

December 20, 1999

John Spotilla  
Administrator  
Office of Information & Regulatory Affairs  
Office of Management and Budget  
The White House  
Washington, D.C.

**Re: Commercial Air Tour Limitation in the Grand Canyon National Park  
Special Flight Rules Area; Docket No. FAA-99-5927; Notice No. 99-12**

Dear Administrator Spotilla:

As you know, on July 9, 1999, the Federal Aviation Administration (FAA) published a Notice of Proposed Rulemaking (NPRM) on special flight rules in the vicinity of the Grand Canyon National Park (GCNP). The FAA proposal would, among other things, impose a limit on the number of flights small air tour operators could fly over the GCNP in a given year.

The Office of Advocacy of the U.S. Small Business Administration (SBA) was created in 1976 to represent the views and interests of small businesses in federal policy making activities.<sup>1</sup> The Chief Counsel participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. In addition to these responsibilities the Chief Counsel monitors compliance with the Regulatory Flexibility Act (RFA), and works with federal agencies to ensure that their rulemakings analyze and substantiate the impact that their decisions will have on small businesses.

The Office of Advocacy appreciates the opportunity once again to participate in discussions and comment on FAA's proposed rulemaking for the Grand Canyon National Park, during this OMB review period. We have reviewed the proposal and accompanying Initial Regulatory Flexibility Analysis (IRFA) for this rulemaking and have found that the FAA has not fully complied with the requirements of the Regulatory Flexibility Act. Although the FAA has made progress in attempting to analyze the potential impact of this regulation on the small air tour industry, the analysis does not include some important considerations, nor does it fully analyze all of the feasible alternatives to the current proposal.

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<sup>1</sup> Regulatory Flexibility Act, 5 U.S.C. § 601, as amended by the Small Business Regulatory Flexibility Act, Pub. L. No. 104-121, 110 Stat. 866 (1996).

## **Cost Estimates – Choice of Base Year**

In its proposal, the FAA plans to institute an “Operations Limitation” by limiting the number of commercial flights air tour operators in the GCNP may make each year. This cap on the number of flights will have a significant cost impact on the 24 small businesses operating air tours in the Grand Canyon. In our letter to FAA, dated November 14, 1996, we noted that the agency needed to estimate this impact by considering the operators’ loss of revenue. FAA has attempted to calculate this figure by determining the difference in current and projected future net operating revenues based upon the number of commercial air tours that are conducted in a typical year.

The ‘typical year’ which was chosen by the FAA was the “only one for which there appears to be adequate data, May 1, 1997 – April 30, 1998.” However, numerous affected operators have informed the Office of Advocacy that this particular year does not adequately reflect the current and anticipated demand for service. If this is true, FAA’s use of this data in determining allocations of flights would impose great losses in revenues. The Office of Advocacy urges the FAA to adequately assure that the base year data is an accurate reflection of the actual average operating figures for these small businesses. Utilizing data from a single year to set a cap on the level of small business growth, when that data may not be indicative of future business operations would surely be an undue burden on small business, as contemplated by the Regulatory Flexibility Act (RFA). If this base year is indeed an incorrect barometer (for all of the many reasons cited by the air tour operators during stakeholder meetings and other comments), then FAA’s estimates of the loss of revenue to this entire local industry is significantly underestimated. We urge the FAA to find alternative means of setting the base year figures. Perhaps this year of data could be used in conjunction with records provided by the 24 operators, or some other form of verification. Other potential impacts on those numbers for that year need to be taken into account; i.e: foreign tourist figures, seasonal dips and recent market fluctuations.

## **Lost Revenue Analysis**

Another way in which FAA cost estimates may be underestimated is in the analysis of a small tour operator’s ability to absorb the lost revenues and other cost burdens of this proposed regulation. FAA states in its proposal that “...air tour operators should be able to raise air tour prices.” As Advocacy stated in an earlier letter to FAA on this subject, the ability of a small business to recoup costs through increased prices depends on the elasticity of demand. It is the position of many of the operators that the air tour industry is very price sensitive. This is true in the case of many small businesses, which cannot pass-on regulatory costs to their customers.

When regulating small entities, agencies must understand the nature of the way in which small businesses operate. Rising costs and the subsequent impact must be accounted for in the FAA cost model. There is no data to indicate at what point an aerial tour of the Grand Canyon becomes cost prohibitive for the average tourist. Once that threshold is reached, ground operations or other activities would replace the choice of taking an aerial

tour. Customers would resort to other activities – bus tours, walking tours, or even a decision to remain in Las Vegas and not tour the park at all. It is true that there will always be those few customers who are willing to pay for a view of the Grand Canyon at any price. However, there is no data or information on FAA assumptions to determine what the price differential might be, which would cause the average tourist to make alternative plans; and therefore be counted as lost revenue for these tour operators. This type of analysis would be helpful in making a determination of the actual ability of a small business to survive the new cap by raising its prices. The FAA should not promulgate a regulation without adequate information and a realistic estimate of the lost revenue and overall cost impact on these 24 air tour operators. FAA should give special consideration to the actual estimates and figures provided by the operators themselves in any comments to this proposed rule. This will provide the agency with a further basis for calculation of the economic impact of the promulgation of this rule.

### **Alternatives**

In Advocacy's previous comments, we stated that the FAA should identify and analyze alternatives to the proposal which "minimize any significant economic impact of the proposed rule on small entities." We urged the FAA to: 1) strive for a thoughtful and balanced approach to public policy; 2) consider the serious objections of the tour operators; and because the FAA is not under a statutory deadline for completing this regulation, to 3) "flush out more alternatives that include a standards advisory process of some type." We also urged FAA to consider the creation of a performance-based system.

All of these suggested methods for seeking feasible alternatives remain viable options for the FAA. The proposal continues to mandate a cap on the number of flights these small air tour operators may make over the Grand Canyon, preventing all of them from adding additional flights as consumer demand for their service increases. These tour operators will be limited to this allocation for two years, and may even continue indefinitely. Further, this proposal would limit entry into the Grand Canyon air tour industry. A small enterprise wishing to serve this market would only be allowed to do so by buying out or replacing an existing operator's allocation.

### **Alternative to the Cap**

When there is a regulation that affects 100% of the industry in an area, as it clearly does here, every possible alternative must be examined in a true effort to avoid the tremendous burdens which would be imposed by a growth denying allocation and a barrier to market entry. Analyzing feasible regulatory alternatives is one of the very important agency mandates under the Regulatory Flexibility Act. The purpose of this provision is to aid the agency in finding the least burdensome formula for promulgating a governmental regulation while accomplishing its important public policy objective. Advocacy recognizes the importance of the "restoration of natural quiet" to the park; however the FAA should not prematurely establish caps which may not reflect the true future demand, loss of revenue and actual economic impact of the proposed rule. A cap on the growth of

a small business should truly be the last resort after all feasible alternatives have been examined.

### **Quiet Technology Incentive**

Consideration has not been given in the current proposal to a quiet technology incentive program as an alternative to an industry allocation system. The use of an incentive based voluntary program for reducing the level of noise in the park through the purchase and use of quieter planes over time, would seem to meet the goal of the regulation while not unduly burdening these small operators. The FAA should solicit comment from the industry and/or establish a working group to devise such a program, which would be acceptable to both the governmental requirements and the industry needs.

### **Alternative to the Base Year**

The FAA should also analyze alternatives to utilizing the 1997-1998 year of data as the base year for establishing an allocation. The use of future years, or an average of the next 2 years, might be an alternative that more accurately reflects the marketplace within the Grand Canyon tour industry and will aid in forecasting industry growth rates. The operators have raised significant concerns over the choice of the base year and have concluded that the use of these figures to establish the cap would be economically destructive to the industry. When it can wait, government should not regulate ahead of necessary data, which will provide meaningful answers to these important questions. The small air tour operators are not to blame for the federal government's lack of data collection prior to 1997. They should not be penalized for the government's lack of sufficient information to regulate them fairly. The alternative of waiting for the next year or two of data should be examined to aid the FAA in a realistic determination of market demand and the true cost of this rule.

### **Partial Exemptions & other incentives**

Even if an allocation system is used, there has been no consideration given to those operators who have recently managed to reduce their number of flights over the Grand Canyon through purchase of larger, quieter aircraft. As part of an incentive program within an allocation system, these operators could be rewarded with additional permitted flights, etc. Rewarding those businesses which are already making significant efforts to reduce the level of noise in the park, instead of penalizing them, seems to be an alternative which deserves significant attention.

### **Periodic Adjustment to Allocation**

Another alternative to the current allocation plan is one that involves FAA and National Park Service (NPS) monitoring of the noise level in the park on a regular basis, in order to adjust the limits that have been placed on the operators. The current proposal states that the allocation will remain unchanged for two years. The FAA rejected alternatives to

this proposal, which would revise the allocations over a shorter time frame, because they would not “achieve the proper balance between providing the certificate holders with the latitude necessary to conduct business, and controlling noise in the GCNP.” We disagree with this assumption. It is true that an operator would need to know and plan for its anticipated business throughout the year. However, if after a noise level was taken in the park and it was determined that additional flights would not adversely affect the ‘natural quiet’ of the park; an operator would welcome any additional allocations and the opportunity to increase their yearly business beyond the initial cap. This is perhaps a feasible alternative for the operators which deserves additional attention.

### **Conclusion**

The Federal Aviation Administration must review its cost estimates and analysis to ensure that it has adequately reflected the loss of revenue and the economic impact on the 24 small air tour operators doing business in the Grand Canyon National Park. Further, the Regulatory Flexibility Act requires FAA to consider feasible alternatives that would minimize this burden. The Office of Advocacy does not believe that the FAA has gone far enough in examining these and other alternatives.

It is true that current regulatory proposals and existing rules within the GCNP already utilize various methods to assist in reducing the level of noise in the park. There have been a number of rulemakings to aid in this goal, addressing Flight Free Zones, raised altitudes, curfews, and even a cap on the number of aircraft in the park. Now the FAA would like to take the additional step of placing a cap on the number of operations within the park. Why not examine the alternative of waiting for these existing rules and proposals to have an impact on the problem before implementing an allocation system? The FAA is attempting to put in place a system that would have a precedent setting impact upon the GCNP and other such areas under their purview. When agencies begin limiting the vital growth of our nation’s businesses instead of examining all feasible alternatives to such action, the regulatory burden upon small businesses increases greatly.

The Office of Advocacy encourages OIRA to closely examine FAA’s analysis of this proposed regulation and direct the FAA to reexamine existing alternatives. Additionally, the FAA should be encouraged to work with the industry to find feasible alternatives which would accomplish the goal of restoring the natural quiet to the Grand Canyon National Park, without unduly burdening the small air tour operators which provide service within it. If our office can be of assistance to you in this matter, Claudia Rayford, of my staff can be reached at (202) 205-6533.

Sincerely,

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