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 AUTH. NAME: MCGURREN, H. J. AUTHOR AFFILIATION: Hearing Branch 1
 RECIPIENT NAME: Atomic Safety and Licensing Board Panel

SUBJECT: Response in support of P Hourihan 800811 petition to intervene & request for hearing, conditioned on particularization of aspects of concern. Supports holding of hearings in Phoenix area, w/appearance & Certificate of Svc.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

ARIZONA PUBLIC SERVICE
COMPANY, et al.

(Palo Verde Nuclear Generating
Station, Units 1, 2 and 3)

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Docket Nos. STN 50-528
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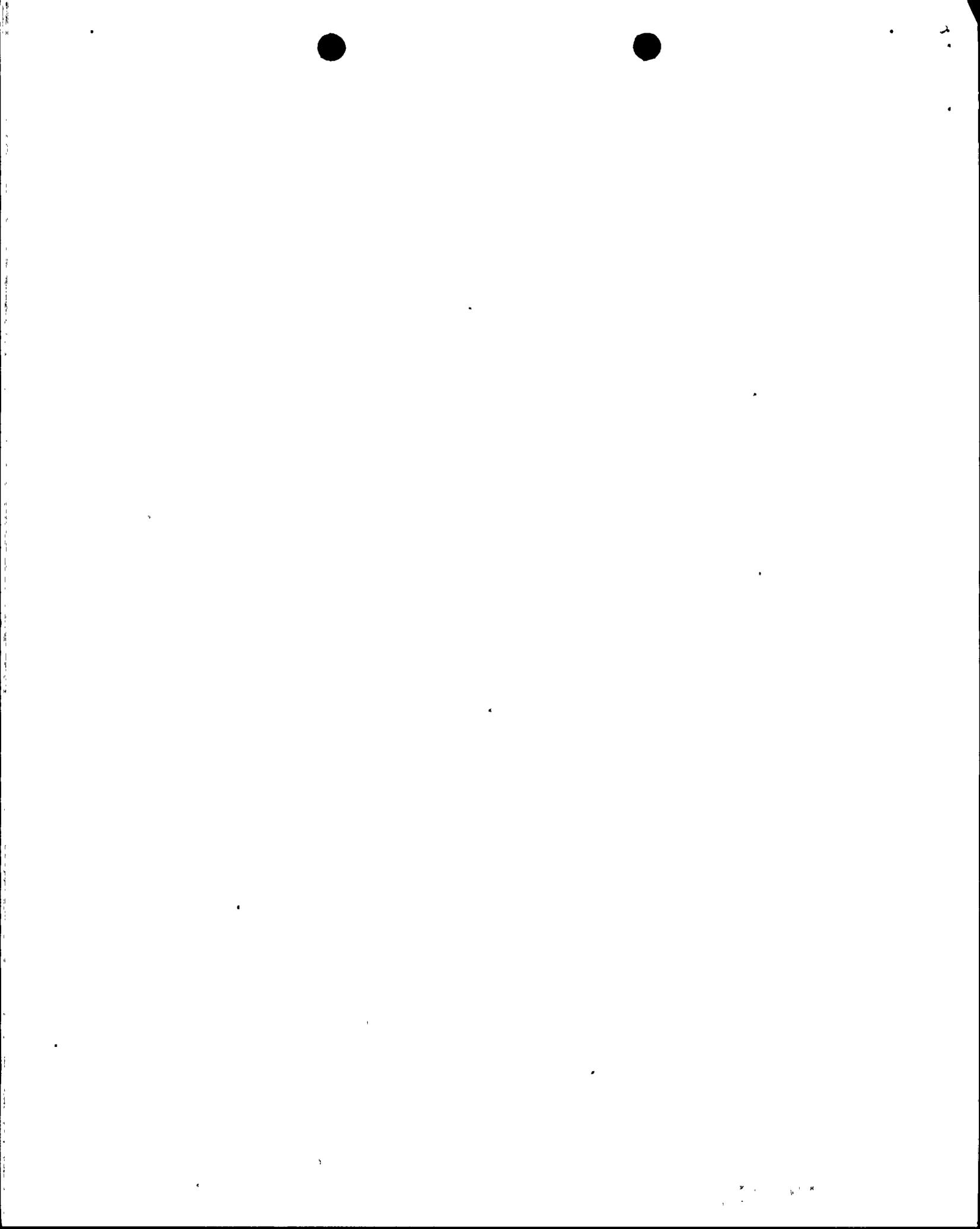
NRC STAFF RESPONSE TO PETITION
FOR LEAVE TO INTERVENE OF PATRICIA HOURIHAN

I. INTRODUCTION

On July 11, 1980, the U.S. Nuclear Regulatory Commission (Commission) published in the Federal Register (45 Fed. Reg. 46941) notice of receipt of an application for facility operating licenses for Palo Verde Nuclear Generating Station Units 1, 2 and 3 as well as notice of opportunity for hearing. The notice provided that any person whose interest may be affected could submit a petition for leave to intervene in accordance with 10 C.F.R. §2.714, no later than August 11, 1980. Pursuant to this notice, on August 11, 1980, Patricia Hourihan (Petitioner) submitted a timely petition for leave to intervene and a request for hearing for herself as well as on behalf of two other persons, Kevin Dahl and Christopher Shuey.

It is argued below that the petition with respect to Patricia Hourihan is adequate to meet the "interest" requirements of 10 C.F.R. §2.714 but fails to adequately identify the aspects of the proceeding as to which the petitioner wishes to intervene. The Staff believes the petition is inadequate to support

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the intervention of Kevin Dahl and Christopher Shuey.^{1/} This response is limited to the issues of whether Petitioner satisfies the requirements of 10 C.F.R. §2.714 with regard to "interest" and the identification of aspects of the proceeding as to which intervention is sought.^{2/}

II. ARGUMENT

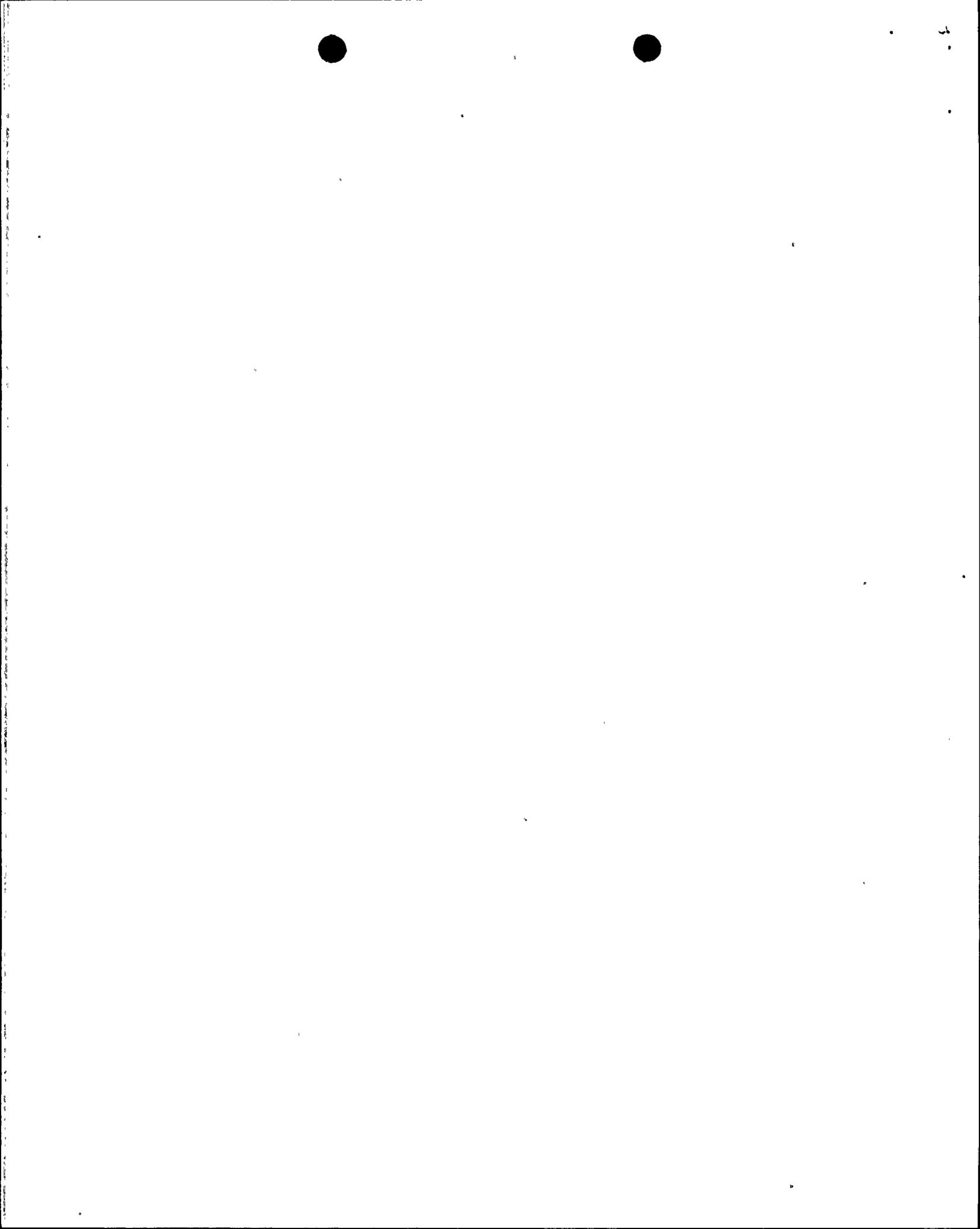
A. Requirements for Intervention

The provisions of 10 C.F.R. §2.714 require that a petition to intervene set forth with particularity the interest of the petitioner in the proceeding, the manner in which that interest may be affected by the proceeding, and the aspect or aspects of the proceeding as to which intervention is sought.

With regard to interest and standing to intervene as-of-right, the Commission has established that contemporaneous judicial concepts of standing are to be

^{1/}We note that neither Christopher Shuey nor Kevin Dahl filed petitions to intervene. An affidavit signed by Christopher Shuey entitled "Statement of Standing" was attached to Petitioner's petition.

^{2/}The Staff does not, at this time, take any position with regard to the admissibility of concerns of the Petitioner as contentions in this proceeding. The Staff views Petitioner's statement of concerns set forth in the Petition as a statement of aspects as to which intervention is sought rather than a statement of contentions and bases. Under 10 C.F.R. §2.714(b), Petitioner has the opportunity to set forth specific contentions and the bases for them in a supplement to its Petition to be filed at least 15 days prior to the first prehearing conference. The Staff's view on the admissibility of contentions will be set forth in response to such supplement to the Petition for Leave to Intervene filed pursuant to Section 2.714(b). In the event that Petitioner ultimately satisfies the contention requirement of Section 2.714(b) as well as the interest and "aspects" requirements of Section 2.714(a), Petitioner's request for hearing should be granted and Petitioner should be admitted as a party to the proceeding.

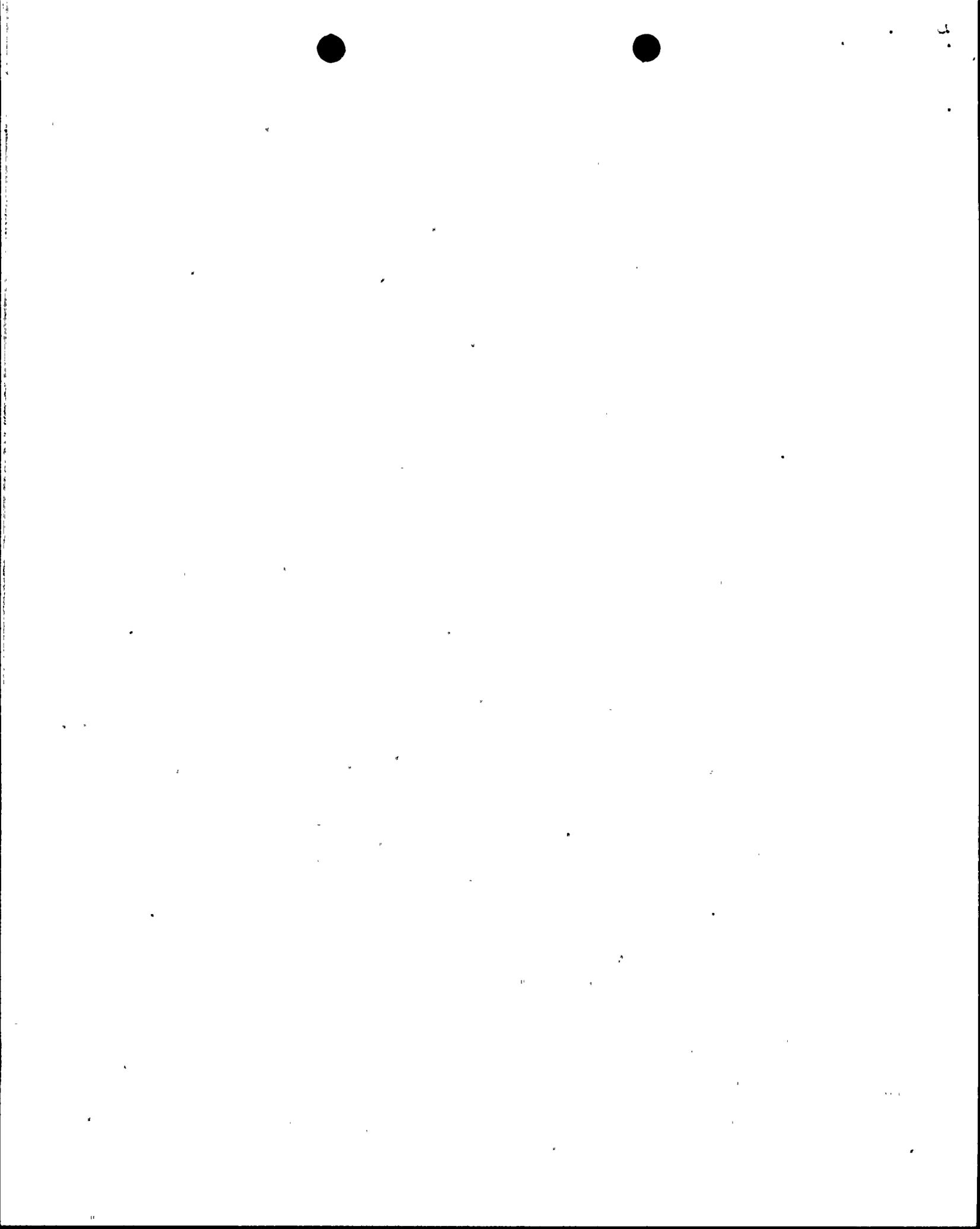


applied in determining whether a petitioner should be admitted as a party to an NRC proceeding. Portland General Electric Company, et al. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1144-45 (1977). Consequently, the Petitioner must show that the proposed action which is the subject of the proceeding could result in "injury in fact"^{3/} to an interest which is "arguably within the zone of interest" protected by the Atomic Energy Act or the National Environmental Policy Act. Pebble Springs at 4 NRC 613-14.

The Petitioner may satisfy these requirements by showing that she resides "within the geographical zone that might be affected by an accidental release of fission products," Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 at n. 6 (1973)^{4/} or that her base of normal everyday activities is in the vicinity of the facility. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183,

^{3/} "Abstract concerns" or a "mere academic interest" in the matter which are not accompanied by some real impact on the petitioner will not confer standing. Transnuclear, Inc., et al. (Ten Applications for Low-Enriched Uranium Exports to Euratom Member Nations), CLI-77-24, 6 NRC 525, 531 (1977); Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976). Rather, the asserted harm must have some particular effect on the petitioner, Transnuclear supra, and the petitioner must have some direct stake in the outcome of the proceeding. See Allied-General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 422 (1976).

^{4/} The Appeal Board has recently held that geographical proximity of a member's residence to a facility is sufficient, standing alone, to satisfy the interest requirements of 10 C.F.R. §2.714. Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

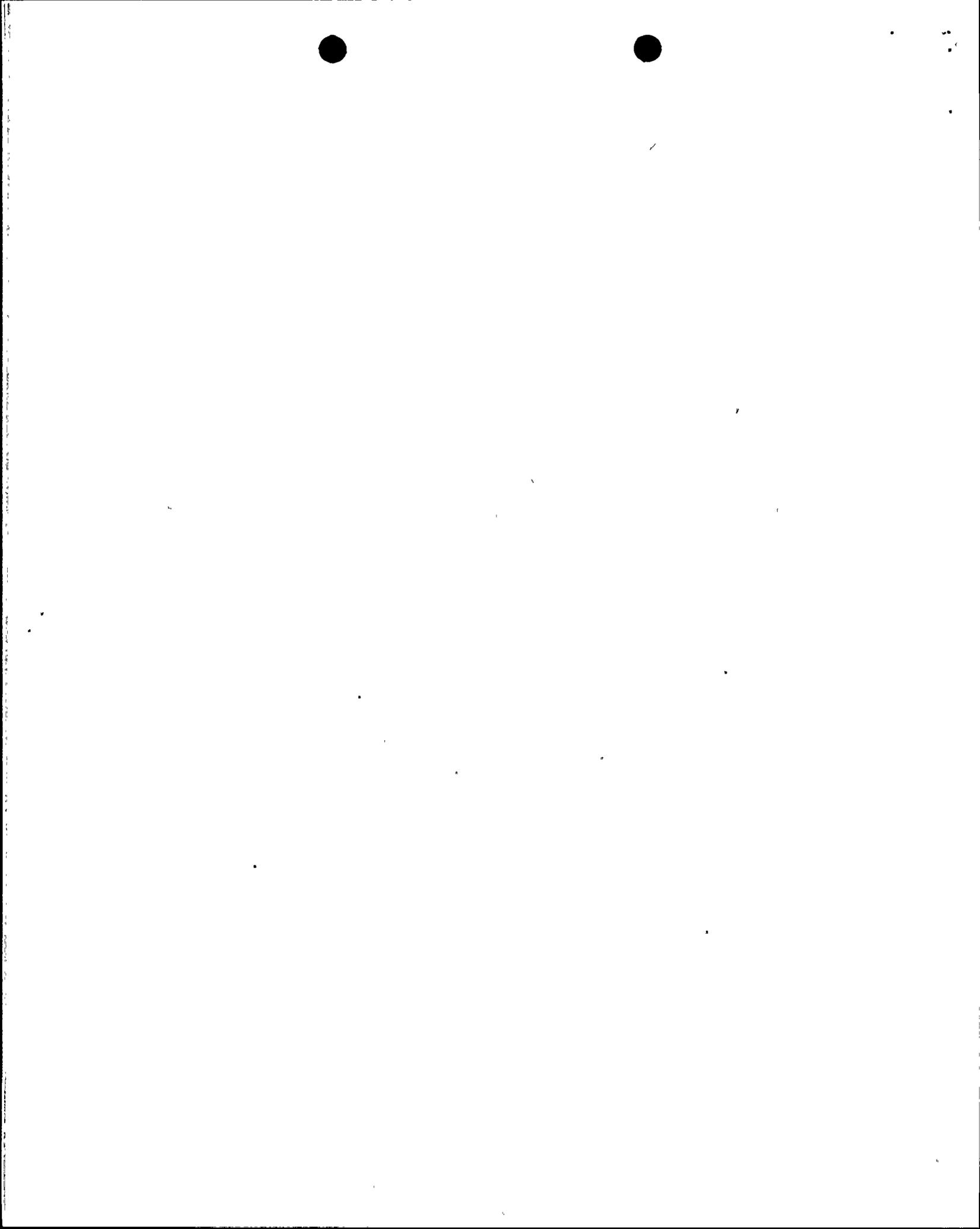


7 AEC 222, 226 (1974).^{5/} Similarly, the requisite interest can be established by showing that she resides in the vicinity of the facility for at least a part of the year. See, e.g., Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-102, 6 AEC 188, 189-90 (1973). While no specific distance from a nuclear power plant has evolved from Commission decisions to define the outer boundary of the "geographic zone of interest," the Appeal Board has found that a licensing board "cannot be tarred with the brush of irrationality" for presuming that someone who carries on everyday activities within 25 miles of the plant has an interest. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974). Further, the Appeal Board has indicated that 50 miles "is not so great as necessarily to have precluded a finding of standing based on residence." Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 n. 4 (1977).

A petitioner, who is not petitioning on behalf of an organization to represent members of an organization,^{6/} cannot assert the rights of third parties. The Appeal Board has applied to NRC proceedings the judicial concept that "a litigant may only assert his own constitutional rights or immunities," quoting McGowan v.

^{5/}A petitioner who resides at an appreciable distance from a nuclear facility but who frequently engages in substantial business and related activities in the vicinity of the facility may establish the requisite interest and standing. See Portland General Electric Company, et al. (Trojan Nuclear Plant), Order Concerning Requests for Hearing and Intervention Petitions (unpublished), July 27, 1978 and Portland General Electric Company, et al. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308 (1978).

^{6/}An organization can establish standing through members of the organization who have interests which may be affected by the licensing action under consideration. Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328, 330 (1976). However, when an organization seeks to base its claim of standing on the interests of its members, the organization must identify specific individual members with the requisite interest, describe how the interests of those members might be affected, and show that each of those members has authorized the organization to act on his or her behalf. Allens Creek, supra.



Maryland, 366 U.S. 420, 429 (1961) and United States v. Raines, 362 U.S. 17, 22 (1960).^{7/}

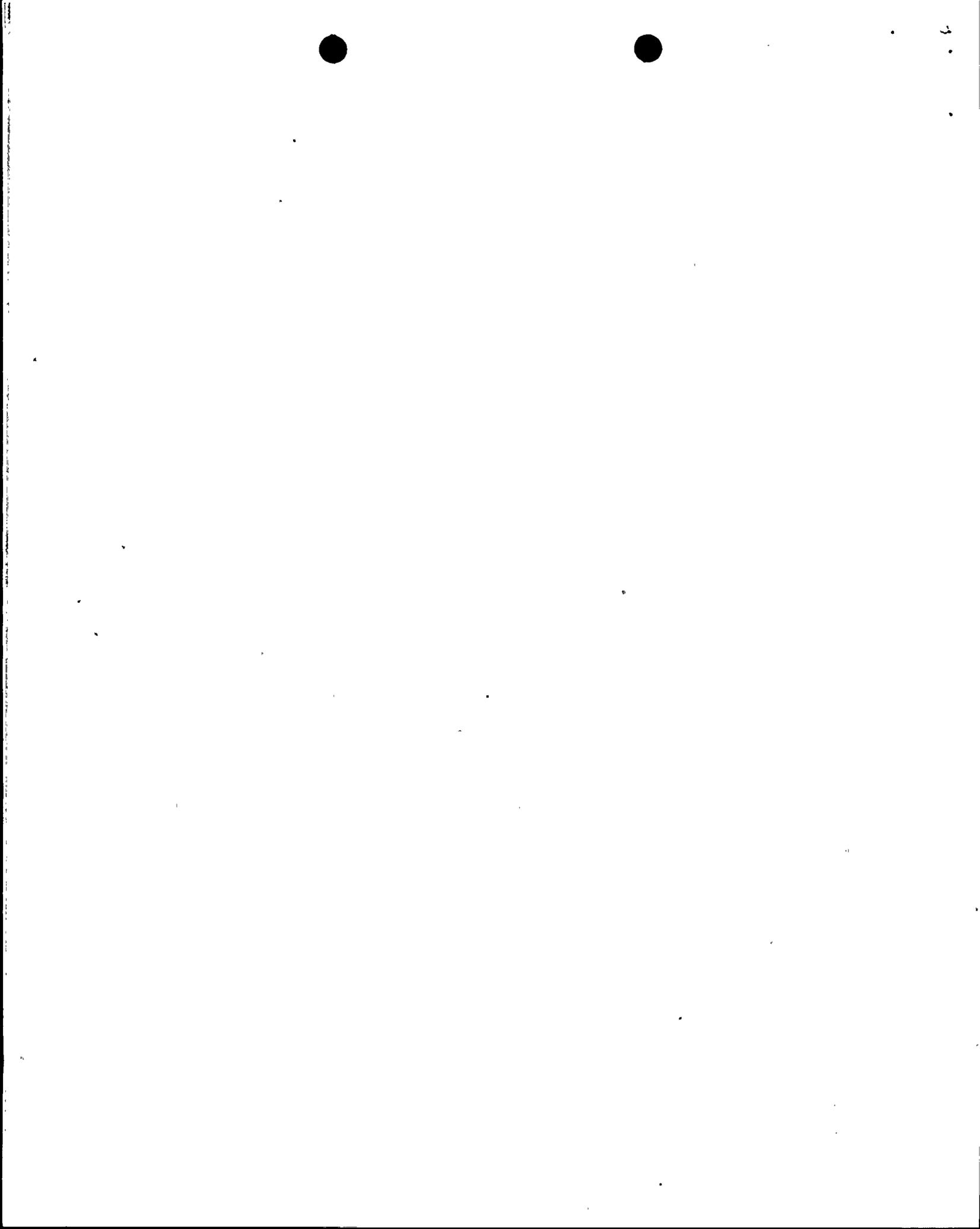
As noted above, a petition to intervene, in addition to setting forth the petitioner's interest and the potential effects of the proposed action on that interest, must identify the specific aspects of the proceeding on which intervention is sought. The only relevant aspects of the proceeding are those which fall within the scope of the proceeding.^{8/} While there is little guidance as to the meaning of "aspect" as that term is used in 10 C.F.R. §2.714, it appears to be broader than a contention but narrower than a general reference to the NRC's operating statutes. Consumers Power Company (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978). In determining whether a petitioner has met the "aspects" requirement of Section 2.714, it is not appropriate to apply the same standards as those applied to determine the admissibility of contentions. Id. Thus, it appears that a petitioner may satisfy the "aspects" requirement by identifying, generally, concerns that might stem from the licensing action which are within the scope of matters that may be considered in the proceeding.^{9/}

Petitioner's right to intervene in the instant proceeding and the adequacy of her Petition should be examined in light of the foregoing principles.

^{7/}Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977). The Appeal Board noted that in Wrath v. Seldin, 422 U.S. 490, 499 (1975) the Court pointed out that in some instances the courts have found that the constitutional or statutory provision in question implies an entitlement to advance a "claim to relief [which] rests on the legal rights of third parties" (at 500-01). The Appeal Board added that ". . . we perceive nothing in the Atomic Energy Act or NEPA which would undergird a conclusion that either or both of those statutes contain such an implication" (footnote deleted).

^{8/}See, e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), Licensing Board "Memorandum and Order Ruling on Petitions and Setting Special Prehearing Conferences" (September 21, 1979) (restart), slip op. at 6.

^{9/}For example, Petitioner might set forth particular equipment or methods of operation which she feels might affect her health and safety.



B. Petitioner's Interest and Standing

Petitioner asserts in an attached affidavit standing based on the proximity of the Palo Verde Station to (1) her Phoenix residence (the nearest boundary of Phoenix is about 36 miles east of the Palo Verde Station^{10/}), (2) her place of work in Tempe, Arizona (approximately 40 to 50 miles from the Palo Verde Station^{11/}), (3) land jointly owned by the Petitioner and her father (located in Sun City, Arizona which is approximately 30 miles from the Palo Verde Station^{12/}). Petitioner further alleges that operation of the Palo Verde Station as a result of this proceeding will adversely affect her health, livelihood and property.^{13/} The Staff believes that such allegations are sufficient, in light of the previously discussed principles with regard to interest and standing, to establish that:

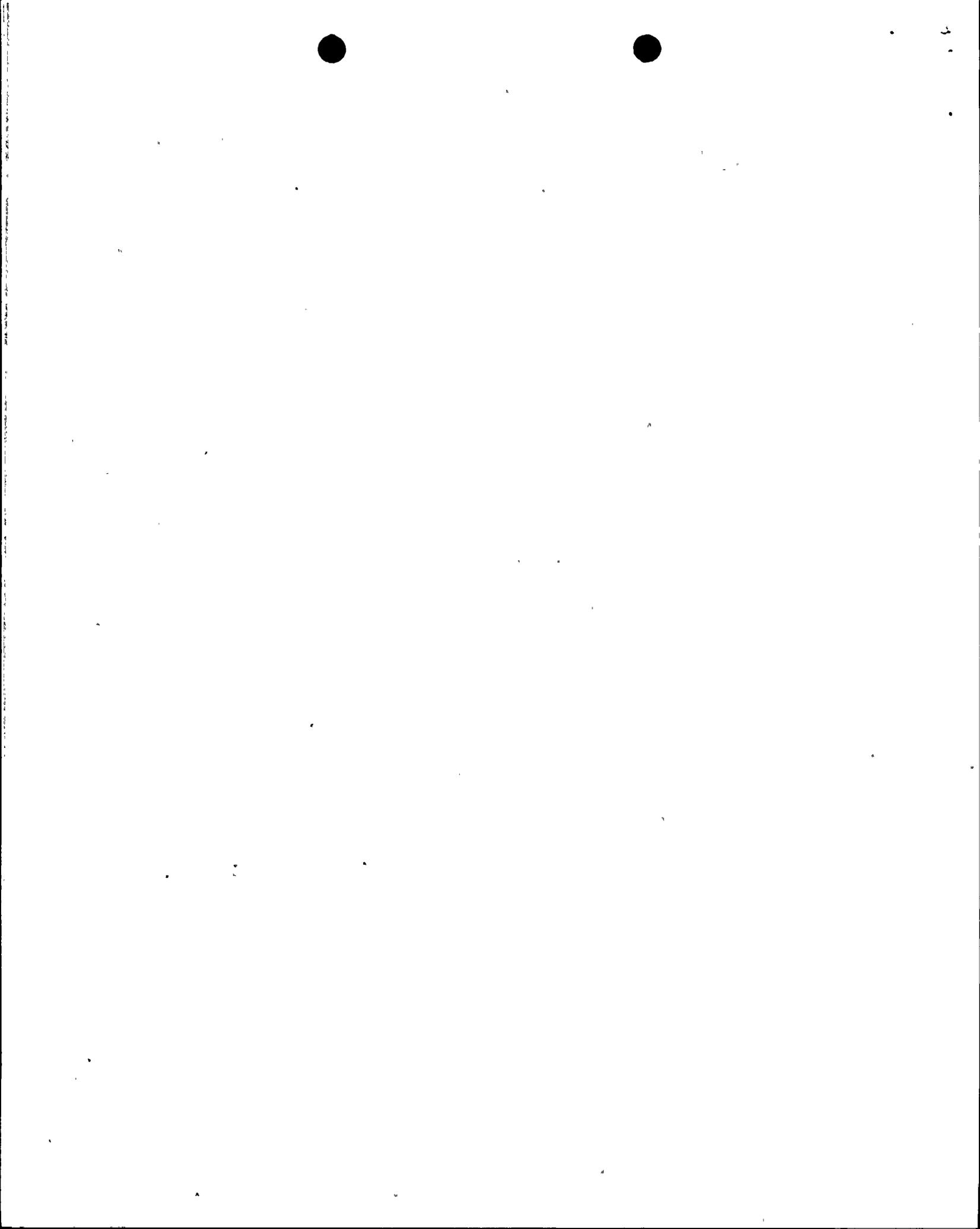
- (1) Petitioner might suffer injury-in-fact from the proposed licensing action (since she lives, works and owns a property interest within geographical proximity to the Palo Verde Station) and
- (2) The interests of the Petitioner in protecting her health, livelihood and property from operation of the Palo Verde Station are within the zone of interests protected by the Atomic Energy Act.

^{10/} Safety Evaluation Report, Palo Verde Nuclear Generating Station, Units 1, 2, and 3 (NUREG-75/098, October 1975), Section 2.1, at pp. 2-1 and 2-4.

^{11/} Final Environmental Station, Palo Verde Nuclear Generating Station, Units 1, 2 and 3 (NUREG-75/078, September 1975), at p. 2-2.

^{12/} Id.

^{13/} Petition at 1.



Accordingly, the Staff believes that the Petitioner has made the requisite showing of interest to intervene as-of-right in the instant proceeding. For the reasons previously noted, however, Petitioner may not intervene on behalf of third parties, Kevin Dahl and Christopher Shuey. See Watts Bar, supra, n. 7.

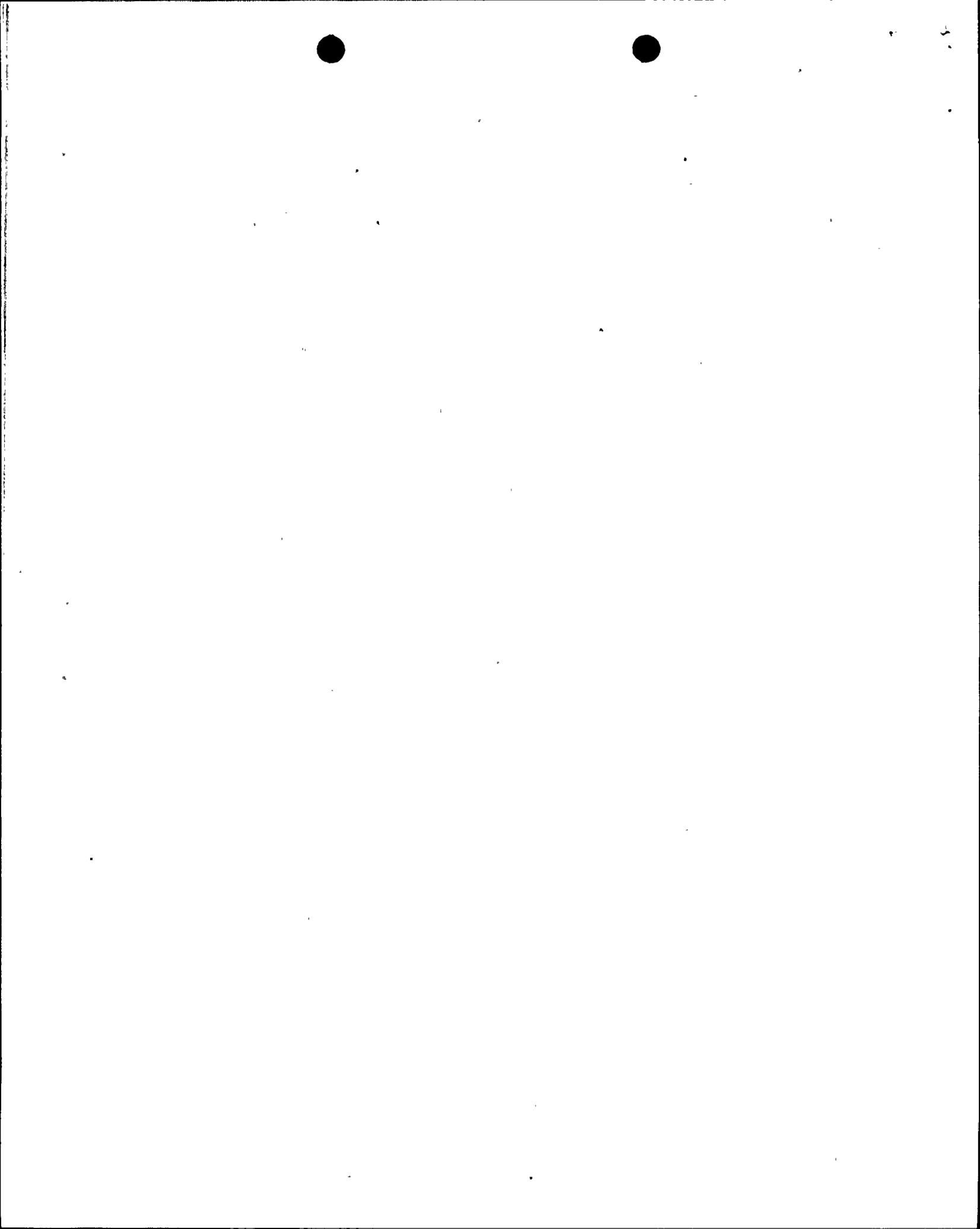
C. Aspects of the Proceeding As To Which Petitioner Seeks To Intervene.

The Petitioner sets forth two "aspects" of the proposed operation of the Palo Verde Station that concern her:

- (1) That the routine operation of the plant endanger the health, lives, civil rights, business interests and property of petitioners; and
- (2) That the operation of the plant may result in an accident which will endanger the interests of petitioners.^{14/}

These "aspects," however, do not satisfy the requirement of 10 C.F.R. §2.714 that the petition ". . . particularize . . . the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." The stated aspects do nothing more than make general reference to operation of the Palo Verde Station. Accordingly, it is the Staff's position that Petitioner has not satisfied the "aspects" requirements of 10 C.F.R.

^{14/} Petition, at 1.



§2.714. The Staff does believe, however, that the Petitioner should be allowed an appropriate period of time, perhaps 15 days, in which to state the particular aspects of the subject matter of this proceeding on which she wishes to be heard. Petitioner must at least set out the matters she wishes the hearing to consider.

III. LOCATION OF HEARINGS

The Petitioner's request for intervention also contains a request that the prehearing conference and hearing, if ordered in the above proceeding, be held in the Phoenix area. As noted in Appendix A to 10 C.F.R. Part 2 of the Commission's Regulations, it is the Commission's policy and practice to begin the evidentiary hearing in the vicinity of the site of the facility. However, this Appendix notes several factors to be considered with respect to selecting the location of the prehearing conferences and further hearing sessions.^{15/} These include: the convenience and necessity of the parties and the Board members, the nature of the particular conference or hearing session, and the public interest. The NRC Staff supports the Petitioner's request with respect to the prehearing conference and the initial phase of a hearing if such hearing is ordered. However, the Staff believes that it is

^{15/} We note that Appendix A to Part 2 of the Commission's Regulations recognizes convenience of the parties and public interest as factors to be considered in determining the location of any prehearing conference or any adjourned session of the evidentiary hearing. The Appendix provides, in part:

- (b) In fixing the time and place of any conference, including prehearing conferences, or of any adjourned session of the evidentiary hearing, due regard shall be had for the convenience and necessity of the parties, petitioners for leave to intervene, or the representatives of such persons, as well as of the Board Members, the nature of such conference or adjourned session, and the public interest.



premature to judge whether every prehearing conference and every hearing session should be held in the Phoenix area.

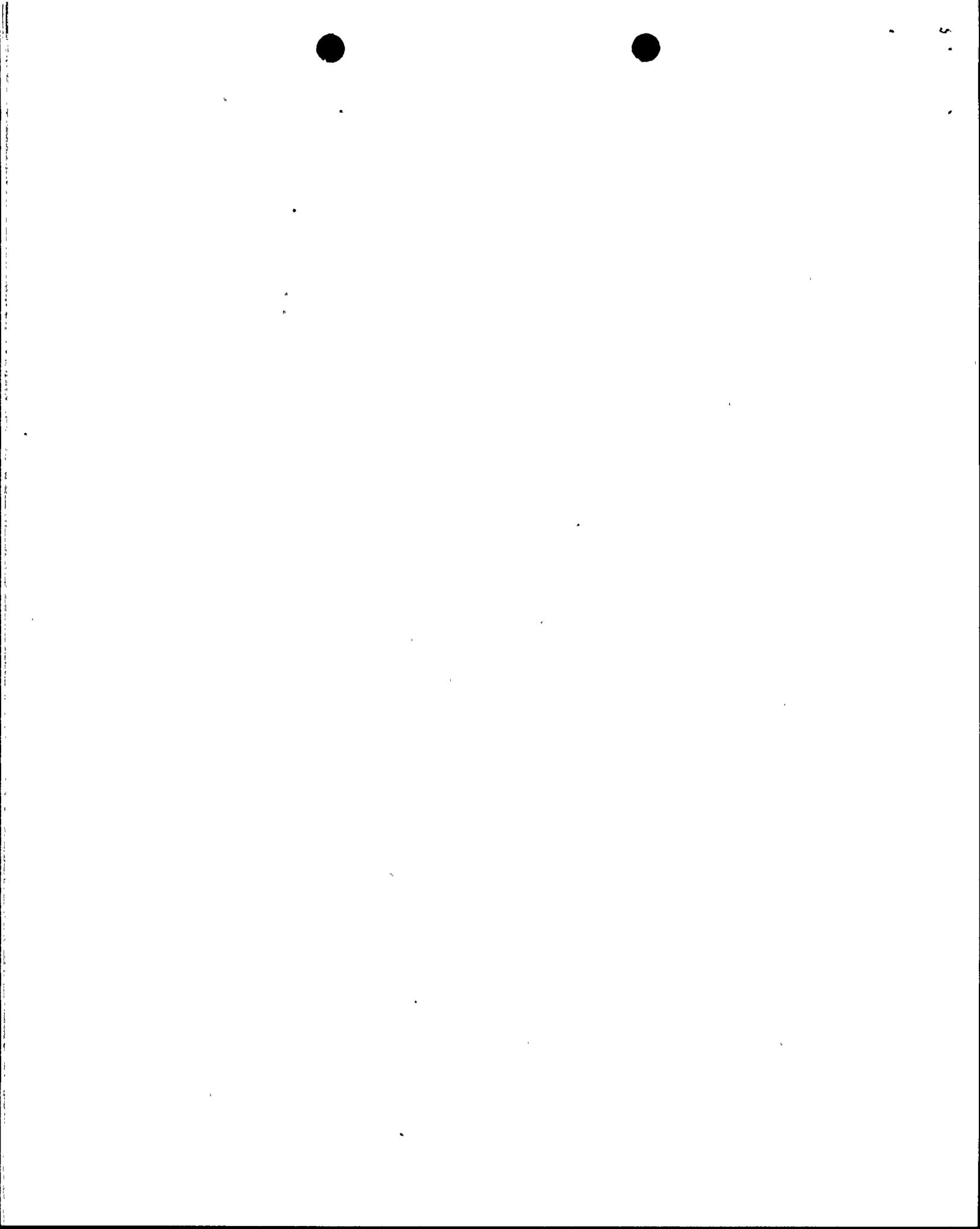
IV. CONCLUSION

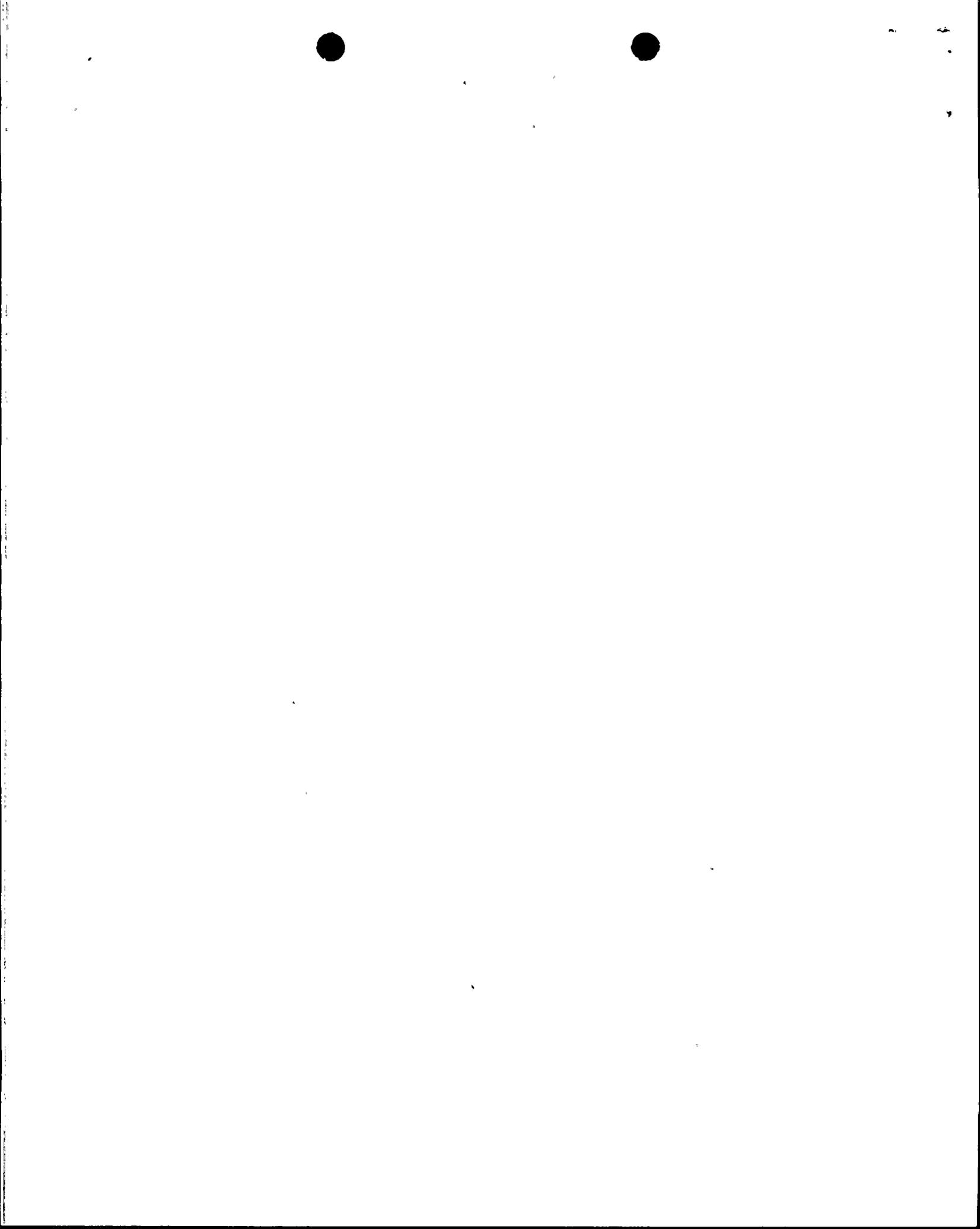
Based on the foregoing, the Staff concludes that Petitioner satisfies the interest requirements of 10 C.F.R. §2.714 but has failed to satisfy the "aspects" requirements of 10 C.F.R. §2.714. The Staff believes that the Petitioner should be allowed an appropriate period of time, perhaps 15 days, to particularize the "aspects" of plant operation that concern her. In the event that Petitioner ultimately satisfies the "aspects" and the contention requirements of 10 C.F.R. §2.714(b), the Staff believes that Petitioner's request for hearing should be granted and Petitioner should be admitted as a party to the proceeding. Further, the Staff supports Petitioner's request that the prehearing conference and the initial phase of the evidentiary hearing, if ordered, be held in the Phoenix area.

Respectfully submitted,


Henry J. McGurren
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of September, 1980





UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

ARIZONA PUBLIC SERVICE)
COMPANY, et al.)

(Palo Verde Nuclear Generating)
Station, Units 1, 2 and 3))

Docket Nos. STN 50-528
STN 50-529
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITION FOR LEAVE TO INTERVENE OF PATRICIA HOURIHAN" and "NOTICE OF APPEARANCE" of Henry J. McGurren in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 2nd day of September, 1980:

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