

ICANN Failed to Provide Any PICDRP Response 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 February 1-8, 2017, the complainants in the .FEEDBACK PICDRP requested, and were denied by Compliance personnel, any opportunity to review a copy of the substantive written Response provided by the .FEEDBACK registry operator.

Compliance personnel did not provide any adequate explanation or rationale for the decision not to disclose the Response filed by the .FEEDBACK registry operator. The PICDRP does not prohibit ICANN from serving responses upon complainants. Rather, the failure to serve such materials on all parties 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, 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. Pleadings Are Shared With All Parties as a Matter of Course in Virtually Every Form of Dispute Resolution Around the World.

Sharing all substantive pleadings with all parties in the context of dispute resolution stands as an undisputed and universal legal norm and a cornerstone of due process. Service on all parties is designed to achieve multiple public interest goals: First, it meets the fundamental fairness goal of ensuring that each party to a dispute obtains a copy of all documents formally used in prosecuting or defending the dispute, and on which the adjudicator will make a decision. Second, they create a rationally-assembled record of each dispute for subsequent reference. Third, and most importantly, they instill fundamental notions of procedural transparency, as well as impartiality between the adjudicators and the parties in all dispute resolution processes. Service on all parties also establishes general trust in the dispute resolution process itself.

For reference, we have assembled a number of illustrative examples concerning service requirements in various forms of international dispute resolution procedures.

i. The International Court of Justice

The International Court of Justice, also referred to as The Hague, is the primary judicial branch of the United Nations. In its multilateral treaty on civil procedure, it mandates that prescribed service may only be refused where “if [a member State] deems that compliance would infringe its sovereignty or security.” *See* Hague Civil Procedure Convention, [Article 4](#) (1954).

ii. United States Federal Court

In the United States, unless explicitly excused by a federal court, every party who has entered an appearance must be served with a copy of all pleadings, *including answers*, and nearly all other court papers. *See* Federal Rules of Civil Procedure, Rule 5(a) (Dec. 1, 2016) (emphasis added).

In fact, under US law (and similarly in other jurisdictions), as a general principle, unserved pleadings and other papers lack any legal force or effect until service is accomplished. *See e.g. Thorne v. Steubenville Police Officer*, 463 F. Supp. 2d 760, 770 (S.D. Ohio 2006) (exhibits that have not been served may not be relied upon); *International Controls Corp. v. Vesco*, 556 F.2d 665, 669 (2d Cir. 1977), cert denied, 434 U.S. 1014 (1978) (amended complaint remains inchoate until served).

iii. *Alternative Dispute Resolution*

The International Centre for Dispute Resolution (ICDR) explicitly requires that all responses be served on complainants. Specifically, [Article 3, Section \(1\) the ICDR International Dispute Resolution Procedures](#) mandates that “Respondent shall submit to Claimant, to any other parties, and to the Administrator a written Answer to the Notice of Arbitration.” Similarly, the International Chamber of Commerce (ICC) explicitly requires that all responses be served on complainants. Specifically, [Article 5, Sections \(1\), \(3\) and \(4\) of the ICC Rules of Arbitration](#) mandate that “the Respondent shall submit an Answer ... to the Secretariat” who “shall communicate the Answer and the documents annexed thereto to all other parties.”

iv. *ICANN New gTLD Objection Procedures*

ICANN’s Post-Delegation Dispute Resolution Procedure (PDDRP) explicitly requires that all responses be served on complainants. Specifically, [Article 10, Sections \(1\) and \(3\) of the PDDRP](#) mandate that “The registry operator must file a Response to each Complaint” and “The Provider must serve it upon the Complainant in electronic form with a hard-copy notice that it has been served.” Similarly, the new gTLD Legal Rights Objection (LRO) explicitly requires that all responses be served on complainants. Specifically, the [World Intellectual Property Organization \(WIPO\) LRO Model Response](#) prescribed that, “Upon filing, a copy of this Response must be provided to the Objector(s) and ICANN.” Again, there is no logical reason why ICANN would follow common due process procedures for some of its dispute resolution procedures but not for others.

B. The PICDRP Does Not Prohibit ICANN From Serving Responses Upon Complainants, or Instruct ICANN to Withhold Such Pleadings.

The PICDRP does not define the term “Response.” Rather, [Section 3.2 of the PICDRP](#) merely mandates that, “ICANN will request that the Registry Operator provide an explanation of why [they believe], notwithstanding the allegations contained in the PIC report, it is in compliance with its PIC and the basis for that belief.” Without any reference to service upon the complainant, the same section concludes that, “The Registry Operator will then have ten business days to respond to ICANN’s request for explanation.” Thus, nothing in the language of the PICDRP explains disparate treatment of the parties or would rationally serve to prohibit service of responses upon complainants by either ICANN or the registry operator.

C. Failure To Serve Responses Upon Complainants 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 serve PICDRP papers on all parties offends fundamental notions of fairness and transparency. In particular, complainants in the .FEEDBACK PICDRP were denied any ability to see the factual or legal responses proffered to ICANN by the Respondent registry operator. These responses may have admitted culpability to certain allegations, introduced new evidence to the proceeding, or made allegations against complainants absent any ability for complainants to reply, among other potentially relevant information.

Failure to serve any response in a PICDRP also offends fundamental notions of neutrality and impartiality, and calls into question the integrity of the entire process. This lack of information significantly disadvantaged the complainants (and continues to disadvantage them), and prejudiced their ability to adequately prosecute the dispute and protect their interests. It also unduly benefitted the Respondent registry operator, who was free to make unsubstantiated factual and legal claims absent any opportunity for rebuttal by the complainants.

For all the reasons stated above, ICANN’s failure to serve PICDRP papers on all parties stands in violation of international law and international conventions, and fundamental notions of fairness, due process, and transparency.

Finally, if this practice is perpetuated by the Compliance department, it threatens to disadvantage and prejudice all future PICDRP complainants, and undermine the value of the PICDRP as a viable 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 to disclose the formal written Response submitted by the .FEEDBACK registry operator on December 15, 2016;
2. Instruct the Compliance department to disclose all communications (including emails) with the .FEEDBACK registry operator as part of the PICDRP;
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 sharing all material pleadings with all parties to the proceeding. 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, disclosure of specific documents from the .FEEDBACK PICDRP proceeding to the complainants will not affect any other parties.

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Respectfully submitted,

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