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13 **ZA Central Registry, NPC**

14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

16 DOTCONNECTAFRICA TRUST, a
17 Mauritius Charitable Trust,
18 Plaintiff,
19 v.

20 INTERNET CORPORATION FOR
21 ASSIGNED NAMES AND
22 NUMBERS; a California corporation;
23 DOES 1 through 50, inclusive,
24 Defendants.

CASE NO. 2:16-cv-00862 RGK (JCx)
*Assigned for all purposes to the
Honorable R. Gary Klausner*

**ZA CENTRAL REGISTRY, NPC’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO INTERVENE
PURSUANT TO RULE 24**

**[Notice of Motion and Motion to
Intervene; Declaration of David W.
Kesselman; and [Proposed] Order
Filed Concurrently Herewith]**

Date: September 19, 2016
Time: 9:00 a.m.
Location: Courtroom 850

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Former named defendant and now third party ZA Central Registry, NPC
4 (“ZACR”), files this motion to intervene because it remains a required party to
5 plaintiff DotConnectAfrica Trust’s (“DCA”) claims for declaratory relief. ZACR
6 prevailed in the bidding for, and retains a property interest in, the gTLD .Africa.
7 DCA’s claims for declaratory relief (and the Court’s injunction in support thereof)
8 continue to impair ZACR’s contractual interest in .Africa. DCA’s Ninth Cause of
9 Action seeks a declaration from this Court that .Africa be delegated to DCA,
10 despite the existence of the Registry Agreement between Internet Corporation for
11 Assigned Names and Numbers (“ICANN”) and ZACR. And, DCA’s Tenth Cause
12 of Action against ICANN requests a judicial declaration that ZACR’s application
13 was deficient and that the Registry Agreement is null and void. As a party to a
14 contract that DCA seeks to void and rescind, ZACR is a required party. ZACR
15 now seeks to intervene in the action pursuant to Federal Rule of Civil Procedure
16 24 to adequately protect its interest in the Registry Agreement and its right to
17 operate the .Africa gTLD.

18 **II. STATEMENT OF FACTS¹**

19 ICANN is a California non-profit public benefits corporation that oversees
20 the Internet domain name system (“DNS”) throughout the world. Declaration of
21 Akram Atallah in Support of ICANN’s Opposition to Plaintiff’s Motion for
22 Preliminary Injunction (“Atallah Decl.”), ECF 36, ¶ 2; *Name.Space, Inc. v.*
23 *Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1127-28 (9th Cir.
24 2015). Among other things, ICANN is responsible for delegating generic top-
25 level domains (for example, “.com,” “.org,” “.edu”). *Id.* at ¶ 3.

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27
28 ¹ For purposes of convenience, and to avoid inundating the Court with duplicative filings, ZACR cites to the docket for general background facts.

1 ZACR is a South African non-profit company with its principal place of
2 business in Midrand, South Africa. Declaration of Mokgabudi Lucky Masilela in
3 Support of Defendant ZACR’s Motion to Reconsider and Vacate Preliminary
4 Injunction Ruling (“Masilela Decl.”), ECF 85-3, ¶ 2. ZACR is the largest domain
5 name registry on the African continent. *Id.* at ¶ 3.

6 DCA is a nonprofit organization established under the laws of the Republic
7 of Mauritius, with its principal place of business in Nairobi, Kenya. FAC ¶ 7.
8 DCA’s primary function was to compete for the .Africa gTLD. Declaration of
9 Sophia Bekele Eshete (“Bekele Decl.”), ECF 17.

10 ICANN formally launched a “New gTLD Program” in 2012. Declaration
11 of Christine Willett in Support of Defendant ICANN’s Opposition to Plaintiff’s
12 Motion for Preliminary Injunction (“Willett Decl.”), ECF 39, ¶ 2. In the
13 Applicant Guidebook (“Guidebook”), ICANN made clear that if a new gTLD
14 included the name of a geographic region, such as .Africa, an application would
15 need to provide documentation showing support from at least 60% of the
16 governments in the region. Bekele Decl., Ex. 3 (ECF 17-03) at 2-18. Further, the
17 criteria made clear that no more than one objection from a government or public
18 entity associated with the geographic area would be permitted. *Id.*

19 ZACR submitted an application for .Africa in 2012 with the full support of
20 all 54 African Union member states. Masilela Decl. (ECF 85-3) ¶¶ 4, 6;
21 Declaration of Moctar Yedaly in Support of ICANN’s Opposition to Plaintiff’s
22 Motion for Preliminary Injunction (“Yedaly Decl.”), ECF 40, ¶ 10. The AUC,
23 which serves as the Secretariat of the African Union, officially endorsed ZACR by
24 letter dated April 4, 2012. Supplemental Declaration of Mokgabudi Lucky
25 Masilela in Support of ZACR’s Motion to Reconsider and Vacate Preliminary
26 Injunction Ruling (“Supp. Masilela Decl.”), ECF 97-1, ¶ 7. The only nonmember
27 state, Morocco, provided its own separate letter of support for ZACR on March
28 28, 2012. Masilela Decl. Ex. B (ECF 85-4). The AUC reiterated its support of

1 ZACR throughout the application process. Masilela Decl., Exs. A and C (ECF
2 85-4); Yedaly Decl. Ex. D (ECF 40-4).

3 DCA, which also submitted an application for .Africa in 2012, did not have
4 the required support of the African governments. Bekele Decl. Ex. 7 (ECF 17-
5 07). Indeed, the record is undisputed that DCA never had the support of 60% of
6 the African countries at any time during the actual application process. Bekele
7 Decl. Ex. 7 (ECF 17-07); Yedaly Decl. Ex. D (ECF 40-4); Masilela Decl. Ex. C
8 (ECF 85-4). In support of its application, DCA purported to rely upon a 2009
9 letter from the AUC. Bekele Decl. Ex. 6 (ECF 17-06). However, the AUC
10 expressly withdrew this earlier “endorsement” of DCA by written letter in April
11 2010 – almost two years *before* ICANN even opened the new gTLD application
12 process in 2012. Bekele Decl. Ex. 7 (ECF 17-07).

13 Having successfully completed each of ICANN’s requirements to operate
14 the .Africa gTLD, ZACR and ICANN entered into a ten year Registry Agreement
15 on March 24, 2014. Masilela Decl. (ECF 85-3) ¶10.

16 DCA sought review of its failed application through ICANN’s independent
17 review process (“IRP”). Bekele Decl. Ex. 1 (ECF 17-01). ICANN’s Board
18 abided the recommendation of the IRP (the “Final Declaration”) and, in July 2015,
19 placed DCA’s application back to the precise point in the process where it had
20 been halted – the Geographic Names Panel. Willett Decl. (ECF 39) ¶ 10.

21 ICANN thereafter allowed an extended evaluation of DCA’s application but
22 ultimately rejected DCA’s application because DCA failed to submit the required
23 documentation demonstrating that it had at least 60% support of the countries in
24 the region. FAC ¶¶ 60-61; Willett Decl. (ECF 39) ¶ 13, Bekele Decl. Ex. 16 (ECF
25 17-16). Accordingly, on February 17, 2016, ICANN notified DCA that its
26 application would not proceed. Willett Decl. (ECF 39) ¶13; Bekele Decl. Ex. 18
27 (ECF 17-18). Thereafter, on March 3, 2016, ICANN’s Board voted to proceed
28

1 with the delegation of .Africa to ZACR, which had properly completed all stages
2 of processing. Willett Decl. (ECF 39) ¶14.

3 **III. PROCEDURAL HISTORY**

4 DCA filed its initial Complaint in the Los Angeles Superior Court on
5 January 20, 2016. ECF 1. In that initial Complaint, DCA only named ICANN as
6 a defendant. After the Superior Court denied DCA's request for a temporary
7 restraining order precluding ICANN from delegating .Africa, ICANN removed
8 the initial Complaint to the federal district court on February 8, 2016. *Id.* On
9 February 26, 2016, DCA filed a First Amended Complaint adding ZACR as a co-
10 defendant with ICANN and asserting claims against ZACR for fraud and
11 conspiracy to commit fraud (FAC ¶¶ 83-95), unfair competition under Cal. Bus. &
12 Prof. Code §17200 (FAC ¶¶ 96-99), intentional interference with contract (FAC
13 ¶¶ 108-114), and declaratory relief seeking a judicial declaration that the Registry
14 Agreement between ZACR and ICANN is null and void, and that ZACR's
15 application does not meet ICANN's standards (FAC ¶¶ 126-132). DCA also
16 alleged that the IRP Final Decision required that ICANN place DCA's application
17 in the delegation phase. FAC ¶ 119-25.

18 On March 1, 2016, DCA filed a motion for preliminary injunction. ECF 16.
19 DCA's motion for preliminary injunction was predicated only on its Ninth Cause
20 of Action against ICANN, which sought a declaration that ICANN "follow" the
21 IRP Declaration and "allow . . . DCA's application to proceed through the
22 remainder of the [new gTLD] application process." *Id.* On April 12, 2016, this
23 Court granted DCA's motion for preliminary injunction enjoining ICANN from
24 delegating the rights to .Africa pending the conclusion of the lawsuit. ECF 75.

25 On April 26, 2016, ZACR moved to dismiss all claims asserted against it
26 for failure to state a claim. ECF 80-1. In asking the Court to dismiss DCA's
27 Tenth cause of action against ZACR for declaratory relief, ZACR argued only that
28 DCA lacked standing to challenge the validity of the Registry Agreement between

1 ICANN and ZACR because DCA was not a party to it. *Id.* at 11. On June 14,
2 2016, this Court granted ZACR’s motion to dismiss in its entirety. ECF 112.
3 However, with respect to the Tenth cause of action for declaratory relief, the
4 Court did not rule that DCA lacked standing to challenge the Registry Agreement.
5 *Id.* Instead, the Court allowed DCA to proceed with its challenge to the Registry
6 Agreement, but dismissed ZACR because DCA had failed to state any substantive
7 basis for relief against ZACR and “a favorable ruling on [DCA’s] claims against
8 ICANN will result in the relief [DCA] seeks.” *Id.*

9 On May 6, 2016, ZACR which had not been served at the time the parties
10 briefed the preliminary injunction, filed a motion to vacate/ reconsider the
11 preliminary injunction order. ECF 85-1. ICANN filed a joinder to that motion on
12 May 10, 2016. ECF 86. On May 11, 2016, ICANN filed a notice of appeal of the
13 Court’s order granting the preliminary injunction. On June 20, 2016, this Court
14 issued its ruling denying the motion to vacate/ reconsider. ECF 113. The Court
15 ruled that the motion was moot as to ZACR because of its intervening order
16 granting ZACR’s motion to dismiss and, treating the motion as having been filed
17 by ICANN alone, held that “there still exists serious questions going to whether
18 Plaintiff had acquired a sufficient number of endorsements to have passed the
19 geographic names evaluation process in the first instance.” *Id.* On June 24, 2016,
20 ZACR filed a notice of appeal of the Court’s orders granting the preliminary
21 injunction and denying the motion to vacate/reconsider the preliminary injunction
22 order. ECF 115.

23 **IV. ARGUMENT**

24 **A. ZACR Is A Required Party To The Ninth And Tenth Causes of**
25 **Action For Declaratory Relief**

26 Absentee parties must be allowed to intervene as a matter of right where, as
27 here, they have an interest in the litigation. Fed. R. Civ. P. 24. ZACR is clearly a
28 required party under Rule 24. ZACR plainly has an interest in the Registry

1 Agreement to which it is a party. A declaratory judgment that the Registry
2 Agreement is null and void (Tenth cause of action) or that DCA's application for
3 .Africa proceed through the delegation phase (Ninth cause of action) would
4 certainly prejudice ZACR. While ZACR believes that DCA lacks standing to
5 attack the validity of the Registry Agreement, and that DCA's claims should be
6 dismissed, ZACR would be severely prejudiced if DCA is allowed to maintain its
7 claims without ZACR's participation in this action. The prejudice cannot be
8 lessened or avoided while these causes of action for declaratory relief remain.

9 **1. ZACR Is Entitled To Intervene As A Matter of Right**

10 Fed. R. Civ. P. 24(a)(2) permits intervention as a matter of right where the
11 applicant "claims an interest relating to the property or transaction that is the
12 subject of the action, and is so situated that disposing of the action may as a
13 practical matter impair or impede the movant's ability to protect its interest, unless
14 existing parties adequately represent that interest."

15 The Ninth Circuit has established the following four-part test that must be
16 satisfied before an applicant may intervene in a pending federal action as of right
17 under Rule 24(a)(2): "(1) [the applicant] has a significant protectable interest
18 relating to the property or transaction that is the subject of the action; (2) the
19 disposition of the action may, as a practical matter, impair or impede the
20 applicant's ability to protect its interest; (3) the application is timely; and (4) the
21 existing parties may not adequately represent the applicant's interest." *United*
22 *States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (citation omitted).

23 "In evaluating whether these requirements are met, courts are guided
24 primarily by practical and equitable considerations." *Id.* (quotation omitted).
25 Rule 24(a) is generally broadly construed in favor of granting applications for
26 leave to intervene. *See id.* at 397-98 ("A liberal policy in favor of intervention
27 serves both efficient resolution of issues and broadened access to the courts. By
28 allowing parties with a practical interest in the outcome of a particular case to

1 intervene, we often prevent or simplify future litigation involving relating issues
2 before the court.") (internal quotations and citations omitted).

3 (a) **ZACR's Interest In .Africa And Impairment of Its**
4 **Interest**

5 The "significantly protectable" interest requirement is generally satisfied
6 when the interest is protectable under some law, and there is a relationship
7 between the interest and the claims at issue. *Sierra Club v. United States EPA*,
8 995 F.2d 1478, 1484 (9th Cir. 1993), *overruled on other grounds by Wilderness*
9 *Soc'y v. United States*, 630 F.3d 1173, 1178 (9th Cir. 2011). The "relationship"
10 requirement is satisfied if the resolution of plaintiff's claim will actually affect the
11 intervening party. *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998).
12 Further, the interest must also relate to the underlying subject matter of the
13 litigation. *City of Los Angeles*, 288 F.3d at 397.

14 First, ZACR has a significant protectable interest relating to the .Africa
15 gTLD. ZACR is the successful applicant for the rights to .Africa; and, as a result,
16 ZACR entered into a ten year Registry Agreement with ICANN for the operation
17 of .Africa. Masilela Decl. (ECF 85-3) ¶ 10. ZACR's contractual rights will be
18 impaired if DCA succeeds in its Ninth and Tenth causes of action, and any related
19 claims for injunctive relief. "Contract rights are traditionally protectable
20 interests." *Southwest Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 820
21 (9th Cir. 2001). ZACR will be directly affected by the disposition of the action –
22 it will either result in the delegation of .Africa to ZACR or a declaration that the
23 Registry Agreement between ICANN and ZACR is null and void. Clearly, ZACR
24 has a significant interest in the outcome of the litigation.

25 Second, the disposition of the action may impair or impede ZACR's ability
26 to protect its interest. If DCA prevails on its Ninth and Tenth cause of action for
27 declaratory relief, the Registry Agreement could be declared null and void and,
28 the Court could order that DCA should be awarded the rights to .Africa.

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(b) ZACR’s Motion to Intervene Is Timely

In determining whether a motion is timely, the court considers the following factors: (1) the stage of proceeding at which intervention is sought; (2) the prejudice to other parties; and (3) the reason for and length of delay. *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986); *see also United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996).

Here, ZACR’s motion is timely. The case is in its early stages; discovery has just begun and documents have not yet been produced. Similarly, no depositions have been taken. And trial is not scheduled until February 2017. Therefore, the first factor weighs in favor of timeliness.

Additionally, there is no prejudice to ICANN or to DCA by allowing ZACR to intervene to protect its interest in .Africa. The “prejudice” factor, turns on whether the existing parties were or may be prejudiced by the delay in moving to intervene, not whether the intervention itself will cause the nature, duration or disposition of the lawsuit to change. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995). Here, there is no delay causing prejudice to the parties. ICANN does not oppose ZACR’s motion to intervene. DCA is evaluating and has not yet taken a formal position. Declaration of David W. Kesselman in Support of ZA Central Registry, NPC’s Motion to Intervene (“Kesselman Decl.”), ¶¶ 2-3.

Moreover, ZACR was only just dismissed from the action on June 14, 2016; thus, there was no delay in moving to intervene. ZACR timely brought this motion after being dismissed from the case and filing an appeal of the Court’s order granting the preliminary injunction and denying ZACR’s motion to reconsider/vacate the preliminary injunction order.

(c) ICANN Is Not Situated to Fully Protect ZACR’s Interest

An applicant-intervenor’s burden in showing that its interests are not

1 adequately protected is minimal; it is sufficient to show that representation may be
2 inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, 30 L. Ed.
3 2d 686, 92 S. Ct. 630 (1972); *California v. Tahoe Regional Planning Agency*, 792
4 F.2d 775, 779 (9th Cir. 1986). To determine whether the existing parties
5 adequately represent a proposed intervenor, courts examine three factors:
6 (1) whether the parties will undoubtedly make all of the intervenor’s arguments;
7 (2) whether they are capable of and willing to make such arguments; and
8 (3) whether the intervenor would add some necessary element to the suit that
9 would be otherwise neglected. *Tahoe Regional Planning Agency*, 792 F.2d at
10 778.

11 ICANN's participation does not ensure that ZACR's interests will be
12 adequately represented. While ICANN and ZACR agree that ZACR is the proper
13 party to be delegated .Africa, their interests are not identical. ICANN has
14 institutional interests relating to its larger role as the entity responsible for DNS
15 throughout the world. By contrast, ZACR’s interests for purposes of this litigation
16 are limited to the delegation of .Africa. Courts have recognized that the interests
17 of parties in this circumstance are divergent. *See, e.g., White v. University of Cal.*,
18 765 F.3d 1010, 1027 (9th Cir. 2014) (concluding that University had broad
19 obligations to serve constituencies other than plaintiff and that such different
20 motivations rendered University unable to sufficiently represent plaintiff's
21 interests).

22 Moreover, there are several arguments that are specific to ZACR and
23 require ZACR’s involvement in the case. ZACR, a South African non-profit
24 company, and the people of Africa, have a strong interest in who operates .Africa.
25 The African Union Commission (“AUC”), the Secretariat for 54 African
26 countries, supports the award of .Africa to ZACR and not to DCA. Masilela Decl.
27 (ECF 85-3) ¶¶ 6-7; Yedaly Decl. (ECF 40) ¶ 10; Supp. Masilela Decl. (ECF 97-1)
28 ¶ 7. ZACR should be allowed to intervene to explain how and why it came to be

1 supported by the AUC and Morocco. *Id.*; Masilela Decl. Ex. B (ECF 85-4).
2 ZACR will also want the trier of fact to understand the importance of .Africa to
3 both ZACR and the people of Africa, including that ZACR will donate part of the
4 proceeds from .Africa to a charity for the benefit of the African public. Yedaly
5 Decl. (ECF 40) ¶¶ 11, 13; Masilela Decl. (ECF 85-3) ¶¶ 12, 14. Moreover, ZACR
6 has an economic interest in .Africa as it has incurred great costs, with no attendant
7 benefits, relating to marketing and maintaining the visibility of the .Africa project.
8 Masilela Decl. (ECF 85-3) ¶¶ 11-12; Supp. Masilela Decl. (ECF 97-1) ¶¶ 2-3, Ex.
9 A (ECF 97-2). ICANN is not situated to make these arguments for ZACR in a
10 meaningful way, and ZACR will add a necessary element to the lawsuit which
11 will otherwise be neglected. For all of these reasons, ZACR should be entitled to
12 intervene in this action as a matter of right.

13 **2. Alternatively, ZACR Should Be Allowed to Intervene With**
14 **The Court’s Permission**

15 Rule 24(b) authorizes permissive intervention where: (1) the applicant for
16 intervention shows independent grounds for jurisdiction; (2) the motion is timely;
17 and (3) the applicant’s claim or defense and the main action share a common
18 question of law or fact. *Freedom From Religion Foundation, Inc. v. Geithner*,
19 644 F.3d 836, 843 (9th Cir. 2011). In exercising its discretion on an application
20 for permissive intervention, the court “shall consider whether the intervention will
21 unduly delay or prejudice the adjudication of rights of the original parties.” Fed.
22 R. Civ. P. 24(b)(2).

23 The requirement of a common question of law or fact is liberally construed.
24 *Black & Veatch Corp. v. Modesto Irrigation Dist.*, Case No. 1:11-cv-00695-LJP-
25 SKO, 2011 U.S. Dist. LEXIS 117737 at *36 (E.D. Cal. October 12, 2011) (*citing*
26 *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977)). As one court
27 noted, permissive intervention should be granted where it will not cause undue
28 strain on judicial resources. *Stallworth*, 558 F.2d at 270 (“With little strain on the

1 court's time and no prejudice to the litigants, the controversy can be stilled and
2 justice completely done if the appellants are granted permission to intervene."
3 (quotation and citation omitted)). Here, even if intervention as a matter of right is
4 not granted, the circumstances of this case warrant permissive intervention.

5 With respect to subject matter jurisdiction, DCA has alleged diversity
6 jurisdiction in its FAC. However, in preparing this motion, ZACR has determined
7 that a question exists as to whether that allegation was/ is proper.² However, if an
8 issue as to subject matter jurisdiction exists, there are exceptions that could still
9 allow ZACR to intervene. See Moore's Federal Practice 6-24, § 24.22 [2].

10 As addressed above, this motion is timely. This case is in its initial stages
11 and, if the motion is granted, ZACR will enter the litigation at its outset and will
12 cause no delay in the proceedings. There is no prejudice because of delay to
13 ICANN or DCA. As noted, ICANN does not oppose ZACR's motion. DCA is
14 evaluating and has not yet taken a formal position. Kesselman Decl. ¶¶ 2-3.

15 Finally, ZACR's defense and the main action share a common question of
16 law and common questions of fact. *Black & Veatch Corp.*, 2011 U.S. Dist.
17 LEXIS 117737 at *36 (existence of common question is liberally construed).
18 Disposition of the Ninth and Tenth causes of action will determine the validity of
19 the Registry Agreement. This determination will involve the same common
20 questions of law and the same determination of facts. Both will address whether
21 ZACR and DCA's applications for .Africa met ICANN's Guidebook requirements
22 and whether DCA or ZACR has the support of the countries of Africa. Both will
23 require an adjudication of DCA's claims that ICANN's Bylaws were not followed
24

25
26 _____
27 ² The presence of foreign nationals on both sides of an action can defeat diversity
28 jurisdiction under section 1332(a)(2). ZACR has alerted the parties to the issue.
ZACR may request further briefing on the subject if, after meeting and conferring
with the parties, it needs to be brought to the Court's attention.

1 and whether ZACR's award of .Africa proper. Efficiency and fairness require that
2 ZACR be permitted to participate in these issues.

3 **V. CONCLUSION**

4 For all of the foregoing reasons, ZACR respectfully requests that the Court
5 grant its motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a).

6 Alternatively, ZACR requests permission to intervene pursuant to Fed. R. Civ. P.
7 24 (b).

8
9 DATED: August 1, 2016

Respectfully submitted,

10 KESSELMAN BRANTLY STOCKINGER LLP

11
12 By: /s/ David W. Kesselman

13 David W. Kesselman

14 Amy T. Brantly

15 Kara D. McDonald

16 Attorneys for [Proposed] Intervenor

17 ZA Central Registry, NPC