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Sent: Wednesday, May 21, 2014 11:21 AM
To: BoardAppeals; ALJappeals; susan.caron@faa.gov; mmckinnon@mckennalong.com
Subject: Administrator v. Pirker; Docket No. CP-217
Attachments: Pirker003.pdf

Counsel:

Please see attached Response filed by Respondent with respect to the motion recently submitted by "Former FAA Officials" in this proceeding.

Very truly yours,
Brendan Schulman

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. RAPHAEL PIRKER, Respondent.	:	Docket No. CP-217 Appeal from March 6, 2014 Decisional Order of Judge Patrick G. Geraghty

RESPONDENT'S RESPONSE TO MOTION OF FORMER FAA OFFICIALS

Respondent Raphael Pirker respectfully submits this Response to the May 16, 2014, motion of "Former FAA Officials" John McGraw and Nick Sabatini for leave to file an amicus brief (the "Motion").

Respondent does not oppose Former FAA Officials' Motion, because he believes that the views of other properly interested parties may be heard on motion if deemed appropriate by the General Counsel, when the Board reviews this unprecedented abuse of agency discretion. However, Respondent is compelled to submit this Response to the Motion to note several reasons why this amicus submission, if accepted by the General Counsel for filing, ought not be credited with the weight that it seeks to command.

First, although the Former FAA Officials' brief purports to be neutral as to the outcome of the appeal, it clearly is not. The amici claim they "do not take a position in favor of either party," but the brief directly challenges Judge Geraghty's conclusions and analysis, and argues that the decisional order was incorrectly decided. Thus, it is actually a brief in support of

the Administrator that ought to have been filed no later than April 7, 2014, absent a showing of "good cause for late filing," which has not been shown. 49 C.F.R. § 821.9. Dissatisfaction with the Administrator's briefing is not good cause for a second bite at the apple paid for by private parties; their arguments, to the extent they are appropriate, could have been raised at any time after the Decisional Order was issued.

Second, the Former FAA Officials are most certainly not neutral friends of the court who are motivated "solely by a desire" to address safety concerns, as they claim. Motion p. 3. These amici have not disclosed what they do now for a living, which presumably involves work in the aviation industry with the potential to return one day as employees of the FAA. As former agency officials, they are closely aligned with the agency's policies and its litigation position. Indeed, Mr. Sabatini's own name appears in the Federal Register as author of Notice 07-01 -- the very policy statement that purported to prohibit commercial model aircraft operations and that is the actual impetus for the FAA's enforcement action against Mr. Pirker. *See* Respondent's Reply Exhibit B.

Finally, the submission largely consists of a discussion of the purported impact of a 2012 statute on *future* possible enforcement actions, a subject that is outside the scope of this proceeding concerning conduct that occurred in 2011, and purported concern about media coverage of what the amici refer to as "dicta." NTSB rules require that the General Counsel determine, prior to granting the leave sought by the Former FAA Officials on motion, that "the brief will not unduly broaden the matters at issue." 49 C.F.R. § 812.9(b). Unlike several other amici, these parties did not seek or obtain the consent of the parties prior to filing. While Mr. Pirker does not object to the filing of the Former FAA Officials' brief, he notes that hypothetical, future enforcement actions are not "matters at issue" in this proceeding. Moreover, the FAA

employs media spokespeople, and at a recent industry conference was observed distributing to the public color glossy brochures expressing advocacy positions with respect to this proceeding (attached) which are also posted on the agency's website.

Although Respondent does not object in principle to the amicus parties who have sought to be heard in this proceeding, this amicus brief ought to be recognized for what it is, an untimely partisan submission on behalf of the FAA by two of its former officials, whose legacy has been placed at issue by Mr. Pirker's challenge to the FAA's policies they had a hand in creating.

Dated: May 21, 2014

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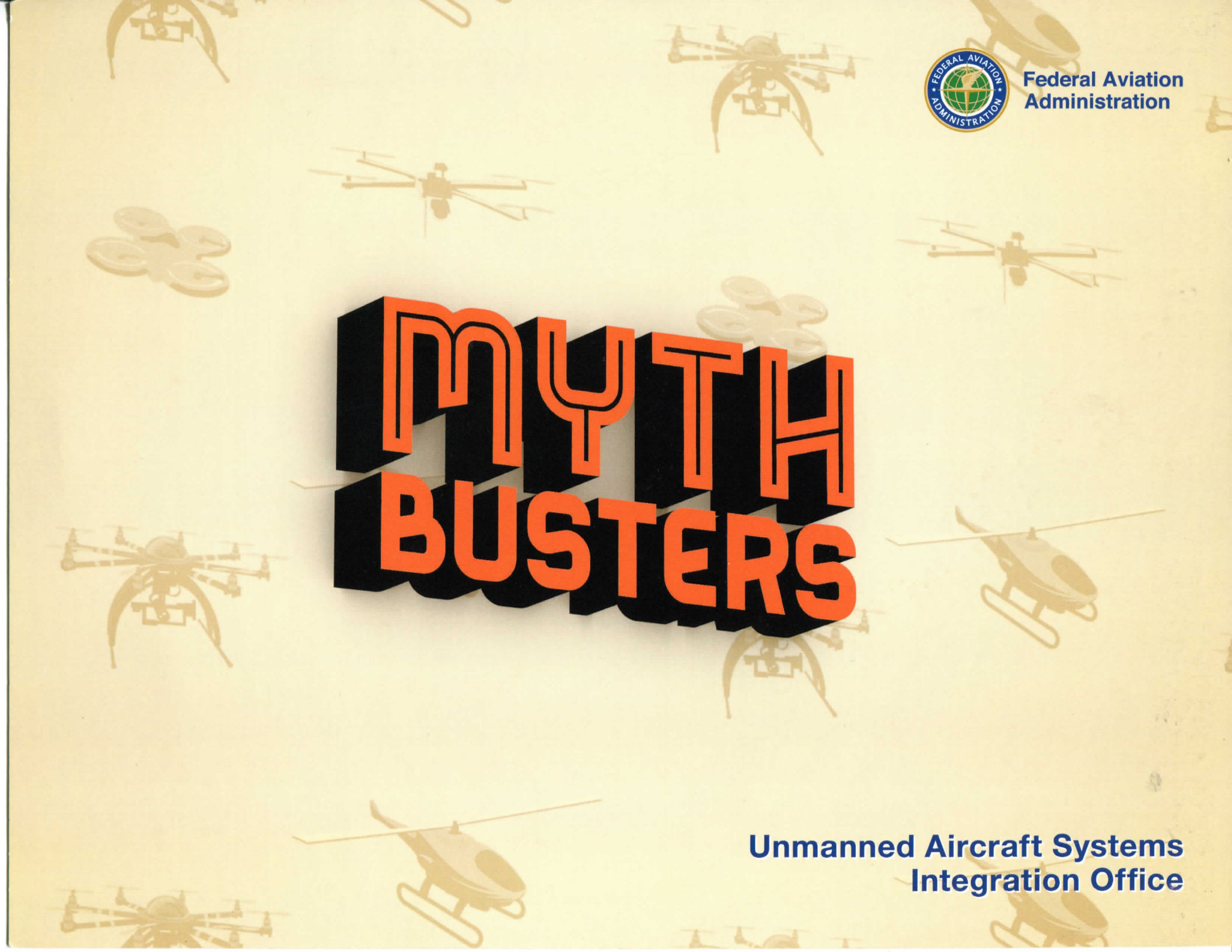

Federal Aviation Administration

MYTH BUSTERS

Unmanned Aircraft Systems Integration Office

Busting Myths about the FAA and Unmanned Aircraft

Myth 1: Unmanned aircraft are not aircraft.

Fact: Unmanned aircraft, regardless of whether the operation is for recreational, hobby, business or commercial purposes, are aircraft within both the definitions found in Title 49, Section 40102(a)(6) of the U.S. Code and Title 14, Section 1.1 of the Code of Federal Regulations.

U.S. Code defines an aircraft as "any contrivance invented, used, or designed to navigate or fly in the air." FAA regulations similarly define an aircraft as "a device that is used or intended to be used for flight in the air." An unmanned aircraft falls under this unambiguous language.

In addition, Public Law 112-95, Section 331(6), (8), and (9) expressly define the terms "small unmanned aircraft," "unmanned aircraft," and "unmanned aircraft system" as aircraft. Model aircraft also are defined as "aircraft" per Public Law 112-95, Section 336(c).

Myth 2: Unmanned aircraft are not subject to FAA regulation.

Fact: All civil aircraft are subject to FAA regulation under Title 49 Section 44701 of the U.S. Code. For example, Title 14, Part 91 of the Code of Federal Regulations applies generally to the operation of aircraft.

Myth 3: The FAA doesn't control airspace below 400 feet.

Fact: The FAA is responsible for air safety from the ground up. Under Title 49, Section 40103(b)(2) of the U.S. Code, the FAA has broad authority to prescribe regulations to protect individuals and property on the ground, and to prevent collisions between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects. Consistent with its authority, the FAA presently has regulations that apply to the operation of all aircraft, whether manned or unmanned, and irrespective of the altitude at which is they are operating. For example, Title 14, Section 91.13 of the Code of Federal Regulations prohibits any person from operating an aircraft in a way that endangers the life or property of another.

Myth 4: UAS flights operated for commercial or business purposes are OK if the vehicle is small and operated below 400 feet over private property.

Fact: All UAS operations for commercial or business purposes are subject to FAA regulation. At a minimum, any such flights require a certified aircraft and a certificated pilot. UAS operations for commercial or business purposes cannot be operated under the special rule for model aircraft found in Section 336 of Public Law 112-95.

To date, only two UAS models, the Scan Eagle and AeroVironment's Puma, have been certified for commercial use, and they are only authorized to fly in the Arctic. Federal, state and local governments and public universities may apply for waivers. The FAA reviews and approves UAS operations over densely populated areas on a case-by-case basis.

Myth 5: There are too many commercial UAS operations for the FAA to stop.

Fact: The FAA has to prioritize its safety responsibilities, but the agency is monitoring UAS operations closely. Many times, the FAA learns about suspected commercial UAS operations via a complaint from the public or other businesses. The agency occasionally discovers such operations through the news media or postings on Internet sites. The agency has a number of enforcement tools available to address these operations, including verbal warnings, warning letters and legal enforcement actions.

Myth 6: Commercial UAS operations will be OK after September 30, 2015.

Fact: In the 2012 FAA reauthorization legislation (Public Law 112-95), Congress told the FAA to create a plan for "safe integration" of UAS by September 30, 2015. Safe integration will be incremental. The agency is writing regulations that will apply specifically to a wide variety of UAS users and supplement existing regulations that apply to the operation of both manned and unmanned. The FAA expects to publish a proposed rule for small UAS – under about 55 pounds – later this year. That proposed rule likely will include provisions for commercial operations.

Myth 7: The FAA is lagging behind other countries in approving commercial drones.

Fact: This comparison is flawed. The United States has the busiest, most complex airspace in the world, including many general aviation aircraft that we must consider when planning UAS integration because they may occupy the same airspace as small UAS.

Developing all the rules and standards we need is a very complex task, and we want to make sure we get it right the first time. We want to strike the right balance of requirements for UAS to help foster growth in an emerging industry with a wide range of potential uses and keeping all airspace users and people on the ground safe.

Myth 8: The FAA predicts as many as 30,000 drones by 2030.

Fact: That figure is outdated. It was an estimate in the FAA's 2011 Aerospace Forecast. Since then, the agency has refined its prediction to focus on the area of greatest expected growth.

We believe civil UAS markets will evolve within the constraints of the regulatory and airspace requirements. Once enabled, commercial markets will develop and demand will be created for additional UAS and the accompanying services they can provide. We estimate roughly 7,500 commercial small UAS will be viable at the end of five years.

CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent by United States First Class mail, postage pre-paid, a copy of Respondent's Response to Motion of Former FAA Officials in the appeal of a March 6, 2014 decision order in *Administrator v. Pirker*, Docket No. CP-217, addressed to:

Susan S. Caron, Esq.
Federal Aviation Administration
Enforcement Division, AGC-300
Office of the Chief Counsel
800 Independence Avenue, S.W.
Washington, D.C. 20591

Mark E. McKinnon
McKENNA LONG & ALDRIDGE LLP
1900 K Street, NW
Washington, DC 20006-1102

In addition, I hereby certify that on this date I have sent by United States mail, postage prepaid, to BoardAppeals@ntsb.gov, an original and one copy of the foregoing document to:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594

Brendan M. Schulman
Counsel for Respondent Raphael Pirker

Dated: May 21, 2014