U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

JAN 16 2018

Mr. Jeff Van West
[redacted]

Re: Request for Legal Interpretation of 14 CFR § 91.185(c)(3)(ii)

Dear Mr. Van West:

This letter responds to your September 15, 2017, request for an interpretation of 14 CFR § 91.185(c)(3)(ii). You ask that the FAA reexamine its previous interpretations in Desselles (2009), Olshock (2010), and Tuuri (2010, 2011). You acknowledge that the FAA's position in its previous interpretations is consistent with its regulations. However, you argue that it is inconsistent with current air traffic practices and creates an unnecessary hazard.

Section 91.185 provides operating requirements for aircraft experiencing two-way radio communication loss. Paragraph (c)(3)(ii) of § 91.185 describes the protocol for leaving a clearance limit to commence descent or descent and approach when the clearance limit is not a fix from which an approach begins:

> (ii) If the clearance limit is not a fix from which an approach begins, leave the clearance limit at the expect-further-clearance time if one has been received, or if none has been received, upon arrival over the clearance limit, and proceed to a fix from which an approach begins and commence descent or descent and approach as close as possible to the estimated time of arrival as calculated from the filed or amended (with ATC) estimated time en route.

You argue that since most IFR clearances issued by ATC have a clearance limit of the destination airport, the current interpretation requires an aircraft to hold over the destination airport until the expected time of arrival and then descend and commence the final approach. You contend that requiring the pilot to hold until the expected time of arrival in the flight plan rather than descend and begin final approach when the aircraft arrives at the clearance limit could affect the pilot's levels of anxiety and preparedness for the final approach and impact other aircraft approaching the airport. You offer that instead the ATC should be prepared for an immediate approach and not hold the aircraft

until their expected time of arrival, because an operable transponder means ATC radar is in contact with the aircraft and knows its position, which could be considered an update of the estimated time of arrival.

We have previously explained that when a pilot flies an IFR flight plan, an estimated time of arrival at the destination is part of the flight plan.[1] If during the flight the aircraft loses radio communication, the clearance limit of the aircraft is the destination. If the aircraft arrives early at its clearance limit, the pilot should hold at the approach fix and commence descent and approach as close as possible to the estimated time of arrival.[2]

As you correctly state in your letter, the requirements of § 91.185(c)(3)(ii) are rarely in effect thanks to the improved technology ensuring that communications between pilot and ATC are not lost. However, the requirements of (c)(3)(ii) are necessary to ensure the safety of the NAS when a pilot is unable to communicate with ATC. An operable transponder is not a substitute for two-way communication between the pilot and ATC, nor for the estimated time of arrival filed in the pilot's flight plan on which the ATC relies to make other safety-based determinations. Therefore, we affirm our previous interpretations of § 91.185(c)(3).

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This letter has been prepared by Sarah Yousaf, Operations Law Branch, Office of the Chief Counsel and coordinated with the Air Space Services Division of the Air Traffic Organization.

Sincerely,



Lorelei Peter
Assistant Chief Counsel for Regulations, AGC-200

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[1] Legal Interpretation to David Tuuri, from Rebecca MacPherson, Assistant Chief Counsel for Regulations (March 17, 2011).

[2] Legal Interpretation to John G. Olshock, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (March 16, 2010); Legal Interpretation to Buster W. Desselles Jr., from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (July 31, 2009).

September 15, 2017

Jeff Van West
[redacted]

Office of the Chief Counsel
800 Independence Avenue SW
Washington, DC 20591

To Whom in May Concern:

This letter is in response to FAA Chief Counsel interpretations Dessalles (2009), Olshock (2010), and Tuuri (2010 and 2011). While the FAA's position in all four of these interpretations follows the letter of the regulation, I believe it is inconsistent with current air traffic practices, installed air traffic equipment, and arguably creates an unnecessary hazard if followed. I ask that FAA Office of Chief Counsel consider if an addition to the existing interpretations, re-interpretation of the existing wording of FAR 91.185, or a change of wording to FAR 91.185, would better serve air safety for all users of the NAS.

Consider how the current interpretation of FAR 91.185 (c)(3)(ii) would play out in the real world. Virtually all IFR clearances issued in the NAS today have a clearance limit of the destination airport. These clearances are issued to RNAV and non-RNAV aircraft alike. Because they are to the destination, there is no expect further clearance time. This means that in the unlikely event of two-way communication failure, FAR 91.185 (c)(3)(ii) applies.

Under the interpretations referenced above, the aircraft would be expected to proceed along its cleared route all the way to directly over the destination airport, because that was the clearance limit. The aircraft would then be expected to proceed to an approach fix and hold until the expected time of arrival in the flight plan. After this time has elapsed, the pilot could descend and commence the approach.

While this procedure may have made sense in the non-radar days of the NAS's youth, it's a potential hazard and unnecessary complication if put into practice today.

- Lost com doesn't necessarily mean lost transponder/ADS-B-Out. Controllers would see the 7600 or other squawk code approaching the airport and clear the airspace in anticipation of the approach. There's no guarantee the pilot has read the interpretations above, or they may invoke emergency authority and simply begin the approach, so the controller must be prepared for an immediate approach. If the pilot holds and waits, he's simply creating a delay for all involved, as well as increasing everyone's anxiety and stress—a potential contribution to an accident.
- Even an aircraft without a functioning transponder would appear as a primary target in much of the NAS, which creates the same situation as above. Where the aircraft is bound for airspace out of radar coverage, ATC would clear all aircraft out any even remotely

affected airspace due to the uncertainty of pilot actions. The longer the pilot delays landing by waiting at a fix, the longer the NAS is impacted by this cordoned-off airspace.

- In busy airspace, the aircraft is now holding over a fix that may impact approaches as multiple airports. The increasing use of STARs, SIDs, and RNAV procedures in general mean entire flows are disrupted if a physical path through space is not available. Blocking that unnecessarily forces controllers back to manual vector procedures, which they can do, but are less practiced on than they were historically. Again, it's an invitation to increased risk.
- Non-RNAV aircraft must invent a path to many destination airports. Back in the day when most airports had a navaid on the field, holding over an airport without GPS was simple. That's no longer the case. ATC has no way of knowing how the aircraft will find its way to the field. The best way might be following the lateral guidance of an approach, which the aircraft could simply fly and land instead.
- The aircraft wastes potential resources circling. Lost com would be stressful for any pilot, sooner the pilot commences the approach, the more mental bandwidth they have and the more fuel they have in case of a missed approach.

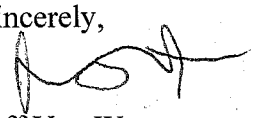
There are actions FAA Counsel for Regulations can do to improve this situation through clarification.

- At a minimum, it can be interpreted that an operable transponder showing an interrogation light means ATC radar is in contact with the aircraft and knows its position. This could be considered a de facto update of the aircraft estimated time of arrival and no delay is needed even if no verbal update has been acknowledged.
- The FAA could consider re-interpreting a clearance limit of an airport without an EFC time to implicitly include an instrument approach to that airport. In this case, an aircraft arriving with two-way communications failure ahead of schedule could simply commence a published approach and remedy the situation.
- If the above is too much of a stretch for the existing wording in FAR 91.185 (c), the FAA could consider rewording the FAR itself into something more consistent with the current, and future, state of air traffic control and navigation.

With the prevalence of multiple radios, computer flight planning, and cell phones paired to headsets, the chances of a true lost communication are nearly nonexistent. "Nearly" isn't "never," however, and the fact that that these procedures (and holding, for that matter) are so uncommonly used only underscores the importance of having the simplest, safest, most expeditious solution also be the correct and legal one.

You have the power to set that straight. Thank you for your time considering this.

Sincerely,



Jeff Van West