given that complainants continued to witness ongoing fraudulent behavior by TLS and were forced to bring this new information to ICANN’s attention in subsequent writings and in person meetings.

Failure to disclose the .FEEDBACK registry operator’s remedial plan to complainants, offends fundamental notions of neutrality. This lack of information continues to prejudice the complainants, and it has prevented the complainants from assessing whether the remedial steps taken adequately address the various Public Interest Commitment violations identified by the

.FEEDBACK PICDRP panel. It has also unduly benefitted the .FEEDBACK registry operator, who seemingly shoulders no accountability to live up to the PICDRP panel's determination. Interested parties, including online consumers, the complainants, and relevant national consumer protection authorities, have been deprived any ability to assess the impact or effectiveness of any putative remedial measures taken by the .FEEDBACK registry operator.

Failure to disclose the .FEEDBACK registry operator's remedial plan also stands in violation of international law and international conventions. As established above, remedial measures must be set out with particularity, and all parties to a dispute are necessarily entitled to receive notice for any remedial measures awarded. Moreover, dispute resolution bodies regularly retain jurisdiction over such remedial measures, in order to ensure compliance by relevant parties. The decision made by Compliance personnel against disclosure or publication of the Respondent registry operator's remedial plan, stands in unmitigated violation of these universal legal norms.

Finally, if this practice is perpetuated by the Compliance department, it threatens to dissuade, disadvantage and prejudice all future PICDRP complainants, and 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. Instruct the Compliance department specifically to disclose the "remedial plan" submitted by the .FEEDBACK registry operator between March 16, 2017 and April 5, 2017;
2. Instruct the Compliance department to disclose all communications (including emails) with the .FEEDBACK registry operator as part of the PICDRP; and
3. 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, but not limited to, requirements around disclosing or publishing remedial measures when PICDRP panels identify any PIC violations. Alternatively, ICANN should simply confirm that it will follow such basic procedures moving forward, and that it will publish written guidance to this effect.

Others in the ICANN community who may wish to use the PICDRP may be affected by certain of the proposed request for relief. However, the proposed request for relief will have only a limited effect on the .FEEDBACK registry operator, whose "remedial plan" would be disclosed to the complainants, solely for the purposes of assessing compliance with the PICDRP panel determination and the Compliance breach notice.

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Respectfully submitted,

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