

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

JERRY McGEE,

Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION  
and the UNITED STATES OF AMERICA

Respondents.

Case No. 03-60245

FEDERAL RESPONDENTS' MOTION TO DISMISS

Mr. Jerry Bernard McGee, a resident of Irving Texas, has filed a petition for review that purports to challenge a decision issued by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"). But the petition fails to identify an NRC order to which the petition for review might apply, and, in fact, none exists. Accordingly, this Court should dismiss the petition.

I. Applicable Law.

This Court has jurisdiction over "all final orders of the [NRC] made reviewable by Section 2239 of title 42." 28 U.S.C. §2342(4) (commonly known as the Hobbs Act). Section 2239(b)(1) of Title 42 (Section 189 of the Atomic Energy Act of 1954, as amended) provides for judicial review of "[a]ny final order entered in any proceeding of a kind specified in" section 2239(a). Section 2239(a), in turn, provides authority for the Commission to issue orders in "any proceeding under [the Atomic Energy Act] for the granting, suspending, revoking, or amending of any license . . ." "Any party aggrieved by the final order may, within 60 days of its entry, file a petition to review in the court of appeals where venue lies." 28 U.S.C. §2344 (emphasis added). In short, for this Court to have jurisdiction over a petition for review, the petition must challenge a final order in an NRC proceeding and be filed by a party to that proceeding within 60 days of the final order.

## **II. Procedural Background.**

This Court docketed Mr. McGee's petition on March 24, 2003. The Petition is styled "United States Department of Justice, Petitioner, v. United States Nuclear Regulatory Commission, Respondent." This Court has re-styled the case "Jerry McGee v. U.S. Nuclear Regulatory Commission." The NRC has forwarded a copy of the Petition to the Department of Justice, because the United States is a statutory party. See 28 U.S.C. §2344. After reviewing the Petition and its exhibits, the United States and the U.S. Nuclear Regulatory Commission, the Federal Respondents, have filed this Motion to Dismiss.

## **III. Argument.**

The Petition states that it challenges an NRC decision issued on February 4, 2003, in an NRC proceeding. Petition at ¶2. The petition then states that the NRC proceeding involved an application for an NRC license submitted by the Commissioner of Social Security. Id. The Petition also states that a copy of the decision is attached to the Petition as "Exhibit A." Id.

But the Declaration of Emile L. Julian ("Julian Declaration"), which is Exhibit 1 to this Motion, will inform the Court that the NRC has no record of any such proceeding and no record of any participation by Mr. McGee in any of the Commission's adjudicatory proceedings whatsoever. Julian Declaration at ¶¶1-8. Furthermore, the decision attached as Exhibit A to Mr. McGee's Petition is a decision issued by the U.S. Court of Appeals for the Second Circuit, not a decision issued by the Commission. Julian Declaration at ¶10. The Second Circuit Order dismissed Mr. McGee's appeal from a decision to transfer his social security case from the Southern District of New York to the Northern District of Texas. Julian Declaration at ¶11.

Quite simply, Mr. McGee was not a "party" to any NRC proceeding that resulted in the issuance of an NRC order, and his Petition does not challenge a "final order" issued by the Commission. These requirements are jurisdictional; accordingly, the petition for review is fatally flawed and should be summarily dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review.

Respectfully submitted,

THOMAS L. SANSONETTI  
Assistant Attorney General

*Greer Goldman*  
GREER GOLDMAN  
Attorney  
Appellate Section  
Environment and Natural  
Resources Division  
U.S. Department of Justice  
P.O. Box 23795  
Washington, D.C. 20026-3795  
(202) 514-4786 (voice)  
(202) 514-8865 (fax)

KAREN D. CYR  
General Counsel

*John F. Cordes, Jr.*  
JOHN F. CORDES, JR.  
Solicitor

*E. Leo Slaggie*  
E. LEO SLAGGIE  
Deputy Solicitor

*Charles E. Mullins*  
CHARLES E. MULLINS  
Senior Attorney  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
(301) 415-1606 (voice)  
(301) 415-3200 (fax)

DATED: June 4, 2003.