



# Comments on ICANN’s Revised Public Interest Commitments Dispute Resolution Procedure (PICDRP)

Status: FINAL

Version: 1

23-Oct-2013

**Business Constituency Submission**

**GNSO//CSG//BC**

## Background

This document is the response of the ICANN Business Constituency (BC) to ICANN's public comment period on the Revised Public Interest Commitments Dispute Resolution Procedure (PICDRP) Proposal.<sup>1</sup> The BC's comments arise from the perspective of business users, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

- promotes end-user confidence because it is a safe place to conduct business
- is competitive in the supply of registry and registrar and related services and
- is technically stable, secure and reliable.<sup>2</sup>

## Comments

The BC considers enforcement of Public Interest Commitments made in Specification 11 (PICs) essential to hold applicants accountable, and foster trust in the ICANN new TLD and governance process, trust in the Internet, and to provide for consumer protection in general. The BC appreciates that ICANN is putting in place an enforcement process to ensure Registry Operators are held to their PICs.

The BC has the following comments regarding this process.

First, we note that ICANN is not obligated to provide any remedial measures pursuant to section 4.6 if a Registry Operator is found not to be in compliance with its PICs. This is concerning given the importance to hold Registry Operators accountable.

Second, the BC believes that there needs to be a mechanism, if not pursuant to the PIC DRP, for an individual or entity to report noncompliance with PICs or other obligations under the Registry Agreement/Registrar Accreditation Agreement without the need to prove harm. ICANN's contractual compliance department should then follow up on credible reports of contractual noncompliance. Proof of actual harm is not going to avert prospective harm that might occur to Internet users. As the IPC noted in its public comments to original PICDRP, *"it is extremely difficult to reverse actions already taken, for example in connection with issuance of domain name registrations."*

Third, in the interest of transparency, the BC recommends that the PICDRP process and correspondence be made public at the time of any final Determination if not sooner.

Fourth, we recommend that ICANN use uniform terms. In some instances the Revised PICDRP uses the term 'PIC Report' and in others it uses the term 'ticket'. We believe "PIC Report" would be the appropriate language for a PICDRP, while "ticket" perhaps could be kept for internal case management.

The BC also has specific comments relating to the following provisions:

Regarding section 2.4:

*"If the parties are able to resolve the issues raised by Reporter in the PIC report during the 30-day conference period, the Registry Operator shall inform ICANN and shall provide ICANN with appropriate evidence that the matter has been resolved..."*

The BC proposes that ICANN confirm that the matter has been resolved with the Reporter before the closure of the PIC report in such cases.

Regarding Section 2.5:

*“If the parties have not resolved the issue(s) raised by Reporter in the PIC report during the 30-day conference period, the PIC report will go back to ICANN for further review. If the Registry Operator requested a conference pursuant to Section 2.2 above and the Reporter failed to participate in that requested conference, ICANN will request evidence of the lack of Reporter participation, and, if necessary, will issue a follow-up to the Reporter regarding its lack of participation in the conference. Registry Operator and/or Reporter must provide evidence of requested conference and lack of Reporter participation within five days of ICANN’s request. If the Reporter did not participate in the requested conference, ICANN will close the ticket and notify both the Reporter and the Registry Operator”.*

The BC proposes that ICANN also consider if there is any evidence indicating that the Registry Operator, after requesting a conference, failed to participate in it, which might be used as a practice to delay the outcome of the process.

Regarding Section 3.2, the BC proposes addition of language in bold type:

*“Within ten business days of the notification of Section 2.3 by Reporter or Registry Operator that the issues have not been resolved, ICANN will request that the Registry Operator provide an explanation of why the Registry Operator believes, notwithstanding the allegations contained in the PIC report, it is in compliance with its PIC and the basis for that belief. The Registry Operator will then have ten business days to respond to ICANN’s request for explanation **and Registry Operator will also provide a copy of this explanation to the Reporter at the same time it is provided to ICANN.**”*

This added language is to clarify that any request by ICANN for additional information and any response thereto also be provided to the Reporter.

Regarding Section 3.3, the BC proposes the additional language in bold type:

*“Based on the PIC report received by ICANN and Registry Operator’s response(s) to ICANN’s request for explanation, ICANN will determine whether a compliance investigation is appropriate in a particular case. At ICANN’s sole discretion, ICANN may elect to invoke the Standing Panel or undertake a compliance investigation with respect to one or more reports and, if so, ICANN will promptly notify Registry Operator **and Reporter. Both parties** [show strike out] must cooperate with ICANN’s investigation, including reasonably providing requested information within ten (10) business days of **any** ICANN requests.”*

Also, the BC would suggest ICANN provide some standards for when its contract compliance department will make a Determination and when it will refer the Determination to a Standing Panel.

Regarding Section 3.4

*“ICANN or 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. Registry Operator’s documented compliance with obligations under Part A above will be deemed to be compliant with Specification 11. To the extent the results of ICANN’s investigation demonstrate that the Registry Operator is not in compliance with Part A, ICANN may elect to proceed with enforcement of Registry Operator’s obligations pursuant to Section 4.3 of the Registry Agreement directly or to seek the input of a Standing Panel to inform ICANN’s continued handling of the matter. In either case, ICANN shall notify both Registry Operator and Reporter of its decision to seek an enforcement action pursuant to Section 4.3 of the Registry Agreement, to seek the input of the Standing Panel, or to take no further action. If ICANN decides the issues raised in the PIC report have been resolved, ICANN will notify the Registry Operator and the Reporter of its decision and close the ticket associated with the PIC report.”*

The BC urges ICANN to publish its explanation for any decisions arising under this section for purposes of transparency.

Regarding Section 4.1,

*“A panel of three people shall be appointed by ICANN (Standing Panel) at ICANN’s expense. The role of the Standing Panel will be to, upon request by ICANN, evaluate compliance by the Registry Operator with its obligations under Part A above. Prior to any evaluation, all members of the Panel shall be required to disclose to ICANN any facts or circumstances that are known to the Panel member and could reasonably be seen as raising a question about the Panel member’s impartiality or independence. ICANN will provide such disclosures to the Reporter and the Registry Operator. If ICANN determines, on its own or based on a request from one of the parties, that the Panel member’s disclosure might reasonably be viewed as undermining his or her impartiality, the Panel member shall be replaced. 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. Any information that was exchanged between the Registry Operator and the Reporter after the PIC report was filed may be considered at the request of and in the sole discretion of the Standing Panel.”*

The BC suggests that ICANN impose minimum requirements and standards of practice to be applied to the Standing Panel and any Panelists appointed by ICANN.

Regarding section 4.6,

*“If the Registry Operator does not resolve the non-compliance after receipt of ICANN’s notice specified in section 4.5 above, ICANN will determine, in its sole discretion, the appropriate remedial measure, if any, and proceed to enforcement. Should the Registry Operator object to the enforcement determination, it may in its discretion avail itself of the Dispute Resolution mechanisms in the Registry Agreement.”*

As noted at the beginning of the BC comments, the fact that ICANN has sole discretion to decide whether to enforce noncompliance by a Registry Operator of its PICs seems to undermine the entire purpose of having the PICs in the first place. The BC would like to know the precise basis under which ICANN might not enforce these contractual obligations. ICANN should have to provide publicly a very compelling basis for not enforcing a Determination of noncompliance.

Regarding Section 5.4,

*“ICANN may impose financial sanctions against any Registry Operator that is found to be a Repeat Offender. ICANN may bar future reporting from any Reporter that is found to be a Repeat Offender.”*

In the interest of due process, the BC suggests that ICANN provide an opportunity for any Repeat Offender to defend and justify its actions prior to any sanctions being taken.

The BC also agrees with the prior comments of the IPC, that the PICDRP is not the only means of enforcing PICs and that ICANN will also have the option to, (1) direct contract enforcement under the Registry Agreement and (2) informal consultation and discussion between the Registry and a party asserting that it has been harmed or will be harmed by an alleged violation of a PIC via Registry action or proposed action.

---

<sup>1</sup> Revised Public Interest Commitments Dispute Resolution Procedure (PICDRP) at <http://www.icann.org/en/news/public-comment/draft-picdrp-02oct13-en.htm>

<sup>2</sup> Business Constituency Charter, at <http://www.bizconst.org/charter.htm>.