

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER
Petitioner
v.
The FEDERAL AVIATION ADMINISTRATION, MICHAEL P. HUERTA, in his official capacity as Administrator of the Federal Aviation Administration, and ANTHONY R. FOXX, in his official capacity as United States Secretary of Transportation,
Respondents

Case No. 15-1075

EPIC’S RESPONSE TO THE FAA’S MOTION TO DISMISS

The motion to dismiss filed by the Federal Aviation Administration (“FAA” or “Agency”) should be denied because EPIC’s Petition for Review was properly filed under 49 U.S.C. § 46110.

The FAA’s Motion to Dismiss relies on two incorrect assumptions: first, that EPIC is challenging the substance of the Agency’s recently proposed drone regulations; and, second, that EPIC was required to file the petition for review prior to the Agency’s publication of proposed drone rules. As EPIC’s Petition makes clear, neither assertion is true. EPIC is not

challenging the proposed drone rules outlined in the Agency's Notice of Proposed Rulemaking ("NPRM") entitled "Operation and Certification of Small Unmanned Aircraft Systems." Pet., Ex. 1, at 9544. Rather, EPIC is challenging the agency order denying EPIC's 553(e) Petition for a rulemaking to establish drone privacy rules. The FAA's order denying EPIC's 553(e) Petition was not reviewable until the NPRM was issued because the Agency informed EPIC that it should anticipate privacy issues being addressed in the proposed rule; however, in the recently released NPRM, the Agency determined that it would not address the issue raised in EPIC's 553(e) Petition. It is disingenuous at best for the Agency to now argue that EPIC was required to file a petition for review before the Agency issued the proposed rule.

FACTUAL BACKGROUND

On March 8, 2012, EPIC submitted a petition to the FAA under 5 U.S.C. § 553(e), requesting that the Agency "conduct a rulemaking to address the threat to privacy and civil liberties that will result from the deployment of aerial drones within the United States." Pet., Ex. 3, at 1. Over 100 privacy experts, organizations, and members of the public joined EPIC's Petition. *Id.* at 5–8. EPIC noted, "[t]he FAA Modernization and Reform Act of 2012 provides a timely opportunity for [the FAA] to address [the threat to

privacy and civil liberties that will result from the deployment of aerial drones within the United States].” *Id.* at 1.

EPIC explained in detail the substantial civil liberties and privacy threats that drones pose. EPIC stated, “[w]ith special capabilities and enhanced equipment, drones are able to conduct far more detailed surveillance, obtaining high resolution picture and video, peering inside high level windows, and through solid barriers, such as fences, trees, and even walls.” *Id.* at 4.

As EPIC explained, “[p]ursuant to the FAA Modernization and Reform Act, the FAA is required to: (1) ‘develop a comprehensive plan’ to implement drones into civil commerce; and (2) provide guidance on a public entity’s responsibility when operating an unmanned aircraft.” *Id.* EPIC requested the FAA to “assess the privacy problems associated with the highly intrusive nature of drone aircraft, and the ability of operators to gain access to private areas and to track individuals over large distances.” *Id.* In light of the substantial privacy threats that drone deployment in the U.S. poses, EPIC and the coalition petitioned the FAA to:

- (1) conduct a notice and comment rulemaking on the impact of privacy and civil liberties related to the use of drones in the United States. In order to adequately address all of the potential threats, the FAA should examine and report on the impact on privacy to individuals within the scope of their comprehensive plan to safely integrate civil

drones into the national airspace, required under § 322(a) of the FAA Modernization and Reform Act.

- (2) conduct a notice and comment rulemaking on the impact of privacy and civil liberties related to the use of drones by government operators pursuant to the agency actions required under § 324(c) of the FAA Modernization and Reform Act.
- (3) take into consideration during the notice and comment rulemaking the use and retention of data acquired by drone operators; the relation between drone operation and property rights; the ability of an individual to obtain a restraining order against a drone vehicle; and use limitations on drone vehicles and requirements for enforcement of those limitations. In relation to the government use of drones, the rulemakings should also consider the application of the Privacy Act of 1974 to the information gathered by drone operators.

Id. at 5.

More than two years later, the FAA responded to EPIC's 553(e) Petition in a letter dated November 26, 2014. Pet., Ex. 2 ("FAA Letter").

The FAA responded as follows:

After reviewing your request, we have determined that the issue you have raised is not an immediate safety concern. Moreover, the FAA has begun a rulemaking addressing civil operation of small unmanned aircraft systems in the national airspace systems. *We will consider your comments and arguments as part of that project.*

Id. at 1. (Emphasis added)

Contrary to the FAA's assertion in the Motion to Dismiss, the FAA Letter plainly did not represent the agency's final determination regarding EPIC's 553(e) Petition. The FAA concedes this point in the Motion to

Dismiss. Mot. to Dismiss at 3 (“The FAA further explained that it had begun a rulemaking to address small unmanned aircraft systems and that it would consider petitioner’s comments as part of that rulemaking process.”). The most obvious interpretation of the text is that the Agency would address the “comments and arguments” contained in EPIC’s 553(e) Petition in the rulemaking.

The Agency did not in fact deny the EPIC Petition until the decision to exclude privacy issues from the rulemaking process was made final in the recently published NPRM. Prior to the issuance of that Notice, the Agency made clear that it would “consider” privacy-related “arguments as part of” the rulemaking process, FAA Letter, *supra*, at 1, and it would have been premature for EPIC to challenge the Agency action with the expectation that the issue raised in the Petition would be addressed. But, in the NPRM, the Agency changed course and found that “privacy concerns” raised by EPIC and others “are beyond the scope of this rulemaking.” Pet., Ex. 1, at 9552.

This Court also has a clear alternative basis to review the Agency order under Section 46110 because EPIC had reasonable grounds not to file the petition prior to the issuance of the NPRM. Specifically, the Agency indicated in the FAA Letter that EPIC should expect privacy issues to be addressed in the proposed rule. Under these circumstances, it would have

been premature and a waste of judicial resources for EPIC to file its petition prior to issuance of the NPRM.

ARGUMENT

The FAA concedes that EPIC filed a petition more than three years ago under the Administrative Procedure Act, 5 U.S.C. § 553(e), requesting that the Agency conduct a rulemaking concerning the privacy impact of drone deployment in the national airspace. The Agency also concedes that it has denied EPIC's 553(e) Petition. The FAA order denying the 553(e) Petition is now ripe for judicial review under the APA and this Court should not dismiss EPIC's Petition for Review.

This Court has long held that "refusals to engage in requested rulemaking constitute final agency action" reviewable under the APA. *See Env'tl. Def. Fund v. Reilly*, 909 F.2d 1497, 1504 n.97 (D.C. Cir. 1990) (citing *Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 723 (D.C. Cir. 1984); *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981); *NRDC v. SEC*, 606 F.2d 1039, 1045–46 (D.C. Cir. 1979)). The FAA's denial of a petition for rulemaking is reviewable, as are all orders issued by the Agency, under 49 U.S.C. § 46110. The term "order" in Section 46110 should "be read expansively." *Safe Extensions*, 509 F.3d 593, 598 (D.C. Cir. 2007). *See also City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1187 (D.C. Cir.

2007) (citing *Aviators for Safe & Fairer Regulation v. FAA*, 221 F.3d 222, 225 (1st Cir. 2000)).

Under Section 46110, a “person disclosing a substantial interest in an order” issued by the FAA “may apply for review of the order by filing a petition for review” with this Court. 49 U.S.C. § 46110(a). The petition must be filed within “60 days after the order is issued,” but the court may also “allow the petition to be filed after the 60th day” if there are “reasonable grounds for not filing by the 60th day.” *Id.* The term “order” in Section 46110 has been understood “to mean an order as defined in the Administrative Procedure Act, 5 U.S.C. § 551(6), namely, ‘the whole or a part of a final disposition . . . of an agency in a matter other than rulemaking’ and ‘final’ in the ordinary sense that it ‘mark [s] the consummation of the agency’s decisionmaking process, and determin[e] rights or obligations or give[s] rise to legal consequences.” *SecurityPoint Holdings, Inc. v. TSA*, 769 F.3d 1184, 1187 (D.C. Cir. 2014).

Both the FAA Letter and the NPRM meet this broad definition of an “order” with respect to EPIC’s 553(e) Petition but, unlike the NPRM, the FAA Letter clearly indicates that it should not be construed as a final determination. In addition, the language of the FAA Letter provides

reasonable grounds to justify EPIC's decision not to file a petition for review until after the NPRM was issued.

1. THE FAA'S DENIAL OF EPIC'S 553(E) PETITION WAS NOT FINAL UNTIL THE AGENCY ISSUED THE NPRM

In its motion to dismiss, the FAA acknowledged that the denial of EPIC's 553(e) Petition is a reviewable order, Mot. to Dismiss at 7, but the Agency incorrectly argued that the denial was final prior to the issuance of the NPRM. In order to be reviewable, an order must also "possess the quintessential feature of agency decisionmaking suitable for judicial review: finality." *City of Dania Beach*, 485 F.3d at 1187 (citing *Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006)).

To be deemed "final," an order must mark "the 'consummation' of the agency's decisionmaking process," and must determine "rights or obligations" from which "legal consequences will flow." *Amerijet Intern., Inc. v. Pistole*, 753 F.3d 1343, 1349 (D.C. Cir. 2014) (citing *CSI Aviation Servs., Inc. v. DOT*, 637 F.3d 408, 411 (D.C. Cir. 2011)). An order will not be considered final if it is merely a "tentative conclusion." *Id.* Any indication that a decision is "open to further consideration, or conditional on future agency action" will tend to show that an order is not yet final. *City of Dania Beach*, 485 F.3d at 1188. *See also Village of Bensenville*, 457 F.3d at

69 (finding that a Letter of Intent is not a final order because its decision is contingent and will “require further administrative process”).

Judicial review is “restricted to review of final agency orders” so as to “avoid premature intervention in the administrative process.” *CSI Aviation Servs.* 637 F.3d at 411 (internal quotation marks omitted). And that is precisely why EPIC did not file the Petition for Review until *after* the FAA issued its drone NPRM. The FAA Letter clearly stated that “the FAA has begun a rulemaking addressing civil operation of small unmanned aircraft systems in the national airspace system” and that the Agency would “consider [EPIC’s] comments and arguments as part of that project.” FAA Letter, *supra*, at 1. In reliance on the Agency’s representation, EPIC chose to wait for the issuance of the NPRM, anticipating that the rulemaking would provide an opportunity to address the privacy implications of civilian drone deployment.

The FAA’s decision not to initiate a *new* rulemaking was not a final denial of EPIC’s 553(e) Petition because the Agency stated that it would address the substance of EPIC’s 553(e) Petition in the current rulemaking. However, when the Agency released the NPRM, it made the final decision to completely exclude privacy issues from consideration. *See* Pet., Ex. 1, at 9552 (“The FAA also notes that privacy concerns have been raised about

unmanned aircraft operations [T]hese issues are beyond the scope of this rulemaking.”).

Like the Letter of Intent in *Village of Bensenville* and the oral denial in *Amerijet*, the FAA Letter did not mark the consummation of the agency’s decisionmaking process. As of November 2014, the FAA still anticipated that it would “consider” privacy issues in the current rulemaking. It was not until the agency issued an order finding that privacy issues were “beyond the scope” of the current rulemaking that the denial of EPIC’s 553(e) Petition became final.

2. EPIC HAD REASONABLE GROUNDS TO WAIT TO FILE THE PETITION UNTIL AFTER THE NPRM WAS ISSUED

Section 46110 states that a petition for review of a decision by the FAA “must be filed not later than 60 days after the order is issued,” but it also specifies that the court “may allow the petition to be filed after the 60th day” if there are “reasonable grounds for not filing by the 60th day.” 49 U.S.C. § 46110(a). EPIC had reasonable grounds for filing its petition for review more than 60 days after the FAA Letter because the Agency indicated that it would consider privacy issues as part of the current rulemaking.

In EPIC’s 553(e) Petition, EPIC urged the FAA to “conduct rulemaking to address the threat to privacy and civil liberties that will result

from the deployment of aerial drones” within the United States. Pet., Ex. 3, at 1. In a letter dated November 26, 2014, the FAA responded to EPIC’s petition declining to conduct a separate rulemaking. FAA Letter, *supra*. But, the FAA stated that it would “consider” the issues raised in EPIC’s petition to the FAA as part of a larger rulemaking. *Id.* at 1.

Given the Agency’s stated intention to consider privacy issues in the current rulemaking, EPIC had reasonable grounds to wait to file the Petition for Review. There was no reason to expend limited judicial resources by filing a petition if the FAA was going to consider the issues EPIC raised in an upcoming rulemaking. See *Paralyzed Veterans of Am. v. CAB*, 752 F.2d 694, 705 n.82 (D.C. Cir. 1985), *rev’d on other grounds sub nom. DOT v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (noting that “[a]ny delay simply served properly to exhaust petitioners’ administrative remedies, and to conserve the resources of both the litigants and this court”).

Like the Petitioner in *Safe Extensions*, EPIC took a “wait and see” approach in order to “avoid litigation” that was potentially unnecessary and to “conserve the resources of both the litigants and this court.” *Safe Extensions*, 509 F.3d at 603–04. In fact, if EPIC had filed the Petition for Review prior to issuance of the NPRM, as the FAA implies that it should have, then the entire Petition could well have been mooted by the issuance

of the Agency's NPRM. If the FAA had addressed privacy issues in the proposed rule, as the Agency previously indicated it would, then EPIC's 553(e) Petition would have been effectively granted. Therefore, it would have been a waste of judicial resources and contrary to principles of administrative exhaustion for EPIC to file prior to the NPRM.

Unlike in other cases where the Court has denied petitions as untimely, EPIC's delay was not the result of ignorance. *See, e.g., Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 521 (D.C. Cir. 2011) (emphasizing that this court has "found 'reasonable grounds' only in cases in which the petitioner attributes the delay to more than simply ignorance of the order"). EPIC's delay was based on reasonable grounds in line with this Court's precedent. *See Safe Extensions*, 509 F.3d at 602-04 (D.C. Cir. 2007) (finding "reasonable grounds" where FAA made statements that suggested it would address petitioner's concerns). Here, as in *Safe Extensions*, the FAA made representations that the issues EPIC raised in its 553(e) Petition would be addressed. EPIC filed the Petition for Review in a timely manner after the Agency reneged on those representations.

Respectfully Submitted,

By: /s/ Marc Rotenberg

Marc Rotenberg*

Alan Butler

Khaliah Barnes

Jeramie Scott

Electronic Privacy Information Center

1718 Connecticut Ave., NW

Washington, D.C. 20009

TEL: (202) 483-1140

E-MAIL: rotenberg@epic.org

Dated: May 28, 2015

* *Counsel of Record*