

Comments of the .FEEDBACK PICDRP Complainants on the Competition, Consumer Choice, and Consumer Trust (CCT) Review Draft Report

We appreciate the opportunity to submit comments on behalf of the coalition of global companies and trade associations who recently filed the Public Interest Commitment Dispute Resolution Procedure (PICDRP) complaint against Top Level Spectrum, Inc. (TLS), the registry operator of the .FEEDBACK new gTLD.¹ The coalition members include famous global companies and trade associations spanning many industry sectors, all of whom had hoped that the PICDRP process would have required ICANN to take action to protect consumers from ongoing fraud and abuse in .FEEDBACK. Given the coalition's experiences with the PICDRP, we believe it is in a unique position to provide valuable insight on the Competition, Consumer Choice, and Consumer Trust (CCT) Review Draft Report (the "Draft Report").² The Draft Report specifically discusses the Public Interest Commitments (PICs) in the new gTLD Registry Agreement and the PICDRP as these mechanisms relate to new gTLD "safeguards" which were specifically designed to protect the public interest.

Executive Summary

Our coalition's experience with the PICDRP process reveals numerous significant shortcomings in the PICs themselves, and the PICDRP as an enforcement mechanism. We are deeply troubled by ICANN's interpretation of the PICs and PICDRP and its apparent lack of commitment to adequately implement new gTLD safeguards and act in the public interest. The PICs are essentially meaningless if the contracted parties can simply insert contractual language in their agreements prohibiting registrants from engaging in fraud, abuse and illegal behavior, yet are able to evade any repercussions when these same contracted parties engage in fraudulent and deceptive behavior themselves. We believe such an overly narrow interpretation sends the wrong message to certain contracted parties who may view ICANN's failure to act as tacit permission to replicate TLS's deceptive and fraudulent business model. We therefore recommend significant enhancements to the PICs and PICDRP.

Based on the coalition's largely unsatisfactory experience attempting to protect the public interest, at a minimum, there unfortunately needs to be new, clear requirements that explicitly prohibit the contracted parties themselves from engaging in fraud, deceptive practices, or other malicious or abusive conduct. In addition, we strongly support policies that reinforce the notion that the scope of the PICDRP be sufficiently broad to prevent, remedy and deter registry fraud and abuse. The scope must enable ICANN Compliance and the PICDRP Panelists to address registry fraud and deceptive practices in order to give real meaning to the "Public Interest Commitments." Anything less would fall far short of the expectations of governments, consumer protection agencies, law enforcement, non-contracted stakeholders and contracted parties who choose to adopt pro-consumer practices. These stakeholders had the natural

¹ The coalition members include: 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 See ICANN, Competition, Consumer Trust and Consumer Choice Review Team Draft Report of Recommendations for New gTLDs (Mar. 7, 2017), available at <https://www.icann.org/public-comments/cct-rt-draft-report-2017-03-07-en> [hereinafter "Draft Report"].

expectation that the PICs and the PICDRP would serve their intended purpose of protecting the public from registry harm and preserving the broader public interest in ensuring a secure and stable domain name system.

We also highlight a number of serious transparency issues the complainants experienced throughout the PICDRP process. First, ICANN shared the coalition's complaint and exhibits with TLS, yet refused to share TLS's response with the complainants. ICANN also failed to provide advance notice to the complainants regarding the convening and composition of the PICDRP Standing Panel. Further, ICANN did not share with our coalition any details regarding the expected timing of the Panel's evaluation and decision. Finally, it is extremely troubling that, to date, ICANN has failed to provide any details to the complainants regarding the apparent "remediation plan" implemented by TLS or any information regarding the specific steps TLS has supposedly taken to address the numerous PIC violations identified in the PICDRP Standing Panel decision and corresponding ICANN breach notice. These numerous transparency failures only highlight a shocking lack of due process and underscore the need for reform to the process itself in addition to the substance of the PICs and PICDRP scope discussed above.

As the .FEEDBACK example illustrates, there is a clear need for changes to the Registry Agreement and the PICDRP, as well as ICANN's implementation and enforcement thereof. We wholeheartedly agree with prior comments from the GAC raising concerns that the PICDRP is "complex, lengthy, and ambiguous, raising questions as to its effectiveness in addressing serious threats."³ Absent any changes, the PICs and PICDRP are essentially meaningless, and do not serve their intended purpose of ensuring new gTLDs are operated in the public interest, in accordance with applicable international and local law.

Our full comments on the CCT Review Draft Report, focusing on the PIC and PICDRP issues relevant to our coalition, are provided below.

Background

The Draft Report Discussion on PICs and the PICDRP

The Draft Report discusses the following general observations about the PICs and the PICDRP, which were all designed ostensibly to protect the public from fraud and abuse occurring in new gTLDs:

- The Public Interest Commitments (PICs) incorporated into all registry agreements were particularly challenging to assess because the specific language of each registry's voluntary commitments varied greatly. The Draft Report states that it remains unclear how effective enforcement has been.⁴
- Besides voluntary PICs, there are mandatory PICs for all new gTLDs as a part of the Registry Agreement. All new gTLD registry operators will use only ICANN-accredited

³ See ICANN, GAC Singapore Communiqué (Feb. 11, 2015), available at https://gacweb.icann.org/download/attachments/37617834/GAC_SINGAPORE52_COMMUNIQUE_FINAL2.pdf?version=1&modificationDate=1424223541000&api=v2.

⁴ See Draft Report, at 7.

registrars and include GAC safeguards (i.e. the PICs contained in Specification 11 of the base new gTLD Registry Agreement).⁵

- The Base Registry Agreement required new gTLD registry operators to include provisions in their Registry-Registrar agreements that prohibited registrants 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.” By its terms, this safeguard is aimed at mitigating abusive activity. This provision was incorporated into the mandatory public interest commitments (PICs) section of the Registry agreement. Notably, the plain language of the safeguard does not obligate the registry operator to monitor and enforce this provision beyond requiring the inclusion of the provision in the downstream Registrar-Registrant agreement. ICANN has concluded that 99% of new gTLD registry operators had complied with the obligation to include this language in their Registry-Registrar agreements by the end of 2014.⁶
- One consumer safeguard mechanism unique to the new gTLD program was the incorporation of mandatory and voluntary Public Interest Commitments (PICs). PICs were specifically included in the registry applications and, ultimately, registry agreements. The advent of these binding and enforceable contractual obligations stemmed from GAC concerns about how commitments contained in new gTLD applications would be enforced by ICANN. Consequently, the GAC advised that all commitments and objectives set forth in new gTLD applications (or amendments thereto) should be “transformed into binding contract obligation subject to compliance oversight by ICANN.” In its Toronto Communiqué, the GAC also signaled that it had a variety of public policy concerns about the new gTLD applications, including issues involving: consumer protection, strings related to regulated market sectors such as financial, health and charities, intellectual property issues, and the relationship between new gTLDs and applicable legislation.⁷
- Mandatory and voluntary PICs are enforced by both ICANN Compliance via its usual complaint procedures and via the Public Interest Commitment Dispute Resolution Process (PICDRP) established on December 19, 2013. The GAC has expressed concerns that the PICDRP is “complex, lengthy, and ambiguous, raising questions as to its effectiveness in addressing serious threats.” To date, no complaints have been submitted alleging breach of a voluntary PIC. The first use of the PICDRP complaint process is currently underway.⁸

Despite recognizing concerns with the PICs and the PICDRP, the Draft Report proposes no specific recommendations on how to improve either of these mechanisms. We understand that although third parties filed many prior complaints with ICANN alleging violations of the PICs, our coalition’s complaint represented the first time ICANN accepted a PICDRP complaint and sent it on to a Standing Panel for a determination. The coalition’s experiences using the PICDRP process against .FEEDBACK provide an important case study for ICANN in order to

⁵ See *id.* at 61.

⁶ See *id.* at 79.

⁷ See *id.* at 89.

⁸ See *id.* at 94.

understand the flaws in the PICs and the PICDRP and what is needed to improve these mechanisms to protect consumer trust and the public interest. We share some brief background on the FEEDBACK complaint below.

The .FEEDBACK PICDRP

From the moment TLS launched the .FEEDBACK gTLD, it (and parties acting in concert with it), unleashed an escalating series of deceptive marketing practices that violate its PICs, and the promises it made to ICANN when it originally applied for the exclusive right to run .FEEDBACK. TLS's deceptive conduct violates the policies, terms and conditions that it imposes on others, and violates consumer protection laws. As a result, in October 2016, our coalition filed a PICDRP Complaint against TLS outlining numerous deceptive and misleading practices harming consumers and businesses. Some of the evidence we shared with ICANN showing PIC violations included the fact that TLS:

- Promised they would run .FEEDBACK as a place for genuine commentary, whether positive or negative, when, in fact, TLS hired paid reviewers to write and post fabricated reviews on .FEEDBACK. TLS also cut and pasted real users' comments on various companies without authorization, posted years earlier from Yelp. TLS never disclosed that such reviews are not from actual customers, nor its role in soliciting and hiring paid reviewers. It was telling that the vast majority of such reviews (62%) come from users located in the Seattle, Washington area, near TLS's headquarters.
- Launched a marketing program called FREE.FEEDBACK, deceptively targeting brand owners to validate and renew .FEEDBACK domain names they never sought to register in the first place. The FREE.FEEDBACK program scraped existing Whois data from existing .COM registrations associated with various brands, and resulted in brand owners being targeted by phishing schemes.
- Grabbed numerous domain names in .FEEDBACK for itself or its affiliates corresponding to well known brands in violation of ICANN rules.
- Charged exorbitant and discriminatory pricing for brand owners of several thousand dollars while offering the identical domain names to others for "dirt cheap", and implemented a \$5,000 "trademark claims" fee to discourage brand owners from attempting to recover domain names matching their marks that TLS allocated to third parties.⁹

After our PICDRP Complaint was filed, we discovered additional fraudulent activity in the .FEEDBACK TLD, which we shared with ICANN and requested they investigate and share with the PICDRP Panel. For example, we found a fraudulent customer service phone number posted on the unauthorized FACEBOOK.FEEDBACK, WHATSAPP.FEEDBACK, and INSTAGRAM.FEEDBACK websites, all of which appeared to be used in connection with various consumer scams. We also shared with ICANN information about many .FEEDBACK websites containing false or inaccurate contact information about the targeted company. We

⁹ See .FEEDBACK PICDRP Complaint (Oct. 24, 2016), available at <https://www.markmonitor.com/download/blog/FEEDBACK%20-%20PICDRP%20Complaint%20-%20Long%20Form.pdf>. We strongly encourage you to review the full Complaint.

noted that many of the comments posted on .FEEDBACK websites that were scraped from earlier reviews copied from third-party services such as Yelp use different photographs of the user than the ones original posted on the third-party website.¹⁰

Based on our allegations and supporting evidence, ICANN agreed to convene a PICDRP Standing Panel and on March 16, 2017, ICANN published the Panel's determination finding that TLS had breached its PIC obligations. The determination resulted in ICANN issuing a Registry Agreement breach notice against TLS.¹¹ Unfortunately, the decision and ICANN's accompanying breach notice were insufficient for many reasons. The decision sidestepped any discussion of TLS's past and continuing fraudulent conduct, which has now been taking place for well over a year. The decision is notably silent on the past and continuing harms to consumers and companies and, instead, limits itself to a narrow and technical reading and interpretations of the PICs.

As discussed in the decision, given the broad array of violations alleged and the lack of any prior PICDRP determinations to draw on, the Panel sought clarification and received confirmation from ICANN regarding the scope of its review. Based on ICANN's instructions, the Panel limited its scope of review 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."¹² We strongly believe that the Panel should have made its own independent determination regarding its scope based on the terms of the PICDRP itself and the allegations in the Complaint, and that ICANN interfered in the independent review of the PICDRP Complaint when it opined on scope.

Nonetheless, proceeding from its limited scope of review as defined by ICANN, the Panel reached the absurd conclusion that although Specification 11 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" that "Specification 11 imposes no obligation on Respondent as the Registry Operator itself to avoid fraudulent and deceptive practices."¹³ The Panel therefore found that TLS's fraudulent and deceptive conduct did not violate Specification 11, or the Registry Agreement more broadly. The panel therefore failed to act on these serious allegations, noting that despite all the evidence shared with ICANN, the resources the Complainants put into the complaint and supporting evidence, and over a year of continuing and ongoing fraudulent activity by TLS, the burden was shifted back to the Complainants to pursue remedies outside of ICANN to stop the fraud and abuse.¹⁴

¹⁰ We raised these additional issues to ICANN in a letter dated February 2, 2017.

¹¹ See ICANN, Notice of Breach of Registry Agreement (Mar. 16, 2017), available at https://www.icann.org/uploads/compliance_notice/attachment/911/serad-to-westerdal-16mar17.pdf.

¹² See *id.* at 16.

¹³ See *id.* at 17.

¹⁴ See *id.* at 17-18 ("[T]he 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).").

Based on a clearly insufficiently narrow mandate, the Standing Panel was left with reviewing TLS's PIC violations of various registry policies, and despite its narrow mandate, the Standing Panel still found that TLS violated PIC Section 3(c), when it:

- Announced changes to its policies in the news media instead of through the 90-day notice requirement;
- Failed to adhere to the notice requirement when it announced its “Free Speech Partner Program” during the Sunrise Period;
- Lacked transparency in relation to its various fees (despite this determination, the Panel was silent in its ruling on the discriminatory pricing and deceptive marketing practices associated with these fees);
- Lacked transparency around the FREE.FEEDBACK website (despite this determination, the Panel failed to address the many past and current harms to brand owners from this scheme, which remains a live and active website today); and
- Self-allocated or reserved domain names that correspond to trademarks during the Sunrise Period.¹⁵

In its corresponding breach notice, ICANN gave TLS until April 15, 2017 to cure the breaches and avoid a possible Registry Agreement termination process. It is clear that any truly effective remediation plan should have (1) fully prevented these breaches from occurring in the future, and (2) contained specific measures that address and remedy the past harms to the complainants caused by the registry's deceptive practices. At least on paper, the PICDRP determination states that if “the Standing Panel finds that the Registry Operator is not in compliance with its PICs, ICANN shall notify the Registry Operator via an enforcement notice and the Registry Operator shall have 30 days to resolve the noncompliance and notify ICANN of the *remedial measures* taken.”¹⁶

Despite the PICDRP findings and the breach notice, it appears that ICANN considered the violations technical in nature and ones that could easily be cured. On April 5, 2017, ICANN notified the coalition that it had received a remediation plan from TLS, that it found TLS to have cured the breaches, and that ICANN was therefore closing the PICDRP complaint. ICANN has never disclosed to Complainants any details regarding TLS's purported remediation plan, nor shared any steps TLS may have taken to address the PIC violations and breach notice. Based on our observations, it appears that .FEEDBACK is, unfortunately, operating exactly as it had before we filed the PICDRP complaint.

We also note that the PICDRP Standing Panel members themselves appeared unsatisfied with the process and recognized there are unanswered concerns regarding whether the PICs were truly fit for their intended purpose of protecting the public from harm. In correspondence to the New gTLD Subsequent Procedures Policy Development Process Working Group, in connection with

¹⁵ See *id.* at 18-19.

¹⁶ See ICANN, PICDRP § 4.5 (Dec. 19, 2013), available at <http://newgtlds.icann.org/en/applicants/agb/picdrp-19dec13-en.pdf> (emphasis added).

“Work Track 3” pertaining to “String Contention, Objections & Disputes”, Standing Panel member David JA Cairns observed:

Unless there are specific commitments tailored for each registry agreement, or the general commitments in paragraph 3 are elaborated to include a broader range of objectionable behavior (such as deceptive marketing and abuse of trademark rights as alleged in our case), then there will be frustration that the PICDRP procedure is ineffective or simply not “fit for purpose.” In short, the PICDRP purports to be a dispute resolution mechanism available to defend the public interest but really only addresses a very limited range of public interest concerns.

Another member of the Standing Panel, Scott Austin, suggested:

It may be in the best interest of the PICDRP process and ICANN’s effective and consistent implementation of same to open a dialogue with the full list of PICDRP panelists to identify best practices or policy element clarifications to meet the goals of the process from ICANN’s perspective, and discuss whether expansion of the scope of Section 3a. to cover Registries or developing incentives for gTLD applicants to submit self-imposed PICS anticipated by Paragraph 2 of Specification 11 should be a matter of policy change and decision focus going forward.

Comments

At the very least, our coalition’s experience with attempting to ensure ICANN registry PICs using the PICDRP process reveals numerous significant shortcomings in the PICs themselves, and the PICDRP as an enforcement mechanism. We are deeply troubled by ICANN’s interpretation of the PICs and PICDRP and its apparent lack of commitment to adequately implementing new gTLD safeguards and acting in the public interest.

The PICs are essentially meaningless if the contracted parties can simply insert contractual language in their agreements prohibiting registrants from engaging in fraud, abuse and illegal behavior, yet evading any repercussions when these same contracted parties engage in fraudulent and deceptive behavior themselves. We believe such an overly narrow interpretation sends the wrong message to certain contracted parties who may view ICANN’s failure to act as tacit permission to replicate TLS’s deceptive and fraudulent business model. We therefore recommend significant enhancements to the PICs and PICDRP. Based on the coalition’s largely unsatisfactory experience attempting to protect the public interest, at a minimum, there unfortunately needs to be new clear requirements that explicitly prohibit the contracted parties themselves from engaging in fraud, deceptive practices, or other malicious or abusive conduct.

In addition, we strongly support policies that reinforce the notion that the scope of the PICDRP be sufficiently broad to prevent, remedy and deter registry fraud and abuse. The scope must enable ICANN Compliance and the PICDRP Panelists to address registry fraud and deceptive practices in order to give real meaning to the “Public Interest Commitments.” Anything less would fall far short of the expectations of governments, consumer protection agencies, law enforcement, non-contracted stakeholders and contracted parties who choose to adopt pro-

consumer practices. These stakeholders had the natural expectation that the PICs and the PICDRP would serve their intended purpose of protecting the public from registry harm and preserving the broader public interest in ensuring a secure and stable domain name system.

We also feel compelled to comment on several concerning transparency issues the complainants experienced throughout the PICDRP process. First, ICANN shared the coalition's complaint and exhibits with TLS, yet refused to share TLS's response with the complainants. ICANN also failed to provide advance notice to the complainants regarding the convening and composition of the PICDRP Standing Panel. Further, ICANN did not share with our coalition any details regarding the expected timing of the Panel's evaluation and decision. Finally, it was extremely troubling that, to date, ICANN has failed to provide the complainants any details regarding the apparent "remediation plan" implemented by TLS or any information about the specific steps TLS has supposedly taken to address the numerous PIC violations identified in the PICDRP Standing Panel decision and corresponding ICANN breach notice. These numerous transparency failures only highlight a shocking lack of due process and underscore the need for reform to the process itself in addition to the substance of the PICs and PICDRP scope discussed above.

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We appreciate your consideration of these comments and look forward to working with the ICANN community to ensure that all necessary steps will be taken to address these important concerns about protecting the public interest and consumer trust.

Respectfully submitted,

Brian J. Winterfeldt

Co-Head of Global Brand Management and Internet Practice

Mayer Brown LLP

bwinterfeldt@mayerbrown.com

1999 K Street, NW

Washington, DC 20006-1101

202.263.3284 direct dial

202.830.0330 fax

¹⁷ See ICANN, GAC Singapore Communiqué (Feb. 11, 2015), available at https://gacweb.icann.org/download/attachments/37617834/GAC_SINGAPORE52_COMMUNIQUE_FINAL2.pdf?version=1&modificationDate=1424223541000&api=v2.

Sarah B. Deutsch
Counsel
Mayer Brown LLP
sdeutsch@mayerbrown.com
1999 K Street, NW
Washington, DC 20006-1101
202.263.3765 phone
202.830.0390 fax

Counsel for the Coalition