

## **ICANN Failed to Disclose Assigned Panelists**

### **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 February 1-17, 2017, the complainants in the .FEEDBACK PICDRP requested, and were denied by Compliance personnel, any opportunity to review the PICDRP panel composition for conflicts of interest purposes.

Compliance personnel did not provide any adequate explanation or rationale for the decision not to disclose the composition of the .FEEDBACK PICDRP panel. The PICDRP does not prohibit ICANN from disclosing the composition of any panel convened to any party. Rather, the failure to disclose the composition of the panel runs contrary to international legal norms applied in alternative dispute resolution settings and civil proceedings throughout the world. Moreover, it stands in violation of Bylaws commitments toward transparency and conformity with international law. This failure ultimately undermines the trust the parties have in the fairness and neutrality of the PICDRP process itself.

### **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. The Identities of Adjudicators are Disclosed in Advance to all Parties in Virtually Every Form of Dispute Resolution Around the World.**

The identities of adjudicators are disclosed in advance to all parties as an undisputed and universal legal norm. Such adjudicator disclosure requirements are designed to achieve multiple public interest goals: First, they ensure that all parties to a dispute are afforded reasonable notice and time to assess the independence and impartiality of proposed arbitrators or adjudicators. Second, and most importantly, they instill fundamental notions of procedural transparency, as well as neutrality and impartiality between the adjudicators and the parties in all dispute resolution processed. This ensures that the process itself is fair and trustworthy.

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

##### *i. Permanent Court of Arbitration*

The Permanent Court of Arbitration (PCA) is an intergovernmental organization that resolves disputes between nations or international organizations and parties to international agreements. All parties attempting to resolve disputes through the PCA have the ability to select their own arbitrators, and arbitrators must in turn disclose any “circumstances that may give rise to justifiable doubts as to their impartiality or independence.” *See e.g.* PCA Optional Rules for Arbitrating Disputes Between Two States, [Articles 6-9](#) (Oct. 20, 1992); PCA Optional Rules for Arbitrating Disputes Between International Organizations and Private Parties, [Articles 6-9](#) (July 1, 1996).

##### *ii. United States Federal Court*

In the United States, adjudicator appointment at the federal level is dictated by the local rules for each court. For example, in the United States District Court for the District of Columbia, judges

are appointed at the time a civil complaint is filed, when the clerk stamps on the complaint the number of the case and the name of the judge whom it is assigned. *See* Rules of the United States District Court for the District of Columbia, [Civil Rule LCvR 40.3\(a\)](#) (Nov. 2017). Thus, the process immediately identifies the adjudicator and the parties would be notified of such.

iii. *Alternative Dispute Resolution*

The International Centre for Dispute Resolution (ICDR) explicitly allows parties to select a mediator, and only in the absence of agreement is the ICDR is empowered to invite a mediator to serve. In addition, mediators are required to “decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator’s impartiality.” *See* ICDR International Dispute Resolution Procedures, [Articles 4-5](#) (July 1, 2014).

Similarly, the International Chamber of Commerce (ICC) explicitly mandates confirmation of the arbitrators, and also permits parties to challenge appointments “whether for an alleged lack of impartiality or independence, or otherwise ... within thirty days from receipt by [a] party of the notification of the appointment or confirmation of the arbitrator.” *See* ICC Rules of Arbitration, [Articles 13-14](#) (March 1, 2017).

iv. *ICANN New gTLD Objection Procedures*

The ICANN Post-Delegation Dispute Resolution Procedure (PDDRP) explicitly requires that all expert panel members “must be independent of the parties to the post-delegation challenge,” and instructs each dispute resolution provider to “follow its adopted procedures for requiring such independence, including procedures for challenging and replacing a panelist for lack of independence.” *See* PDDRP, [Article 13, Section 13.4](#) (June 4, 2012).

Similarly, the new gTLD Legal Rights Objection (LRO) explicitly permits each party to “challenge the appointment of a panelist if circumstances exist which give rise to justifiable doubt as to the Expert’s impartiality or independence.” *See* World Intellectual Property LRO Rules of Procedure, [Article 9\(c\)](#) (June 20, 2011).

B. The PICDRP Does Not Prohibit ICANN From Disclosing Panelists to Complainants in Advance, and Should be Interpreted to Require Such Advance Disclosure of the Panelists to All Parties.

The PICDRP is silent on whether ICANN must identify for either party the panelists it has selected. The PICDRP only requires that “ICANN shall notify both registry operator and reporter of its decision ... to seek the input of the standing panel ...” *See* PICDRP, [Section 3.4](#) (Dec. 19, 2013). Without any reference to reasonable notice to each party, the PICDRP merely mandates that, “all members of the panel shall be required to disclose to ICANN any facts or circumstances that are known to the panel member and could reasonably be seen as raising a question about the panel member’s impartiality or independence,” and where any such disclosures are made, “ICANN will provide [them] to the reporter and the registry operator.”

*See id.* At Section 4.1. Thus, nothing in the PICDRP would rationally prohibit ICANN from disclosing to the parties the identities of the panelists it selected for the purposes of independent impartiality and independence assessments. Moreover, while all eight PICDRP panelists are named on the [ICANN webpage dedicated to the PICDRP](#), it is unrealistic and impractical to expect parties to assess in advance impartiality and independence as to all eight potential panelists.

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 providing advance disclosure of the specific composition of the panel in a particular case. On the contrary, it should be read to require such advance disclosure, for the reasons outlined in this Complaint.

C. Failure To Disclose Assigned Panelists Violates ICANN Bylaws Commitments Toward Transparency 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). These commitments apply equally to Compliance personnel charged with overseeing PICDRP proceedings.

Failure to disclose assigned panelists in advance offends fundamental notions of fairness, transparency, and neutrality. In particular, complainants in the .FEEDBACK PICDRP were denied any ability to preemptively assess and challenge panelist appointment on the basis of independence or impartiality. For example, typical questions that would be raised in connection with the appointment of a mediator, arbitrator, or other similar adjudicator would include: Do any of the panelists serve as outside counsel to registry operators? Do any of the panelists represent entities that acquiesced to the fraudulent practices alleged in the PICDRP complaint? Have any of the panelists been accused of past misconduct? Do any of the panelists have any financial interest in the outcome of the case? Are there any other reasons to question whether any of the panelists have any conflicts of interest, or otherwise could undermine their impartiality? ICANN did not disclose the identities of the panelists, and they were not revealed until the panel determination issued, so the complainants never received any meaningful opportunity to assess those or other independence and impartiality questions. This decision unnecessarily prejudiced the complainants' ability to prosecute the dispute and protect their interests.

Failure to disclose assigned panelists to all parties stands in violation of international law and international conventions. As established above, parties are ordinarily afforded the ability to select and identify panelists at the outset, with dispute resolution service provider intervention only necessary in the absence of any mutual agreement between the parties. The decision made by Compliance personnel against advance disclosure of the panelists stands in unmitigated violation of the universal legal norms discussed above.



Finally, if this practice is perpetuated by the Compliance department, it threatens to impair any independent ability to assess independence or impartiality problems within the PICDRP, as well as undermine the value of the PICDRP as a viable and trusted method of dispute resolution.

#### **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 to provide a detailed explanation and rationale for its decision not to provide advance notice of the identities of the selected panelists in the .FEEDBACK PICDRP or provide the identities of the panelists to the parties upon request;
2. Provide any information from the PICDRP Panelists about impartiality and independence, including any facts or circumstances disclosed by Panelists, or any certification from the Panelists that they do not have any conflicts of interest; 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 providing advance notice of the identities of selected panelists. Alternatively, ICANN should simply confirm that in all future PICDRP proceedings they will disclose the identity of all panelists upon appointment, in advance of any evaluation or determination, so that parties may perform assessments on independence and impartiality, including potential conflicts of interest.

Others in the ICANN community who may wish to use the PICDRP may be affected by certain of the proposed request for relief. However, disclosure of ICANN's detailed explanation and rationale for its decision not to provide advance notice of the identities of the selected panelists in the .FEEDBACK PICDRP or provide the identities of the panelists to the parties upon request, will not affect any other parties.

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Respectfully submitted,

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