

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

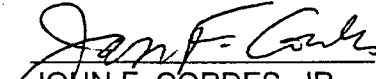
For the foregoing reasons, this Court should dismiss the petition for review.

Respectfully submitted,


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DATED: June 4, 2003.

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

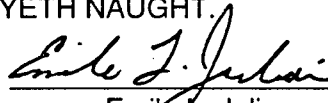
DECLARATION OF EMILE L. JULIAN

I declare under penalty of perjury that the following statements are true and correct to the best of my ability.

1. My name is Emile L. Julian and I make the following statements based upon my own personal knowledge or upon knowledge obtained in the course of my employment and relied upon by me in the performance of my duties.
2. I am employed in the Office of the Secretary at the United States Nuclear Regulatory Commission ("NRC" or "Commission").
3. My title is Assistant to the Secretary for Rulemakings and Adjudications. I have attached a short resume of my NRC employment as Exhibit 1 to this Declaration.
4. I assist the Secretary in supervising the Rulemakings and Adjudications Staff, who comprise the section of the Office of the Secretary that is responsible for maintaining the official docket for each and every rulemaking or adjudicatory proceeding held by the Commission.
5. Accordingly, I have direct knowledge of all proceedings pending before the Commission and of all filings in each of those proceeding.
6. I have reviewed the Petition filed with the U.S. Court of Appeals for the Fifth Circuit in this matter ("the Petition") by Mr. Jerry Bernard McGee, a copy of which is attached as Exhibit 2 to this Declaration.
7. The Petition states that it seeks review "of a final order entered by the United States Nuclear Regulatory Commission on February 4, 2003, in a proceeding entitled 'In the Matter of the Application of Court Order Transfer, Docket Number 02-6221' approving the application by Commissioner of Social Security . . . for a license under Section 173 of the Atomic Energy Act of 1954 [43 USC §2223]." Petition at ¶2

8. I have reviewed the docket files of all proceedings pending before the Commission and I have found no record of any such proceeding or of any such order, as described by Paragraph 2 of the Petition.
9. Furthermore, the Petition states that the referenced order "is annexed hereto, marked Exhibit A[.]" Petition at ¶2.
10. I have reviewed the document marked as "Exhibit A" and find it to be an Order issued by the U.S. Court of Appeals for the Second Circuit on February 4, 2003, not an Order issued by the U.S. Nuclear Regulatory Commission.
11. The Second Circuit Order dismisses an appeal filed by Mr. McGee from a district court order transferring his social security case from the Southern District of New York to the Northern District of Texas.
12. The Petition also states that the Mr. McGee filed a petition for leave to intervene in the proceeding on March 22, 2002, and that leave was granted on December 10, 2002. Petition at ¶4.
13. I have reviewed the Commission's docket files and records and can find no record of Mr. McGee's ever filing a petition for leave to intervene and no record of any decision granting any such petition.
14. In sum, the Commission's official docket files do not have any record of a proceeding as described in the Petition for Review or of Mr. McGee's participation in a Commission adjudicatory proceeding.

FURTHER DECLARANT SAYETH NAUGHT.



Emile L. Julian

Dated at Rockville, Maryland
this __ day of June, 2003.

RESUME OF EXPERIENCE AT THE NUCLEAR REGULATORY COMMISSION

NAME: Emile L. Julian

OFFICE ADDRESS: Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

OFFICE TELEPHONE: (301) 415-1966

DATE OF BIRTH: September 13, 1946

BAR MEMBERSHIP: Member of the District of Columbia and Federal Court Bars

EMPLOYMENT AT THE NUCLEAR REGULATORY COMMISSION:

Title and Place: Assistant for Rulemakings and Adjudications
Office of the Secretary of the Nuclear Regulatory Commission

Time of Employment: February 1997 to present

Description of duties:

Serve as legal advisor to the Secretary. Advise the Secretary on the performance of his or her duties under 10 CFR Part 2 and on laws, regulations and Congressional legislation that impact NRC's mission. Additionally, act as liaison with Commission Legal Assistants, the Office of General Counsel, the Office of Commission Appellate Adjudications and the Atomic Safety and Licensing Board Panel on legal matters requiring action on the part of the Commission or the Secretary. On occasion have served as Acting Secretary.

Manage the official rulemaking and adjudicatory dockets for the Commission and the Atomic Safety and Licensing Board Panel. Serve as the Clerk of the Court in this capacity and in the performance of the clerk duties interact with NRC offices, licensees, interest groups, intervenors and members of the public on rulemaking and adjudicatory matters such as filing requirements or compliance with 10 CFR Part 2. Advise the Secretary on the status of adjudicatory hearings, rulemakings, and adjudicatory items before the Commission for action. Responsible for the concept of the Electronic hearing Docket, its design, planning and implementation as a full-text and image document management system for the computerized management of the hearing docket. Responsible for the management of a computerized document management system for the rulemaking dockets.

Title and Place: Chief, Docketing and Service Branch
Office of the Secretary of the Commission

Time of Employment: February 1990 to January 1997

Description of Duties:

The duties were essentially the same as the duties described for my position as Assistant for Rulemakings and Adjudications. Due to an effort to achieve a supervisory ratio of one manager for eight employees in the Office of the Secretary, my supervisory duties were eliminated. However, more emphasis was placed on my legal advisory duties by the Secretary as a result of the change.

Title and Place: Commission Monitor (Legal)
Office of the Secretary of the Commission

Time of employment: October 1984 to October 1986. From 1986 to 1990 served as Acting chief of the Docketing and Service Branch

Description of Duties:

Monitored Commission meetings, prepared background papers on meeting subjects, drafted and circulated Staff Requirements memoranda, obtained Commission consensus and votes on legal Secy papers and comsecys and developed and maintained a tracking system for Commission comsecys.

EDUCATION: Legal: Howard University School of Law
Year of Graduation: 1971
Areas of Concentration: International law, Comparative law and
Corporation Law

Degree: Juris Doctor

College: Franklin and Marshall college
Year of Graduation: 1968
Areas of Concentration: Government, International Relations and Public
Administration

Degree: Bachelor of Arts.



U.S. COURT OF APPEALS
FILED

MAR 24 2003

CHARLES R. FULBRUGE III
CLERK

03-60245

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REVIEW — TO UNITED
STATES COURT OF APPEALS — TO RE-
VIEW AND SET ASIDE NRC ISSU-
ANCE OF LICENSE TO CONSTRUCT
NUCLEAR POWER GENERATOR [28
USCS 962344; 42 USCS 9622
39(b), 5871(g); FRAP 15(a)]

UNITED STATES DEPARTMENT OF JUSTICE

PETITIONER,

V.

UNITED STATES NUCLEAR REGULATORY
COMMISSION,

RESPONDENT.

NO. 02-10980

TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS
FOR THE 5TH CIRCUIT:

1. PETITIONER IS A CITIZEN OF
THE STATE OF TEXAS, AND RESIDES
AT 159 COWBOYS PARKWAY #1026,
IRVING, TX 75063.

2. REVIEW IS SOUGHT OF A FINAL
ORDER ENTERED BY THE UNITED STA-
TES NUCLEAR REGULATORY COMMIS-
SION ON FEBRUARY 4, 2003, IN A
PROCEEDING ENTITLED "IN THE MAT-
TER OF THE APPLICATION OF COURT
ORDER TRANSFER, DOCKET NUMBER 02-
6221" APPROVING THE APPLICATION BY
COMMISSIONER OF SOCIAL SECURITY,
HEREIN REFERRED TO AS APPLICANT, FOR
A LICENSE UNDER SECTION 173 OF THE
ATOMIC ENERGY ACT OF 1954 [42
USC 96 2223]. A COPY OF SAID ORDER
IS ANNEXED HERETO, MARKED EXHIBIT
A, AND MADE A PART HEREOF BY RE-
FERENCE.

FACTS ON WHICH VENUE BASED

3. THE FACTS AND STATUTES ON WHICH JURISDICTION AND VENUE ARE BASED ARE AS FOLLOWS:

a. JURISDICTION OF THIS COURT IS BASED ON 28 USC § 2342 AND 42 USC § 2239(b) AND 5871(g).

b. VENUE OF THIS REVIEW PROCEEDING IS PROPERLY LAID IN THIS COURT UNDER 28 USC § 2343.

NATURE OF PROCEEDINGS AS TO WHICH RELIEF SOUGHT

4. ON MARCH 22, 2002, PETITIONER FILED WITH THE NUCLEAR REGULATORY COMMISSION, PURSUANT TO 10 CFR § 2.714, A PETITION FOR LEAVE TO INTERVENE IN THE LICENSE PROCEEDINGS REFERRED TO ABOVE. SUCH PETITION WAS GRANTED ON DECEMBER 10, 2002. PETITIONER ALLEGED, AMONG OTHER THINGS, THAT THE ABOVE-NAMED APPLICANT FAILED TO CORPUS CHRISTI-

EULOGIZE PAUPERISM.

5. ON FEBRUARY 4, 2003, THE APPLICANT FILED AN ANSWER ALLEGING, AMONG OTHER THINGS, THAT: LABAN-TAKES SONS' PROPERTY WITHOUT GIVING PLATES OF BRASS.'

6. AT A PREHEARING CONFERENCE BEFORE AN ATOMIC SAFETY AND LICENSING BOARD ESTABLISHED BY THE NUCLEAR REGULATORY COMMISSION IT WAS AGREED THAT REBEKAH: THIS PEOPLE MUST ABIDE BY THE LAW.

7. ON MAY 22, 2001, THE BOARD HANDED DOWN ITS FINAL DECISION AS FOLLOWS: CASE CLOSED; GARNISH.

THE BOARD FOUND THAT A REACTOR OF THE GENERAL TYPE PROPOSED BY JAMES A. KISSKO, ACTING-DEPUTY-COMMISSIONER CAN BE CONSTRUCTED AND OPERATED AT THE PROPOSED SITE WITHOUT UNDUE RISK TO THE PUBLIC HEALTH AND SAFETY.

THE BOARD FURTHER FOUND THE APPLICANT'S APPLICATION FOR A CLASS ACTION LICENSE TO BE SATISFACTORY.

ACCORDINGLY, THE BOARD GRANTED THE APPLICATION FOR A CLASS ACTION LICENSE. A COPY OF THE DETERMINATION AND FINAL DECISION OF THE ATOMIC SAFETY LICENSING BOARD IS ATTACHED HERETO, MARKED EXHIBIT B, AND MADE A PART HEREOF BY REFERENCE.

8. ON AUGUST 27, 2001, PETITIONER FILED A PETITION FOR RECONSIDERATION WITH THE NUCLEAR REGULATORY COMMISSION FOR A REVIEW AND REVERSAL OF ITS FINAL DECISION. ON DECEMBER 11, 2002, AS ABOVE ALLEGED, AND AS SHOWN IN EXHIBIT A ATTACHED HERETO, THE NUCLEAR REGULATORY COMMISSION DENIED SAID PETITION FOR RECONSIDERATION.

GROUND ON WHICH RELIEF SOUGHT

9. THE ORDER OF THE NUCLEAR REGULATORY COMMISSION AND THE DECISION OF THE ATOMIC SAFETY AND LICENSING BOARD ARE ERRONEOUS AND CONTRARY TO LAW IN THAT BREED PRUNING: BY APPROVING THE APPLICATION OF SOCIAL SECURITY ADMINISTRATION FOR A CLASS ACTION LICENSE, THE COMMISSION VIOLATED THE ATOMIC ENERGY ACT OF 1954 AND RULES AND REGULATIONS PROMULGATED BY THE COMMISSION BY FAILING TO CONSIDER OFFERED EVIDENCE AS TO THE GEOLOGICAL INSTABILITY OF THE PROPOSED REACTOR SITE, SUCH FAILURE BEING AN IMPROPER CONSIDERATION OF AND REGARD FOR THE HEALTH AND SAFETY OF THE PUBLIC.

THE RELIEF PRAYED

WHEREFORE, PETITIONER PRAYS THAT (THE ORDER OF THE NUCLEAR REGULATORY COMMISSION ENTERED FEBRUARY 22, 2003,) BE ANNULLED AND SET ASIDE, AND THAT THE NUCLEAR REGULATORY COMMISSION

BE DIRECTED TO REOPEN THE HEARING
ON THE MATTER OF APPLICANT'S APPLI-
CATION TO CONSIDER SLOTHFULNESS.

DATED MARCH 29, 2003.

Mr. Jerry McGee
MR. JERRY MCGEE
159 COWBOYS PARKWAY
#1026
IRVING, TX 75063

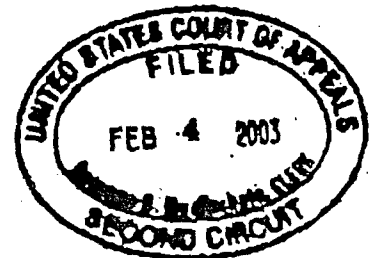
S.D.N.Y.
02-cv-2313
Mukasey, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of February two thousand and three,

Present:

Hon. James L. Oakes,
Hon. Guido Calabresi,
Hon. Sonia Sotomayor,
Circuit Judges.



Jerry Bernard McGee,
Plaintiff-Appellant,

v.

02-6221

Commissioner of Social Security,
James A. Kissko,
Acting Deputy Commissioner,
Defendant-Appellee.

Appellant, *pro se*, appeals from a district court order transferring his case to the Northern District of Texas. A transfer order pursuant to 28 U.S.C. § 1291 is an interlocutory order that is not immediately appealable. See Fort Knox Music, Inc. v. Baptiste, 257 F.3d 108 (2d Cir. 2001). Accordingly, this Court lacks jurisdiction over the this appeal, and it is ORDERED that the appeal is dismissed.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

FEB -4 2003

By: Lucille Can

Exhibit A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JERRY McGEE,

Petitioner,

v.

UNITED STATES OF AMERICA and UNITED STATES
NUCLEAR REGULATORY COMMISSION,
Respondents,

Case No. 03-60245.

I hereby certify under penalty of perjury that the FEDERAL RESPONDENTS' MOTION TO DISMISS was served by placing copies of the same in the United States Mail, postage prepaid, addressed to:

Jerry Bernard McGee
159 Cowboys Parkway, #1026
Irving, Texas 75063



CHARLES E. MULLINS
Senior Attorney
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U.S. Nuclear Regulatory Commission
(301) 415-1606
(301) 415-3200 (fax).

Dated: June 3, 2003.