

General Information	
PIC Report ID	VNE-286-30027
PIC Reporter	Brian J. Winterfeldt
Registry Operator	Top Level Spectrum, Inc.
Date of PIC Report	24 October 2016
Date PIC Report sent to Registry Operator	8 November 2016
Date of PIC Conference	6 December 2016
Date of Referral to Standing Panel	6 February 2017
Date of Standing Panel Report	14 March 2017

Standing Panel Member Information			
Panelist	Name	Signature	Registry Compliant? (Y/N)
Presiding	Scott R. Austin	s:/Scott R. Austin/	N
2	Christopher To	s:/Christopher To/	N
3	David JA Cairns	s:/David JA Cairns/	N

PIC Report Details	
Top-level domain (TLD)	feedback
Domain name (if applicable)	Not applicable
Registry Operator contact information	Jay Westerdal, CEO Top Level Spectrum, Inc. 1845 West Mercer Way Mercer Island, WA 98040 United States +1 206 866 5090 jay@topspectrum.com
Specify the Specification 11 section number(s) and PIC(s) from the Registry Operator's Registry Agreement in which the Registry Operator is allegedly not complying:	
Section (3)(c)	
Specify the stated grounds of alleged non-compliance with each PIC:	
The registry operator has failed to operate the .FEEDBACK Registry in a transparent manner consistent with general principals of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.	
Specify the provided explanation of the harm caused to the Reporter by the alleged non-compliance with each PIC:	

The harm caused by the alleged non-compliance with PIC Section (3)(c) of Specification 11 to the Complainant group of brand owners constituting the Reporter is as follows:

1. The Registry Operator failed to adhere to transparent registration policies causing lost opportunity costs and confusion to the Complainant group of brand owners.
2. The Registry Operator denied the Complainant group of brand owners the ability to plan the best registration strategy for the .FEEDBACK gTLD or to organize defensive registrations, thereby potentially exposing their brands to fraudulent or deceptive practices.
3. The FREE.FEEDBACK website generated communications to trademark owners regarding domain names for which they had not applied, with insufficient information or explanation, causing substantial costs and confusion to trademark owners.

Chronology of Events

Date	Event
*	See Exhibit A

Detailed Decision

Detailed findings and conclusions, including whether the Registry Operator is in compliance with the relevant PIC provision(s):

See attached Exhibit A.

Exhibit A

to

Public Interest Commitment (PIC)
Standing Panel Evaluation Report

**CHRONOLOGY OF EVENTS AND
DETAILED DECISION**

Adobe Systems Incorporated et al. v. Top Level Spectrum, Inc., d/b/a
Fegistry, LLC et al.

PIC Report ID: VNE-286-30027

PARTIES

Complainants and PIC Reporters are **Adobe Systems Incorporated, American Apparel and Footwear Association, Best Buy Co., Inc., Darden Corporation, Facebook, Inc., Kate Spade, LLC, Levi Strauss & Co., Little Caesar Enterprises, Inc., MarkMonitor Inc., Panera, LLC, Tailored Brands, Inc., United States Telecom Association, and Verizon Communications Inc.** (“Complainants”) represented by **Brian J. Winterfeldt and Sarah B. Deutsch of Mayer Brown LLP**, District of Columbia, USA;

Respondent Registry Operator is **Top Level Spectrum, Inc., d/b/a Fegistry, LLC et al.** (“Respondent”)

TOP-LEVEL DOMAIN (gTLD)

The gTLD at issue is **.FEEDBACK**

PANEL

The undersigned each respectively certifies that he has acted independently and impartially and to the best of his knowledge has no known conflict in serving as a Panelist in this proceeding.

Scott R. Austin, Esq., as Presiding Panelist
Christopher To, Esq., as Co-Panelist
David JA Cairns, Esq., as Co-Panelist

PROCEDURAL HISTORY and CHRONOLOGY OF EVENTS

Around June 13, 2012, Respondent submitted its application to become the exclusive registry operator of the **.FEEDBACK** gTLD. The “New gTLD Application Submitted to ICANN” (“the Application”) was published in the Internet Corporation for Assigned Names and Numbers’ (“ICANN”) website.

On December 19, 2013 ICANN and the Respondent executed the Registry Agreement, designating the Respondent as the Registry Operator for the **.FEEDBACK** gTLD.

On April 14, 2015, the Respondent published the Registration and Launch Policies (“the Registration and Launch Policies, version 1”) containing the details and specifications in relation to, inter alia, the Registration Policies, Acceptable Use Policy, Sunrise Policy, Quiet Period, Early Access Program and General Availability Period, that apply to all the .FEEDBACK registrations.

On October 15, 2015, the Respondent published its TLD Startup Information and Registration Launch Policies (“RLP”) on the ICANN startup registration website. This Policies specified that the Registry would operate an End Date Sunrise period from October 20, 2015 until January 6, 2016; a Trademark Claims period from January 18, 2015 until April 17, 2016; and an Early Access Period, from January 6, 2016 until January 18, 2016.

On December 10, 2015, the Registration and Launch Policies, version 1 were replaced by the revised Registration and Launch Policies (“the Registration and Launch Policies, version 2”).

On December 29, 2015, the Respondent published the FREE.FEEDBACK domains Registration Agreement.

On October 24, 2016, Complainants filed an “initial report” through the ICANN PIC Form online portal, pursuant to ICANN’s Public Interest Commitment Dispute Resolution Procedure (“PICDRP”).

On October 25, 2016, ICANN’s Compliance Department confirmed receipt of the Initial Report and, recognizing the strict word limitations of the PIC Form online portal, requested that Complainants submit any additional information or documentation that support the Initial Report by November 1, 2016.

On October 27, 2016, Complainants submitted supplementary information including a comprehensive forty-one (41) page Complaint and thirty-six (36) supporting exhibits totaling 1,785 pages.

On November 2, 2016, ICANN formally confirmed receipt of supplementary information and indicated it would review the submission and follow up upon the completion of its preliminary review.

On November 8, 2016, ICANN informed Complainants that it had completed its preliminary review of the Complaint concerning the .FEEDBACK gTLD and indicated it had entered the Complaint and supplementary information into ICANN’s database and that the Complaint and supplementary information had been forwarded to Respondent.

Pursuant to Sections 2.2 to 2.4 of the PICDRP, the respondent may request to confer with complainants. The complainants must participate in the requested

conference or risk closure of the PICDRP complaint. The respondent must conduct the conference within thirty (30) days from the date on which ICANN forwarded the complaint together with the supplementary information. If the issues raised in the complaint are not resolved during the thirty (30) day conference period, the complainants are required to inform ICANN.

On November 8, 2016, Respondent proposed to hold a face-to-face meeting in Seattle, Washington, where Respondent is located, on November 15, November 18, or November 21, 2016.

On November 18, 2016, Complainants' counsel Mr. Winterfeldt indicated that an in-person meeting in Seattle, Washington was not feasible and instead proposed holding the requested conference by telephone on either December 6, 2016 or December 7, 2016.

On November 18, 2016, Respondent responded by email agreeing to the proposed conference by telephone on December 6, 2016.

On December 6, 2016, the PIC telephone conference was held between Complainants and their counsel and Respondent from approximately 2 p.m. to 3 p.m. Eastern time.

On December 15, 2016, Complainants submitted their Conference Report of the December 6, 2016 PIC telephone conference with a transcript and audio recording attached as exhibits, which reported that the issues raised by Complainants in their PIC Report "were not resolved during the conference."

On February 6, 2017, ICANN appointed Scott R. Austin, Esq., as Chair, and Christopher To, Esq. and David JA Cairns, Esq., as Co-Panelists and the matter was referred by ICANN to the PICDRP Standing Panel for evaluation.

On February 27, 2017, ICANN extended the date for the Standing Panel to deliver its Standing Panel Evaluation Report to March 14, 2017.

ICANN and the PICDRP Standing Panel have proper jurisdiction pursuant to the PICDRP and Specification 11 of the .FEEDBACK Registry Agreement. See *Compl. Ex. 6*, ICANN, PICDRP Part B § 1.3 (Dec. 19, 2013); *id.* § 3.3; *id.* § 3.4; *see also Compl. Ex. 5*, ICANN, .FEEDBACK Registry Agreement, Specification 11.

RELIEF SOUGHT

Complainants request that the Respondent Registry Operator be found not in compliance with each Public Interest Commitment (PIC) in Specification 11 Sections (3)(a) and (3)(c), and Complainants be awarded costs and fees together with other relief beyond the scope of this proceeding.

PARTIES' CONTENTIONS

A. Complainants make the following contentions:

1. Complainants comprise 13 brand owners widely recognized as leading U.S. based global providers of products and services, namely, Adobe Systems Incorporated, American Apparel and Footwear Association, Best Buy Co., Inc., Darden Corporation, Facebook, Inc., Kate Spade, LLC, Levi Strauss & Co., Little Caesar Enterprises, Inc., MarkMonitor Inc., Panera, LLC, Tailored Brands, Inc., United States Telecom Association, and Verizon Communications Inc.
2. Complainants, either directly or through their affiliates or wholly-owned subsidiaries, own numerous registrations for their well-known respective trademarks and service marks, including, inter alia, the ADOBE, BEST BUY, OLIVE GARDEN, YARD HOUSE, FACEBOOK, INSTAGRAM, WHATSAPP, KATE SPADE, LEVIS, LITTLE CAESARS, MARKMONITOR, PANERA, PANERA BREAD, MEN'S WEARHOUSE, and VERIZON marks, in the United States, and around the world. Complainants own numerous domain names and operate well-known websites associated with their trademarks, which consumers depend upon for genuine products and services, information and customer support.
3. Complainants' constituent members represent portfolios of brands comprised of marks that are inherently distinctive, strong, famous, and deserving of a broad scope of protection.
4. Respondent has engaged in numerous ongoing violations of its PICs, promises set forth in its new gTLD application, and its own policies, terms and conditions.
5. Respondent repeatedly changed its own policies and marketing programs in a confusing, unclear, nontransparent manner, and with discriminatory intent.
6. Respondent self-allocated, or reserved for allocation to third parties acting in concert with Respondent, 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.
7. Respondent 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.
8. Respondent mandated that all .FEEDBACK domains point to a live website where people can "give actual feedback," even though Respondent has 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.

9. Respondent 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 Respondent's headquarters.
10. Respondent changed its policies yet again to launch a marketing program called FREE.FEEDBACK, which resulted in Respondent misusing brand owners' .COM WHOIS information and deceptively soliciting them to validate and renew. FEEDBACK domain names they never sought to register. The FREE.FEEDBACK program resulted in brand owners being targeted by phishing schemes using the scraped .COM registration data used in the deceptive FEEDBACK registration.
11. Complainants brought the Complaint for the narrow and important purpose of addressing Respondent's deceptive and misleading practices, which violate the commitments it made to operate .FEEDBACK as a trusted space for genuine commentary, whether positive or negative.
12. Respondent's fraudulent activities harm Complainants, all other targeted businesses, and consumers who seek real and trustworthy feedback about companies or are looking for customer support.
13. Respondent's deceptive practices are exactly the kind of registry misconduct the PICs were designed to prevent.
14. Respondent violated, and failed to abide, in its own right, by the PIC provisions prohibiting "fraudulent or deceptive practices" and other "activity contrary to applicable law" in the .FEEDBACK registry in violation of its PIC set forth in Specification 11 (3)(a) of Respondent's Registry Agreement with ICANN.
15. Respondent committed to, but failed to operate .FEEDBACK in "a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies" in violation of its PIC set forth in Specification 11 (3)(c). of Respondent's Registry Agreement with ICANN.
16. Respondent Top Level Spectrum, Inc., applied for exclusive rights to operate the .FEEDBACK TLD on or about June 13, 2012, and executed its registry operator agreement with ICANN on December 19, 2013.

B. Respondent makes the following contentions:

1. Respondent denies any breach of the PIC commitments.
2. Respondent contends that there has been no discrimination as "we have treated all registrars and registrants with the same set of rules", and "all names that are not reserved are available on a first come first serve basis"
3. Respondent states that the Complainants had never previously complained in relation to the alleged breaches and that it is abusing the ICANN PICDRP to circumnavigate the Registry.

4. Respondent claims that the Complainants fail to show how the Registry's policies are discriminatory, and that there is nothing fraudulent or deceptive in its policies or operations.
5. Respondent states that all the policy changes have been announced and given 90 days notice before becoming effective. It asserts it has published all the policies and sent them via email to all the Registrars at the same time.
6. Respondent denies that it self-allocated, or reserved for allocation to third parties, domain names corresponding to brands. It asserts that Top Level Spectrum has a reserved list of domains and that it was accidentally published on the zonefile during the Sunrise period, but that those domains were removed when the mistake was noticed.
7. Respondent vehemently denies Complainants' allegations that the Registry Operator hired professionals to write fabricated reviews.
8. Respondent states the Complainants have no basis to make allegations against the FREE.FEEDBACK domain name. It states that the FREE.FEEDBACK website "simply asks for the user's information to try a 1 year free domain registration". The Respondent asserts that it takes "reasonable precautions" in relation to the information provided to them by the registrars.
9. Respondent denies the Complainants' allegation in relation to the failure to disclose adequately the terms and conditions of its offers, including cancellation dates for the trials and other charges.

DISCUSSION

The PICDRP instructs this Standing Panel that " the Standing Panel, as set forth in Section 4 as appropriate, will determine whether the response by Registry Operator satisfies its contractual compliance obligations to ICANN." And "The PIC report and response, if any, by the Registry Operator will be the basis for the Standing Panel's compliance evaluation.

As noted above the PIC Report provides the Complaint with Exhibits, which relies upon 2 PICs upon which it alleges noncompliance by the Respondent Registry Operator with its contractual obligations to ICANN, namely, PIC (3)(a) and PIC (3)(c) of Specification 11.

Preliminary Issue 1: Determination of Scope of Review

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 alleged 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 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.

The Panel notes that Specification 11 of the Registry Agreement with the Respondent (Complaint Exhibit 5) includes no specific PICs made by Respondent at the time of the .FEEDBACK gTLD application. These would have been included in paragraph 2 of Specification 11, which in the .FEEDBACK Registry Agreement is blank, except to note that the "Registry Operator has not included commitments, statements of intent or business plans provided for in its application to ICANN for the [.FEEDBACK] TLD". The panel is left to review, therefore, solely the Registry Operator's compliance with the generic provisions of section (3) (a) and (3) (c) raised in the Complaint, since Specification 11 Section 1, Sections (3)(b) and 3(d) were not raised in the Complaint and are not within the scope of this evaluation.

In addition, in as much as the acts complained of may not fall within the scope of these limited sections of the PICDRP, the Panel notes that among the background on the PICDRP and its history of development submitted with the Complaint, it is recognized that ICANN's PICDRP is just one option and not the only option available to brand owners seeking to recover for alleged harmful acts of the Registry Operator raised in the Complaint. As pointed out by ICANN Chair Dr. Stephen Crocker in 2016:

"The Public Interest Commitments Dispute Resolution Procedure ("PICDRP") provides a potential alternative or parallel mechanism for a harmed party to pursue remedies but it does not preclude or limit ICANN from enforcing the PICS through its normal contractual compliance process and timetable. It should also be noted that nothing in the PICDRP limits harmed parties, regulatory authorities or law enforcement from pursuing other available remedies against the party causing harm (whether the registry operator, registrar or registrant), including, for example, pursuing remedies through administrative, regulatory, or judicial bodies to seek fines, damages, injunctive relief or other remedies available at law." Complaint Exhibit 4, Letter from Dr. Stephen D. Crocker, Chair, ICANN Board of Directors, to Greg Shatan President, Intellectual Property Constituency dated June 30, 2016, at page 3.

Preliminary Issue 2: Extension of Time.

In order for the Panel to better serve the interests of both parties the Panel requested additional time from ICANN in order to consider the significant amount of materials provided by the parties for the Panel to review, which totaled nearly 1800 pages. Given the need for the Panel to communicate and coordinate over three time zones and the extensive materials to review for this Evaluation, the

panel requested and received from ICANN an additional 15 days for its decision.

Registrar Registration Agreement Requirements: PIC (3)(a) of Specification 11.

(3)(a). Registry Operator will include a provision in its Registry-Registrar Agreement that requires Registrars to include in their Registration Agreements a provision prohibiting Registered Name Holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

In their Complaint, Complainants contend that they have been harmed by many alleged fraudulent practices and misrepresentations by Respondent. Complainants contend that they brought the Complaint for the narrow and important purpose of addressing Respondent's deceptive and misleading practices, which violate the commitments it made to operate .FEEDBACK as a trusted space for genuine commentary, whether positive or negative. Complainants contend that Respondent violated, and failed to abide, in its own right, by the PIC provisions prohibiting "fraudulent or deceptive practices" and other "activity contrary to applicable law" in the .FEEDBACK registry in violation of its PIC set forth in Specification 11 (3)(a) of Respondent's Registry Agreement with ICANN.

The Panel first notes that PIC (3)(a) of Specification 11 only obligates Respondent Registry Operator to include certain provisions in the Registry-Registrar Agreement. Specifically, it requires the Registry Operator to ensure that its registrars include in their registration agreements with registrants a provision prohibiting registered domain holders from engaging in certain conduct, including a prohibition against fraudulent and deceptive practices.

Second, the Panel notes that PIC (3)(a) of Specification 11 imposes no obligation on Respondent as the Registry Operator itself to avoid fraudulent and deceptive practices.

Third, the Panel finds that Respondent's Registry Operator Agreement contains no covenant by the Respondent to not engage in fraudulent and deceptive practices.

Next, after careful review of the substantial materials submitted by Complainants, the Panel finds that the Complainants PIC Reporters' allegations in the Complaint relate to the conduct of the Registry Operator and do not provide allegations or evidence relating to the terms of the contractual chain between the

Registry Operator, Registrar and registrant of domain names for the .FEEDBACK gTLD.

Based on the foregoing, the Panel concludes that while the alleged conduct complained of relating to PIC (3)(a) in the Complaint may be actionable in another forum, the evidence submitted is not sufficient to persuade the Panel that there is non-compliance by the Registry Operator with PIC (3)(a).

Registry Operator Transparency and Nondiscrimination Registration Policy Requirements: PIC (3)(c) of Specification 11

(3)(c) Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.

Complainants contend that Respondent committed to, but failed to operate .FEEDBACK in “a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies” in violation of its PIC set forth in Specification 11 (3)(c) of Respondent’s Registry Agreement with ICANN. Complainants trademark owners raised a broad range of facts and arguments to support the violations alleged in the Complaint. The Panel has considered all the supposed violations, and the reasoning and evidence provided in support. Many allegations do not fall within the plain wording of PIC (3)(c) which imposes an obligation of transparency in relation to registration policies only, and these will not be further considered. The only matters where the Panel finds a violation of PIC 3(c) has been established are the following:

First, announcements of policy changes were made in the news media instead of through the Respondent’s website and without adherence to the 90-day notice requirement established by the Registration and Launch Policies themselves. Specifically, the Respondent announced during the Sunrise period: (i) the allocation of 5,000 domains matching top brands and (ii) the registration of domain names matching one of the world’s largest media brands for a “promotional” purpose, creating a state of confusion among trademark owners.

Second, the Respondent also failed to adhere to the notice requirement for a change in policy when it introduced, during the Sunrise period, the “Early Access, Free Speech Partner Program”.

Third, there was a lack of transparency in relation to applicable fees. The Respondent’s policies as published oblige registrants to pay certain fees (for instance, clause 4 of the FEEDBACK SAAS Platform offering, clause 6.3 of the Sunrise Policy; clause 8.2 of the Early Access Program; clause 4 of the Registration and Launch Policies, version 2, of December 10, 2015, providing for a “Live Site” obligation to which the registrants may opt out by paying a fee), but

without transparency in the clauses themselves, or in any other additional available documentation provided in evidence, as to the amount or calculation of these fees or their payment method.

Fourth, there has been a lack of transparency in relation to the policy applicable to the FREE.FEEDBACK website for the following reasons: (i) the Respondent has not adhered to its policy requirement of verifying the email address of registrants and suspending the domain if registration fails (clause 5(x) of the FREE.FEEDBACK policy); (ii) the incorporation of the Whois data of a trademark owner directly into a new registration generated communications to trademark owners that were not transparent for the trademark owners, lacking sufficient explanation or information or the policy itself, to enable trademark owners to understand why domains had been registered in their names; (iii) the policy is not clear and transparent in relation to the steps necessary for the cancellation of an unwanted registration.

Finally, self-allocating or reserving domains that correspond to the trademark owners' marks during the Sunrise period constitutes a failure by the Respondent to adhere to Clause 6 of its Registration and Launch policies, versions 1 and 2. According to the policies, Sunrise period is exclusively reserved for trademark owners and nothing is said in the policies in relation to self-allocation, and was contrary to the object of the Sunrise period itself.

DECISION

The Respondent Registry Operator **IS** compliant with PIC Section (3)(a) of Specification 11 of its Registry Operator Agreement with ICANN

The Respondent Registry Operator **IS NOT** compliant with PIC Section (3)(c) of Specification 11 of its Registry Operator Agreement with ICANN

Scott R. Austin, Esq., Presiding Panelist
Christopher To, Esq., as Co-Panelist
David JA Cairns, Esq., as Co-Panelist
Dated: March 14, 2017