[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER, Petitioner, v. FEDERAL AVIATION ADMINISTRATION, Respondent.	No. 15-1075

REPLY IN SUPPORT OF MOTION TO DISMISS

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ARGUMENT

Petitioner has now made clear that it does not challenge the FAA's notice of proposed rulemaking, "Operation and Certification of Small Unmanned Aircraft Systems," 80 Fed. Reg. 9544 (Feb. 23, 2015). Opp. 1-2. And petitioner acknowledges that it did not file a petition for review from the FAA's dismissal of its rulemaking petition within the 60-day time frame contained in 49 U.S.C. § 46110. Opp. 10. As explained in our motion to dismiss, the petition for review is therefore untimely.

Petitioner's response is two-fold. First, petitioner asserts that the FAA's letter dismissing petitioner's request for rulemaking was not the final denial of its request. Instead, petitioner argues that the notice of proposed rulemaking on small unmanned aircraft systems—which did not take action on the rulemaking request—was the actual denial of petitioner's request for rulemaking. Opp. 8-10. Second, petitioner urges that its failure to timely challenge the FAA's dismissal of its rulemaking petition is excusable because it wanted to wait and see whether the notice of proposed rulemaking would address its privacy concerns. Opp. 10-12. Neither argument is persuasive.

1. As explained in our motion to dismiss, the FAA's letter denying petitioner's rulemaking petition was a final agency action. The letter makes clear that the FAA is "dismissing [the] petition for rulemaking in accordance with 14 C.F.R. §11.73." Pet., Ex. 2, at 2. Petitioner relies on a statement in the letter that the FAA had begun a rulemaking to address small unmanned aircraft systems and would "consider"

petitioner's comments as part of that rulemaking process. *Id.* at 1. But that statement did not qualify the definitive agency determination dismissing the rulemaking petition.

An examination of the relevant FAA regulation underscores this point. Section 11.73 provides several enumerated actions the FAA may take in response to a rulemaking petition. 14 C.F.R. § 11.73. In determining the appropriate action to be taken, the FAA considers the immediacy of the safety or security concerns raised in the petition, the priority of other issues the FAA must address, and the resources it has available to address these issues. *Id.* at §11.73(a). The FAA may exercise its discretion to "dismiss the petition" based on these considerations. *Id.* at 11.73(e). That is precisely what the FAA did here. In fact, the FAA's letter explained that the final decision to deny the petition was made because the issue raised by petitioner was not an immediate safety concern. *See Id.*

Petitioner likewise cannot avoid its untimeliness problem by ignoring the relevant administrative decision and attempting to frame its claim more broadly as a challenge to the FAA's handling of "privacy issues." Opp. 10. Petitioner sought specific relief from the FAA regarding the initiation of a rulemaking, and the FAA denied that relief by dismissing the petition.

Moreover, even assuming the truth of petitioner's premise that the FAA's letter was not a final agency action and instead became part of FAA's ongoing rulemaking on small unmanned aircraft systems, the petition for review would still be improper

under 49 U.S.C. § 46110. This is because the unmanned aircraft systems notice of proposed rulemaking is not a final order. *See Las Brisas Energy Center, LLC v. E.P.A.*, 2012 WL 10939210 (Dec. 13, 2012) (unpublished) (granting motions to dismiss and explaining that "[t]he challenged proposed rule is not final agency action subject to judicial review. . ."). Thus, under petitioner's reading of the FAA's letter, petitioner must wait for issuance of a final rule to challenge any perceived shortcomings in FAA's response to its comments regarding privacy concerns. Petitioner may not transform the notice of proposed rulemaking into final agency action by construing it as the denial of a rulemaking petition.

2. Petitioner's argument that its delay should be excused is equally unavailing. Petitioner made a choice not to challenge the FAA's letter dismissing its rulemaking petition and instead to wait for the notice of proposed rulemaking. And the FAA did not "renege" on any promise with respect to the notice of proposed rulemaking; the FAA's letter informed petitioner that it would "consider" the issues raised. Having made its decision not to challenge the dismissal of its rulemaking petition, petitioner must now await the conclusion of the rulemaking proceeding before bringing a challenge to the substance of the final rule. *Paralyzed Veterans v. CAB,* 752 F.2d 694, 705 n.82, *rev'd on other grounds sub nom. DOT v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (cited at Opp. 11), only underscores the error of petitioner's argument. There, petitioners awaited the issuance of a final rule. *See id.* ("[P]etitioners elected to wait until the regulation was in final form before seeking review."). Petitioner contends

here both that (1) the FAA's letter was not a final denial of its rulemaking petition because the FAA subsumed the rulemaking petition into ongoing rulemaking proceedings and (2) even under this theory it need not wait until the FAA has concluded rulemaking proceedings to file a petition for review. For the reasons explained *supra* 2-3, petitioner is incorrect.

Petitioner's reliance on *Safe Extensions v. FAA*, 509 F.3d 593, 602-04 (D.C. Cir. 2007), is also misplaced. The timeliness issue in that case—which was not raised by the FAA—turned on a factual dispute regarding the content of oral statements by FAA employees to Safe Extensions employees with respect to the tentativeness of an advisory circular. Here, in contrast, the FAA unequivocally dismissed the rulemaking petition, and petitioner has presented no reasonable grounds for its delay in challenging that dismissal. *Cf.* . *See Americopters, LLC v. FAA*, 441 F.3d 726, 734 (9th Cir. 2006) ("To be sure, idleness did not cause [petitioners] to miss their deadlines. But their quixotic pursuit of the wrong remedies was not a reasonable ground for delay.").

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2015, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Abby C. Wright
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