

ICANN Exerted Undue Influence Regarding the Scope of the Panel Review

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”).

As the complainants only discovered from reading the .FEEDBACK PICDRP Panel determination dated March 14, 2017, Compliance and the Office of the General Counsel had issued guidance to the PICDRP panel, without any prior notice to the parties, opining that fraudulent conduct falls outside the scope of the public interest commitments found in the new gTLD Registry Agreement.

That guidance improperly foreclosed otherwise independent analysis and conclusions from the PICDRP panel, particularly with respect to fraudulent and deceptive conduct perpetrated by the .FEEDBACK registry, either directly as a registrant, or in concert with third party registrants. ICANN’s ex parte intervention in the ongoing dispute resolution process runs contrary to principles of judicial independence and ICANN’s general practice within new gTLD objection and dispute processes under which panels are afforded discretion to independently determine the appropriate scope of their review. 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. Panel Discretion Encompasses the Ability to Make Determinations as to Scope Where More Specific Guidance is Lacking Within The PICDRP Itself.

The PICDRP does not envision any ability of the Panel to seek this kind of procedural guidance from ICANN. In its PICDRP report, the PICDRP Panel noted the “preliminary issue” of “determination of scope of review.” *See* PICDRP Panel Report, at 6. More specifically, the report states as follows in connection with this issue:

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 Panel’s 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. In this instance, Section (3)(a) and (3)(c) of Specification 11.

See PICDRP Panel Report, at 6-7.

We believe it must be within the Panel’s discretion to make determinations as to scope where more specific guidance is lacking within the PICDRP itself – at least in the initial instance, subject to review by the parties and/or ICANN.

The relevant scope of the PICDRP is limited by the following language: “Consistent with the Registry Agreement, the Registry Operator will comply with Specification 11 The PIC report and response, if any, by the Registry Operator will be the basis for the Standing Panel’s compliance evaluation. Absent exceptional circumstances, additional evidence will not be considered and there will be no hearing.” *See* ICANN, PICDRP §§ A, B.4.1.

B. Panel Discretion and Authority Also Encompasses the Ability to Make Independent Determinations on Actionable Violations of PICs.

Improper influence exerted by ICANN had a significant and material impact on the Panel evaluation and overall outcome of the proceeding. Without any notice to either party, the Panel was in communication with ICANN Compliance and the ICANN legal department, which directed the Panel to disregard allegations and evidence concerning fraudulent and deceptive conduct perpetrated by the registry operator, or parties acting in concert with the registry operator.

By opining on scope in this manner, ICANN unfairly influenced the Panel's independent interpretation of the PIC language in the RA, and the overall independent evaluation of the PICDRP complaint. This undue influence clearly had a significant and material impact on the Panel's evaluation, attendant findings and conclusions, and the overall outcome of the proceeding. As a result of ICANN's intervention, the PICDRP Panel essentially ignored a number of key allegations and substantial evidence within the PICDRP complaint, particularly those allegations relating to fraudulent and deceptive conduct perpetrated directly by TLS, or by parties acting in concert with TLS at TLS's direction. This action effectively pre-ordained the outcome, and ensured that no future PICDRP could ever be used to protect the public from registry fraud, however egregious and well proven.

It is clearly within the PICDRP Panel's authority to review and make its own determinations as to whether the allegations in the PICDRP Complaint state actionable violations of the PICs. ICANN's guidance on scope effectively circumvented this independent analysis by the Panel, completely subverting the purpose of having an independent review mechanism for alleged PIC violations. Ironically, although the purpose of the PICs and PICDRP is to ostensibly protect the public from consumer harms, ICANN disallowed the Panel from even evaluating whether the registry's own fraudulent conduct violated its Public Interest Commitments.

C. All Other ICANN New Gtld Dispute Resolution Panels Are Empowered to Exercise Such Discretion and Authority.

All other ICANN new gTLD dispute resolution panels are empowered to exercise independent discretion and authority in determining the scope of their evaluation under the applicable procedure. For example:

1. Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) panelists review the criteria enumerated in PDDRP Section 9.2.
2. String Confusion Objection (SCO) panelists review the criteria enumerated in New gTLD Applicant Guidebook (AGB) Module 3 Sections 3.2 and 3.5.1. In connection with SCO proceedings, ICANN refused to provide procedural or substantive guidance to panelists regarding key issues such as confusion involving singular and plural strings or conflicting results among certain overlapping contention sets. *See, e.g., Charleston Road Registry Inc. v. Foggy Beach, LLC*, ICDR Case No. 50 504 000243 13 (Sept. 19, 2013) (determination regarding string confusion involving

- singular/plural variant .GAME and .GAMES applications); .CARS SCO Proceedings (*Charleston Road Registry Inc. v. Koko Castle, LLC*, ICDR Case No. 50 504 00233 13 (Aug. 7, 2013); *Charleston Road Registry Inc. v. Uniregistry, Corp.*, ICDR Case No. 50 504 T 00238 13 (Oct. 10, 2013); *Charleston Road Registry Inc. v. DERCards, LLC*, ICDR Case No. 50 504 T 234 13 (Aug. 27, 2013)) (inconsistent determinations as to string confusion between singular/plural variant .CAR and .CARS TLDs); .CAM SCO Proceedings (*Verisign, Inc. v. dot Agency Limited*, ICDR Case No. 50 504 T 00226 13 (Aug. 13, 2013); *Verisign, Inc. v. United TLD Holdco. Ltd.*, ICDR Case No. 50 504 T 00229 13 (Aug. 12, 2013); *Verisign, Inc. v. AC Webconnecting Holding B.V.*, ICDR Case No. 50 504 T 00224 13 (Aug. 13, 2013)) (inconsistent determinations as to string confusion between .CAM and .COM TLDs).
3. Legal Rights Object (LRO) panelists review the criteria enumerated in AGB Module 3 Sections 3.2 and 3.5.2. In connection with LRO proceedings, ICANN refused to provide procedural guidance to panelists and dispute resolution service providers regarding exceptions for failures to meet filing deadlines. *See, e.g., Axis Communications AB/ Axis AB v. Saudi Telecom Company*, WIPO Case No. LRO2013-0051 (Sept. 20, 2013) (terminating LRO proceeding for failure to meet filing deadlines); *Merck KGaA v. Merck Registry Holdings, Inc.*, WIPO Case No. LRO2013-0009 (Sept. 24, 2013) (panel *sua sponte* made procedural determinations regarding extending filing deadlines and accepting filings beyond various filing deadlines).

As demonstrated above, in the context of new gTLD objection mechanisms, each independent panel assigned to process such objections prepared its own evaluation as to the appropriate scope of its review. We were not able to identify any instances in any of these proceedings where a particular panel sought ad hoc guidance from ICANN as to the scope of review. There is no reason why the PICDRP Panelists should not have been free to make the same independent findings on scope as panelists in other ICANN dispute resolution processes. The same independent process should have taken place in the context of this PICDRP, and should take place in any future PICDRP proceedings.

Thus, in the absence of specific provisions to the contrary, and especially because this was a matter of first impression, ICANN should have instructed the PICDRP Panel to perform its own analysis and reach its own conclusions regarding the proper scope of its review. Such independent analysis could have been performed by the Panel, based on the language in the PICDRP itself, background materials relating to the development of the PICDRP, other ICANN dispute resolution procedures or documents, the complaint and response from the parties, any additional submissions from the parties, and additional arguments elicited from the parties by the Panel on the particular issue of scope. By opining directly on the issue of scope, ICANN unduly influenced and interfered in the PICDRP, and undermined the effectiveness of the PICDRP as a possible viable remedy in future cases.

- D. ICANN's Undue Influence on the Scope of Review Under the PICDRP 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). These commitments apply equally to Compliance personnel charged with overseeing PICDRP proceedings.

Relevant principles of international law and applicable local law include the right to due process, which includes requirements to “minimize substantively unfair or mistaken deprivations” by enabling persons to contest the basis upon which [an entity] proposes to deprive them of protected interests.” 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 due process of law includes, generally, a right to notice of, and an opportunity to respond to, procedural matters in the context of any legal proceeding. See, e.g., *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Further, the right to an impartial and neutral tribunal is another 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) (“The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.”).

However, ICANN did not act in accordance with these principles when it provided ex parte substantive advice regarding the proper scope of the PICDRP Panel’s review of the .FEEDBACK PICDRP complaint. Such action by ICANN unduly influenced and interfered with the independence and impartiality of the Panel. ICANN also failed to disclose the Panel’s request for guidance, and ICANN’s response, prior to the publication of the Panel’s determination and corresponding ICANN breach notice, in contravention of principles of accountability and transparency in the PICDRP process. These failures deprived the complainants of their due process rights to notice and an opportunity to respond this improper procedural guidance, as well as their right to a fair and impartial panel evaluation.

Finally, if this practice is perpetuated by Compliance, it threatens to impair any independent ability of future PICDRP panels to assess the proper scope of review, thereby undermining 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 further *de novo* hearing by the PICDRP Panel, or an alternative or *en banc* panel (to avoid bias), on the issue of scope of the PICDRP, and on the substantive issues originally deemed out of scope, without any intervention by ICANN;
2. Disclose details regarding the PICDRP Panel's request for ICANN Compliance or the Office of General Counsel's guidance concerning PICDRP scope, including a copy of the Panel's request itself;
3. Provide the PICDRP Panel's rationale for seeking clarification on scope from ICANN;
4. Disclose ICANN's exact response to the PICDRP Panel's request for guidance concerning scope;
5. Provide an explanation and rationale for ICANN's decision to provide such guidance on scope, and an analysis supporting ICANN's response and guidance both procedurally and substantively;
6. Provide this Complaint to the ICANN Board's Organizational Effectiveness Committee for independent review and remedial action; and
7. 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, criteria for determining the proper scope of the PICDRP, and an explicit prohibition against ICANN's Office of General Counsel from participating in an ongoing PICDRP process.

Future participants in PICDRP proceedings will be affected by certain of the proposed request for 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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