



initial decision, from which the parties cross-appealed. The appeal briefs were due on December 21, 1989, pursuant to 14 C.F.R. 13.233(c).<sup>1/</sup>

Respondent wrote in its request for an extension of time that the law judge had ordered FAA counsel to provide color copies of photographs introduced into evidence by the FAA at the hearing (presumably Exhibit 1), and that the FAA had failed to supply these color copies. Respondent baldly asserted in its letter that it needs those copies in order to prepare its appeal brief.

The FAA opposes Respondent's request which, according to FAA counsel, was made at the "eleventh hour" because, as he asserts, Respondent should not have waited until one week before its brief was due before realizing that more information was needed to prepare its brief. Therefore, FAA counsel writes, Respondent has not demonstrated good cause for the requested extension of time. FAA counsel interestingly has

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<sup>1/</sup> Section 13. 233(c) provides in pertinent part:

Unless otherwise agreed by the parties, a party shall perfect an appeal, not later than 50 days after entry of the oral initial decision on the record ... by filing an appeal brief with the FAA decisionmaker.

14 CFR 13.233(c).

failed to either agree or disagree with Respondent's assertion that there was an order by the law judge to produce color photographs. FAA counsel did note, however, that he does not possess the negatives or color copies of the subject photographs, which were given to the FAA by an outside party.

Section 13.233(c)(2) of the Rules of Practice, 14 CFR 13.233(c)(2), provides that in situations in which the parties do not agree to extend the time for the filing of an appeal brief, the FAA decisionmaker may grant an extension of time if good cause is shown.<sup>2/</sup> To make this determination, I have reviewed the record of the proceeding. Respondent may well have an honest misunderstanding that he would be receiving color copies of the subject photographs. The "support" in the record for Respondent's contention that the law judge ordered the FAA to provide color copies of the photographs, it seems to me, is equivocal at best.<sup>3/</sup> Consequently, in light of

<sup>2/</sup> Section 13.233(c)(2) provides:

Written motion for extension. If the parties do not agree to an extension of time for perfecting an appeal, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker . . . . The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

14 CFR 13.233(c)(2) (emphasis added).

<sup>3/</sup> This misunderstanding might be the result of an off-the-record discussion which, I presume, concerned these photographs.

this albeit weak showing of good cause,<sup>4/</sup> Respondent will be granted a limited extension of 10 days from the date of service of this order to file his appeal brief.

In making this finding that Respondent has made a showing of good cause for a limited extension, I have taken into consideration the fact that the Civil Penalty Demonstration Program is still in its early stages and that Respondent's request was received by the Appellate Docket Clerk on the eve of the expiration of the 50-day period for the filing of appeal briefs, and, therefore, technically was not late.<sup>5/</sup>

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<sup>4/</sup> Parties should be mindful of the fact that once this infant Civil Penalty Demonstration program, "matures" and case law interpreting the Rules has been written, a stronger showing of good cause may be required.

<sup>5/</sup> I do not anticipate in future cases that it would be likely that I will consider that a requesting party has demonstrated good cause unless its request is received prior to the expiration of the time period for filing an appeal brief. Parties should be aware of the fact that the mere filing of a request for an extension of time in which to file a brief does not automatically stay a filing deadline. Thus, unless I grant an extension of time, or a member of my staff or the Appellate Docket Clerk, acting under my direction, informs a requesting party prior to the passage of the filing deadline that the request for an extension has been or will be granted, the requesting party has no reason to believe that the filing deadline has indeed been extended. Hence, if a requesting party is not notified that its request for an extension of time in which to file an appeal brief is or will be granted, and yet allows the due date to pass, that party runs the risk that its appeal will be dismissed for failure to perfect in a timely fashion. Thus parties would be wise to

Moreover, it appears that no prejudice will result to the FAA if the 10-day extension is granted and the FAA has not argued otherwise. To ensure that the FAA is not prejudiced, I am ordering that Respondent not use its appeal brief as a vehicle for responding to the FAA's cross-appeal brief, which has recently been filed in a timely fashion. Respondent will have ample opportunity to respond to the FAA's cross-appeal  
Respondent files its reply brief.<sup>6/</sup>

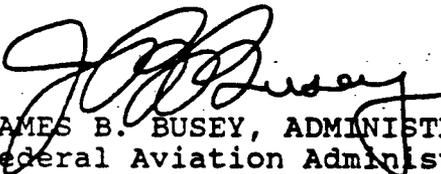
avoid both 1) "eleventh hour" requests for extensions of time and 2) the use of regular mail, rather than an expedited mail or messenger service, to send written requests to the Appellate Docket Clerk for my consideration. Additionally, a requesting party would be prudent to contact the opposing party or, if represented, opposing party's counsel, to ascertain whether an agreement can be reached regarding an extension; if the requesting party is authorized to represent that such an agreement has been reached, consideration of the request can be expedited.

In this case, the Appellate Docket Clerk, acting pursuant to my direction, informed Respondent by telephone on December 21st, that a 10-day extension would be granted.

<sup>6/</sup> This decision should not be construed as extending the time for filing Respondent's Reply Brief.

THEREFORE, it is ordered that:

- 1) Respondent is granted a 10-day extension of time from the date of service of this Order to file its Appeal Brief, and
- 2) Respondent is to not to use its Appeal Brief to respond to arguments presented by FAA in its Appeal Brief.

  
JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued: December 22, 1989