BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SEATAC SHUTTLE LLC, **Complainant,** **v.** **KENMORE AIR HARBOR LLC,** **Respondent.**	**DOCKET TC-072180**

MOTION ON BEHALF OF COMMISSION STAFF FOR SUMMARY DETERMINATION

December 21, 2007

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1 Commission Staff (Staff) moves the Commission for a summary determination that Seatac Shuttle, LLC (Seatac Shuttle) is not entitled to relief in this docket as a matter of law. The name and address of Staff's attorney and the address for Commission Staff is listed in ¶¶ 8 and 10 respectively of the Commission's Notice of Prehearing Conference (December 13, 2007).

2 This is a dispositive motion per WAC 480-07-380. This motion places in issue WAC 480-30-011(1).

I. Background

3 On November 13, 2007, Seatac Shuttle filed with the Commission a pleading entitled "Formal Complaint." The complaint is dated November 8, 2007. On December 4, 2007, Kenmore filed and served its Answer.

4 In the complaint, Seatac Shuttle claims that Kenmore Air Harbor LLC (Kenmore Air) is in violation of WAC 480-30 and RCW 81.68. The key allegation is that Kenmore Air is providing service that requires a certificate from the Commission under RCW 81.68. *"Formal Complaint" at 1, 1st* ¶. Seatac Shuttle requests the Commission to "invoke all applicable sanctions and the protections afforded to certificate holders," presumably to the end that the Commission will cause Kenmore Air to cease its ground transportation services. *Id. At 2, last* ¶.

5 Seatac Shuttle also refers to Staff's earlier conclusion that the Commission would regulate Kenmore Air's ground transportation under RCW 81.68, absent federal preemption. *Id. at 1, 4th* ¶. While Staff also concluded that a federal statute preempted the Commission from regulating Kenmore Air's ground transportation service, Seatac Shuttle challenges the Commission's authority to decide that issue. According to Seatac Shuttle: "It is not within

[the Commission's] purview to make determinations of federal law. The issue of preemption, if one exists, is a question for the courts and not the Commission or Staff." *Id. at 2, 1st ¶.*

6 This matter was the subject of prior correspondence between Staff and Seatac Shuttle, and Staff and Kenmore Air. Based on that correspondence, it appears there is no factual dispute in this case.[1] Consequently, Staff is moving for summary determination because Seatac Shuttle is not entitled to relief as a matter of law.

II. Summary

7 Kenmore Air provides ground transportation in connection with its airline services. Kenmore Air's ground transportation would require a certificate from the Commission under

[1] Most of that correspondence is included as Appendices to this Motion. In that correspondence, certain extraneous arguments were made by both Seatac Shuttle and Kenmore Air that will not be addressed in depth in this Motion.

First, Seatac Shuttle has argued that Kenmore Air is in violation of 49 U.S.C. § 41714. *See Appendix 6, letter to Staff from Seatac Shuttle, dated August 23, 2007, at 1, 4th ¶.* It is not necessary for Staff to respond to this argument because even if it was a valid, it would not affect Staff's conclusions regarding the effect of through ticketing in this matter. Nonetheless, 49 U.S.C. § 41714 addresses the availability of slots for airplanes at high density airports. It is not self-evident how this section applies to the form of Kenmore Air's tickets, or any other issue relevant to this case. Even if Kenmore Air were in violation of 49 U.S.C. § 41714, the effect of such a violation does not include making Kenmore Air's ground transportation services subject to Commission regulation.

Second, Seatac Shuttle has also argued that because it holds interstate authority from the United States Department of Transportation (USDOT), it should be exempt from Commission regulation, too. *See Appendix 6, letter to Staff from Seatac Shuttle, dated August 23, 2007, at 1, 4th ¶.* The obvious and fatal flaw in this argument is that there is no federal preemption statute applicable to USDOT certificate holders that is similar to the preemption statute applicable to airlines in 49 U.S.C. § 41713(b)(1). In other words, 49 U.S.C. § 41713(b)(1) does not apply to Seatac Shuttle, and the company cites no preemption statute applicable to USDOT certificate holders.

Finally, Kenmore Air has argued that certain state tax exemptions available to Kenmore Air prove its operations are exempt from Commission regulation. *See Appendix 5, letter to Staff counsel from Kenmore Air's counsel, dated July 24, 2007, at 2 n.2.* Staff asked Kenmore Air's counsel to be more specific about these exemptions, so Staff could determine whether they applied to the fuel Kenmore Air uses in its vans for ground transportation. They do not. Kenmore Air was referring to a state tax exemption relating to the state's airline fuel tax, and an exemption from state gross receipts tax recognized by the department of revenue. The source for the airline fuel tax exemption is RCW 82.42.040, not a federal preemption statute. The gross receipts tax exemption is based on a federal preemption statute (49 U.S.C. § 40116(b)) that is focused solely on state taxation of airlines. *See Department of Revenue excise tax advisory 2006.16.179 (September 6, 2001).* Obviously, that is not the issue here. Consequently, these state tax exemptions are not relevant to the issues in this docket.

RCW 81.68, but 49 U.S.C. § 41713(b)(1) preempts such regulation. Consequently, Seatac Shuttle is not entitled to relief.

III. Statement of Facts/Evidence Relied Upon

8 Seatac Shuttle is an auto transportation company operating under Commission-issued Certificate C-1077.[2] Certificate C-1077 authorizes Seatac Shuttle to provide auto transportation service between Oak Harbor and the Seattle-Tacoma International Airport (Sea-Tac).

9 As pertinent here, Kenmore Air is an air carrier providing "commuter" airline service between Boeing Field (near Seattle, Washington) and Oak Harbor, Washington, as well as between Boeing Field and points in the San Juan Islands and on Vancouver Island, British Columbia, Canada.[3] Kenmore Air possesses Certificate GJRA163A issued by the United States Department of Transportation.[4]

10 To facilitate its airline service, Kenmore Air uses 14 and 20 passenger vans to transport its airline customers between the company's terminal at Boeing Field and Sea-Tac. About 95 percent of Kenmore Air's passengers use this service.[5] The van travels about seven miles each way, over public roads.[6] Each Kenmore Air passenger using Boeing Field is entitled to take this ground transportation service. Kenmore Air does not charge its

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[2] A copy of Seatac Shuttle's certificate is contained in Appendix 1.
[3] Source: KenmoreAir.com. A copy of Kenmore Air's schedule between Boeing Field and Oak Harbor is contained in Appendix 2. Also, according to that website, Kenmore Air also offers airline service out of Lake Union, which is located in downtown Seattle. Kenmore Air provides ground transportation between Sea-Tac and the company's Lake Union terminal, as well as between Sea-Tac and the company's Boeing Field terminal. Apparently, only the latter service is competing with Seatac Shuttle.
[4] Appendix 2 also contains Kenmore Air's air carrier certificate, plus Kenmore Air's DOT registration and aircraft equipment list. These documents were provided by Kenmore Air to Staff counsel in Kenmore Air's counsel's letter, dated July 24, 2007. That letter (without attachments) is contained in Appendix 5.
[5] *See* Appendix 3, letter to Staff from Kenmore Air, dated May 4, 2007.
[6] This measurement was made by Staff using a standard map. Note that Kenmore Air itself provides the ground transportation service to and from Sea-Tac airport; that service is not offered by a separate business entity, such as a Kenmore Air subsidiary.

customers separately for the surface segment of the overall transportation Kenmore Air provides.[7]

11 Kenmore Air transports only its own airline passengers by van. As relevant here,[8] the van transportation is exclusively between Boeing Field and Sea-Tac, before and/or after the Kenmore Air flights that are taken by those passengers. On rare occasions, when it cannot fly to or from Oak Harbor due to severely inclement weather, and when other van service is not available, Kenmore Air may use its ground transportation to transport its airline passengers who purchased airline tickets from Oak Harbor to Sea-Tac, or vice versa.[9]

12 Kenmore Air says its ground transportation service is an important accommodation to its customers, who typically use major airlines to start or continue their transportation. Kenmore Air concludes that its ground transportation is an "integral" and "vital" part of its overall airline services.[10]

13 Sample tickets provided by Kenmore Air for passengers that use Kenmore Air's ground transportation show "Seattle Tacoma" to "Oak Harbor." Notably, Kenmore Air provided no ticket from any other airline that contains Kenmore Air's ground transportation. A sample "ticket-less" travel itinerary shows an example flight from "Oak Harbor" to "Boeing Field," followed by ground transportation to "Seatac." All of Kenmore Air's ground transportation customers have such arrangements, *i.e.,* each person using Kenmore Air's ground transportation uses a through ticket that includes Kenmore Air's airline service

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[7] *See* Appendix 3, letter to Staff from Kenmore Air, dated May 4, 2007.
[8] As we explained in footnote 3, Kenmore Air also provides ground transportation between its Lake Union terminal and Sea-Tac. That ground transportation is not at issue in the complaint. However, that transportation appears to be of the same nature as Kenmore Air's ground transportation to and from Boeing Field and Sea-Tac, *i.e.,* it is provided by Kenmore Air to the company's airline passengers only.
[9] *Id.*
[10] *See* Appendix 5, letter to Staff counsel from Kenmore Air's counsel, dated July 24, 2007, at 2, 2nd ¶.

and Kenmore Air's ground transportation to and/or from Sea-Tac, or a ticket-less itinerary of the sort described above.[11] These sample tickets are contained in Appendix 4.

14 In short, there is "inter-modal competition" between Seatac Shuttle and Kenmore Air in the market for transportation services between Oak Harbor and Sea-Tac. For example, an Oak Harbor resident traveling to Spokane could choose a Kenmore Air flight from Oak Harbor to Boeing Field and then use Kenmore Air's van to Sea-Tac, followed by a Northwest Airlines flight to get from Sea-Tac to Spokane. As an alternative, that customer could choose Seatac Shuttle to travel from Oak Harbor to Sea-Tac by van, and then use Northwest Airlines to get to Spokane.

IV. Statement of Issues

15 1. Does Kenmore Air meet the definition of "auto transportation company" in RCW 81.68.010 with regard to the company's ground transportation services?

16 2. If so, is Kenmore Air exempt from Commission regulation by means of: a) WAC 480-30-011(1); or b) federal preemption under 49 U.S.C. § 41713(b)(1)?

V. Short Answer

17 Kenmore Air meets the definition of "auto transportation company" in RCW 81.68.010 with regard to the company's ground transportation services. WAC 480-30-011(1) does not exempt those transportation services. However, 49 U.S.C. § 41713(b)(1) preempts the Commission from regulating those transportation services. Consequently, the

[11] Kenmore Air may argue that the ticket-less itinerary is a "through ticket." However, as we discuss later, application of the "through ticket" exemption in WAC 480-30-011(1) does not exempt all of Kenmore Air's ground transportation services. Therefore, it is not necessary for the Commission to resolve the issue whether the ticket-less itinerary is a "through ticket."

Commission should conclude as a matter of law that Seatac Shuttle is not entitled to relief,[12] and enter an order dismissing the complaint.

VI. Argument

A. Kenmore Air meets the definition of "auto transportation company" in RCW 81.68.010(3)

18 RCW 81.68.010(3) defines "auto transportation" as "every corporation ... [1] operating ... any motor-propelled vehicle used in the business of transporting persons ... [2] for compensation [3] over any public highway in this state [4] between fixed termini or regular route, and [5] not exclusively within the incorporated limits of any city or town."

19 As the above facts show, Kenmore Air is a corporation: 1) that transports persons by motor vehicle; 2) for compensation;[13] 3) over a public highway in this state; 4) between

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[12] In any event, under RCW 81.04.110, Seatac Shuttle is not entitled to much relief from the Commission, even assuming Kenmore Air required a certificate from the Commission. RCW 81.04.110, authorizes the sort of complaint Seatac Shuttle has filed, which "[sets] forth any act ... omitted to be done by ... any person ... acting as a public service company in violation ... of any provision of law." Here, Seatac Shuttle is claiming that Kenmore Air is operating without a required auto transportation certificate.

However, RCW 81.04 does not provide much, if anything, in the form of a remedy the Commission can grant to a complainant in this context. For example, the statutes authorizing the Commission to issue penalties refer only to violations by public service companies or their officers and employees. *See, e.g.,* RCW 81.04.380 and .405 (public service companies); RCW 81.04.385 (officers and employees of public service companies). The statutes authorizing sanctions against persons other than public service companies who violate Commission statutes, orders or rules impose either criminal sanctions (RCW 81.04.385 and .390) or penalties recoverable only in an action in superior court (RCW 81.04.387).

The Commission has ruled that it cannot issue a cease and desist order in a proceeding under RCW 81.04.110; such an order is only available in a Commission-instituted classification proceeding under RCW 81.04.510. *In re San Juan Express, Inc.,* Docket TS-940956, Fifth Supplemental Order – Commission Decision and Order Adopting Initial Order; Dismissing Complaint (December 20, 1994) at 9: "The Commission may enter a cease and desist order under [RCW 81.04.510] only when the Commission itself has initiated the [classification] proceeding." Staff acknowledges this is *dicta,* because the Commission found that the target of the complaint did not require a certificate from the Commission. However, Staff believes it is a correct conclusion.

In sum, at most, Seatac Shuttle's "Formal Complaint" could result in a Commission order finding that Kenmore Air requires a certificate under RCW 81.68. Of course, such a finding could have the coercive effect desired by Seatac Shuttle. The Commission could treat Seatac Shuttle's complaint as a petition for the Commission to initiate a classification proceeding under RCW 81.04.510, or the Commission could unilaterally initiate a classification proceeding. However, because the Commission is preempted from regulating Kenmore Air's ground transportation anyway, it makes no sense to do either.

[13] As to the "for compensation" element of the definition of "auto transportation company," though Kenmore Air provides the ground transportation service for no separate charge, the service is still "for compensation"

fixed termini (*e.g.*, Boeing Field and Sea-Tac); and 5) it should not be contested that Boeing Field and Sea-Tac are not located within the corporate limits of the same city. Therefore, Kenmore Air meets the definition of "auto transportation company" in RCW 81.68.010(3).

20 Consequently, absent preemption or some other exemption, Kenmore Air would be required to obtain a certificate from the Commission under RCW 81.68.040.

B. Kenmore Air's ground transportation service is not exempt from Commission regulation under WAC 480-30-011(1)(l)

21 WAC 480-30-011(l)(l) is a Commission rule that exempts common carriers that carry "passengers who have had or will have had a prior or subsequent movement by air under a through ticket or common arrangement with an airline ..." Kenmore Air earlier opined that WAC 480-30-011(1)(l) exempts the company's ground transportation services from RCW 81.68.[14] However, that subsection does not apply.

1. WAC 480-30-011(1)(l) does not apply because not all Kenmore Air passengers travel under a "through ticket" or "common arrangement" with an airline

22 On its face, WAC 480-30-011(1)(l) does not apply to Kenmore Air, because all Kenmore Air passengers do not travel under a "through ticket" or "common arrangement" with an airline. The "common arrangement with an airline" language is intended to address arrangements between a carrier on the one hand and an airline on the other. Here, the ground and air transportation is offered by the same entity, so no such "common arrangement" exists.

23 As we explain next, the "through ticket" part of the rule also does not apply to Kenmore Air because that term is intended to mark a dividing line between intrastate and

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because the court will assume Kenmore Air recovers the cost of this service through the overall prices it charges the customer. *See, e.g., McDonald v. Irby,* 74 Wn.2d 431, 435-36, 445 P.2d 192 (1968).

[14] *See* Appendix 5, letter to Staff counsel from Kenmore Air's counsel, dated July 24, 2007 at 2, 3rd ¶.

interstate commerce. However, Kenmore Air would not qualify under that rule even if it could be applied to purely intrastate transportation, because Kenmore Air does not require its customers to ticket the ground transportation when they purchase a Kenmore Air plane ticket. In other words, not all Kenmore airline passengers travel by air under a ticket that includes the ground transportation.

2. WAC 480-30-011(1)(l) draws the line between intrastate transportation on the one hand, and interstate and foreign transportation on the other; it does not exempt purely intrastate transportation

24 The purpose of WAC 480-30-011(1) is to draw the line between transportation the Commission regulates, and interstate or foreign transportation, which the Commission does not regulate. The rule does not (and cannot) create an exempt classification of intrastate passenger carriers that is not otherwise exempt by law.

25 Indeed, the terms "through ticket" and "common arrangement" that are found in that rule are typically used to determine whether the transportation is intrastate or interstate. For example, if ground transportation between two points within a state is part of a through ticketing arrangement involving a prior or subsequent *inter*state flight, both legs of the transportation (air and ground) are interstate in nature. *E.g., Kimball v. Mann,* 384 So.2d 1250 (Fla. 1980); *See also Motor Transp. of Passengers Incidental to Transp. by Aircraft,* 95 MCC 526, 536-37 (1964) (discussing the circumstances in which local ground transportation can maintain the interstate nature of the preceding or subsequent interstate air transportation segment).

26 The Commission recognized this point in *In Re San Juan Air Services, Inc., d/b/a Shuttle Express,* Hearing H-4976, Order MVC 1810 (April 21, 1989) at pages 3-4. In that case, Shuttle Express attempted to avoid Commission regulation under RCW 81.68 for its

airport shuttle service, by arguing that its ground transportation used through tickets and/or common arrangements with the airlines. However, the Commission found that Shuttle Express provided primarily "on-call" service to anyone, even if he or she had no scheduled flight. In other words, very few, if any, customers were "through ticketed" using Shuttle Express and an interstate airline. The Commission ruled that the company's shuttle bus service did not constitute interstate commerce.

27 In sum, WAC 480-30-011(l) marks a dividing line between intrastate transportation on the one hand (which the Commission regulates), and interstate or foreign transportation on the other hand (which the Commission does not regulate). Otherwise, the rule would exempt transportation the Commission would normally regulate. The Commission cannot by rule create an exemption that is not authorized by law.[15]

28 WAC 480-30-011(l) has some applicability in this case. For example, that rule would exempt from Commission regulation Kenmore Air's ground transportation of only those Kenmore Air passengers who traveled to or from Canada on a Kenmore Air flight using a through ticket. In other words, for only those passengers that had a Kenmore Air through ticket between Sea-Tac and Canada would the company's ground transportation have the effect of continuing the foreign commerce.

29 However, WAC 480-30-011(l) does not exempt the ground transportation provided by Kenmore Air for all passengers that continue their journey to other states. For example, assume a passenger travels from Denver, Colorado to Oak Harbor, Washington. She uses United Airlines to fly to Sea-Tac, and Kenmore Air to travel to Boeing Field via van and

[15] While it is unfortunate that WAC 480-30-011(l) makes no reference to interstate commerce, this is an interpretive rule. Therefore, it does not rise to the level of "law;" it is not "binding." *Assoc. of Wash. Bus. v. Dep't of Rev.*, 155 Wn.2d 430, 447, 120 P.3d 26 (2005).

then to Oak Harbor via air. The only "through ticket" in this example is for the transportation from Sea-Tac to Oak Harbor, using Kenmore Air.

30 Therefore, the through ticketing arrangement in this example does not have the effect of continuing the interstate transportation that started in Denver, Colorado. Had the passenger had a though ticket from Denver to Oak Harbor, the answer likely would be different.

31 Likewise, WAC 480-30-011(l) does not exempt the ground transportation provided by Kenmore Air for passengers that never leave the state. For example, consider a passenger who travels from Spokane, Washington to Oak Harbor. She uses Northwest Airlines to fly to Sea-Tac, and then uses Kenmore Air to travel to Boeing Field via van and then to Oak Harbor via air.

32 By all accounts, this transportation from Spokane to Oak Harbor would be purely intrastate transportation, including the ground transportation. Obviously, Kenmore Air's "through ticket" between Sea-Tac and Oak Harbor does not change the nature of that commerce. Absent preemption, the Commission would normally regulate the ground transportation in this example. The Commission could not exempt regulation of such transportation by rule. Therefore, properly interpreted, WAC 480-30-011(l) would not exempt Kenmore Air's ground transportation of such passengers.

33 In sum, WAC 480-30-011(1) exempts Kenmore Air's ground transportation only for those passengers who use Kenmore Air's ground transportation and air transportation under a through ticket to travel between Sea-Tac and points in Canada. Because Kenmore Air's ground transportation is not limited to such passengers, WAC 480-30-011(1) does not relieve Kenmore Air from having an auto transportation certificate under RCW 81.68.

C. Commission regulation of Kenmore Air's ground transportation is preempted by 49 U.S.C. § 41713(b)(1)

34 While Kenmore Air meets the definition of "auto transportation company" in RCW 81.68.010(3), and would otherwise be subject to Commission regulation, Staff concludes that the Commission is preempted from regulating the intrastate ground transportation provided by Kenmore Air. Before we provide that analysis, however, we demonstrate why Seatac Shuttle's threshold claim that the Commission is powerless to decide that preemption issue has no basis.

1. The Commission has authority to decide whether or not it is preempted from regulating Kenmore Air's intrastate ground transportation services

35 Seatac Shuttle apparently agrees with that part of Staff's analysis that the Commission would regulate Kenmore Air's ground transportation under RCW 81.68, absent federal preemption. However, Seatac Shuttle challenges the Commission's authority to decide that federal preemption issue. According to Seatac Shuttle: "It is not within [the Commission's] purview to make determinations of federal law. The issue of preemption, if one exists, is a question for the courts and not the Commission or Staff." *"Formal Complaint" at 2, 1st ¶.*[16]

36 Apparently, Seatac Shuttle is promoting a scenario in which the Commission would decide that Kenmore Air is subject to regulation under RCW 81.68, but then the Commission would not decide whether such regulation is preempted. Presumably, this would compel Kenmore Air to file a lawsuit against the Commission, to enable a court to

[16] Seatac Shuttle may be confusing the ability of a state agency to interpret federal law with the deference a court may give that interpretation. Under the Administrative Procedure Act, the Commission's determination of the scope of federal preemption would likely be reviewed under the "error of law" standard in RCW 34.05.574(3)(d). While the court may provide less deference to a state agency's interpretation of a federal statute compared to, say, that agency's findings of fact, this judicial review standard clearly contemplates that the agency will make that interpretation in the first instance.

address the preemption issue. Apart from the obvious inefficiencies in this scenario, no law requires it.

37 First, Seatac Shuttle's legal position lacks credibility because Seatac Shuttle itself acknowledges that the Commission can and does make determinations regarding federal preemption. For example, in its complaint, Seatac Shuttle refers favorably to a Commission rule that (in part) addresses the scope of preemption. According to Seatac Shuttle: "WAC very clearly defines in which specific cases and circumstances federal preemption is applicable, [and] the question of [Kenmore Air] and its passenger ground transportation is not one of them." *"Formal Complaint" at 2, 1st* ¶.

38 In other words, when the Commission makes a federal preemption determination in a rule, and Seatac Shuttle believes that rule is favorable to the company, Seatac Shuttle relies on it. However, when a federal preemption issue arises in this docket, and Seatac Shuttle believes the outcome might be unfavorable to the company, the company says the Commission lacks authority to determine that issue.

39 Seatac Shuttle cannot have it both ways. Staff submits the rule is just fine;[17] it is Seatac Shuttle's legal theory that has no substance.

40 Indeed, it should be obvious to all that state agencies can and do make determinations on the applicability of federal law.[18] For example, the Commission interpreted a federal statute when it implemented 47 U.S.C. § 214(e)(2), involving "eligible

[17] Seatac Shuttle may believe that WAC 480-30-011(1) defines the scope of preemption in all conceivable circumstances. If so, that is not realistic. In fact, that rule states several examples of exempt transportation; some are based on preemption, while others are based on statute or case law. However, there is nothing to suggest the Commission intends that rule to exhaust all possible examples in which a particular carrier might be exempt from Commission regulation.

[18] The only apparent limitation on a state agency interpreting federal law is that a state agency does not have authority to determine whether its enabling statute is unconstitutional as written. *Bare v. Gorton,* 84 Wn.2d 380, 383, 526 P.2d 379 (1974): "An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power." (Citations omitted).

telecommunications carriers," otherwise known as ETCs. The court upheld the Commission. *Wash. Indep. Tel. Ass'n v. Utilities & Transp. Comm'n*, 110 Wn. App. 498. 41 P.3d 1212 (2002).

41 The Commission is not alone. For example, the Department of Revenue has adopted numerous rules describing the scope of state taxation in light of federal constitutional limitations, such as the Commerce Clause. *See, e.g., WAC 458-20-193D (taxation of certain activities involving interstate commerce).* The Department of Ecology (Ecology) interpreted and applied provisions of the Federal Clean Water Act, and determined it was not preempted from doing so. The court upheld Ecology. *Dep't of Ecology v. Public Utility Dist. No. 1 of Jefferson Cy.*, 121 Wn.2d 179, 849 P.2d 646 (1993).

42 Staff could provide many more examples. The point is that the Commission clearly has authority to determine the scope of its jurisdiction, including the impact of a federal statute on that jurisdiction. Seatac Shuttle's argument to the contrary has no legal support whatsoever, and it has no credibility. The Commission should reject it summarily.

2. The preemptive effect of 49 U.S.C. § 41713(b)(1)

43 49 U.S.C. § 41713(b)(1) is part of the Airline Deregulation Act of 1978. That section preempts states from enacting or enforcing any law or rule "related to price, route, or service of an air carrier that may provide air transportation under this subpart."

44 As noted earlier, Kenmore Air holds an Air Carrier Certificate. The issue is whether Kenmore Air's ground transportation is "related to the price, route or service" of Kenmore Air, and thus is exempt pursuant to 49 U.S.C. § 41713(b)(1).

45 Kenmore Air says its ground transportation service qualifies for preemption because that service is an "integral" and "vital" part of the company's airline operations. According

to the company, without Kenmore Air's own van service, "passengers from Oak Harbor, Port Angeles, and other cities served probably would not have viable air service between these cities and the rest of the world."[19]

46 While this seems like a fair point, it may be somewhat of an overstatement, based on Staff's understanding that Kenmore Air used ground transportation services of Shuttle Express before offering such services itself. In addition, there are regulated auto transportation companies that provide service to and from Sea-Tac and Oak Harbor, for example. In other words, at this stage, Kenmore Air has not clearly established that *only* an airline can make this service work.[20]

47 By the same token, it is reasonable to expect that there exists a substantial convenience factor that cannot be overlooked: Kenmore Air's vans are already on site, ready to meet Kenmore Air's airplanes, and the company can likely adjust better to weather-induced or other changes to the established schedule.

48 In the end, it is not for the Commission to dictate passenger preferences for air transportation as opposed to ground transportation, or any combination of the two forms of transportation.

49 On the other hand, Seatac Shuttle argues that Kenmore Air's ground service is simply a "discretionary," "ancillary" "marketing tool" that is "not a function" of Kenmore Air's air carrier status. According to Seatac Shuttle, Kenmore Air is simply "circumventing the law for economic advantage."[21]

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[19] *See* Appendix 5, letter to Staff counsel from Kenmore Air's counsel, dated July 24, 2007, at 2, 2nd ¶.
[20] As we explain later, it is not necessary for Kenmore Air to show that only an airline can provide these ground services.
[21] *See* Appendix 6, letter to Staff from Seatac Shuttle, dated August 23, 2007, at 1, 5th ¶ to 2, 1st new ¶.

50 Ultimately, the labels used to describe Kenmore Air's ground transportation service do not count. What counts is whether federal exemption applies to what Kenmore Air does. Consequently, we leave the labels, and turn to the case law.

51 It is important to recognize at the outset that 49 U.S.C. § 41713(b)(1) contains very broad preemption language (*i.e.*, preempting any state law or rule "related to price, route, or service of an air carrier"). As the Court stated in *Morales v. Trans World Airlines,* 504 U.S. 374, 383, 112 S. Ct. 2031, 119 L. Ed. 157 (1992), these words "express a broad preemptive purpose." The Court went on to rule that 49 U.S.C. § 41713(b)(1) preempts "State enforcement actions having a connection with, or reference to, airline 'rates, routes, or service' ..." 374 *U.S. at 384.* The Court barred the state of Texas from enforcing state consumer protection laws against fare advertisements by airlines.

52 The courts have decided many cases under 49 U.S.C. § 41713(b)(1). Though we found no case directly on point, the Ninth Circuit Court of Appeals decision in *Federal Express Corp. v. California Public Utilities Commission,* 936 F.2d 1075 (9th Cir. 1991), *cert. denied,* 504 U.S. 979 (1992)(*Federal Express Corp.*), likely controls the outcome of the issue involving Kenmore Air.

53 In *Federal Express Corp.*, the company was operating its package delivery service in the state of California. At issue before the Ninth Circuit was the company's purely intrastate transportation of packages by truck. In other words, the transportation of these packages originated and terminated in California, and Federal Express used only a truck (no airplane) to transport these packages. California argued that this was plainly intrastate transportation, and because it did not involve any air transportation whatsoever, it was fully subject to state regulatory jurisdiction.

54 Note again: *no air transportation was involved in transporting these packages*. Had the court ruled that 49 U.S.C. § 41713(b)(1) was limited to air transportation services only, the court would have ruled for the state of California. Indeed, *Federal Express Corp.* presents a clearer case than Kenmore Air in this docket, because a customer using Kenmore Air's ground transportation always precedes or follows that transportation with air transportation by Kenmore Air.

55 Note also that the transportation at issue in *Federal Express Corp.* was not pursuant to the company's air carrier certificate, and it was purely intrastate. Moreover, many California-regulated intrastate trucking companies could carry those packages, just as a Commission-regulated certificate holder could carry certain of the passengers that use Kenmore Air's ground transportation services.

56 However, the Ninth Circuit ruled that California was preempted by 49 U.S.C. § 41713(b)(1) from regulating the purely intrastate ground transportation of Federal Express.[22] Thus, it is clear from both *Morales* and *Federal Express Corp.* that the preemptive effect of 49 U.S.C. § 41713(b)(1) extends to more that just "transportation on an airplane."

57 Of course, the activity in question has to have some connection with the company's airline business for 49 U.S.C. § 41713(b)(1) to have preemptive effect. As the Ninth Circuit noted, "[t]he trucking operations [of Federal Express] are not some separate business venture ..." *936 F.2d at 1078*. Arguably, Kenmore Air's ground transportation is even more connected with its airline operations than the intrastate truck delivery services at issue in *Federal Express Corp.* was connected with Federal Express' airline operations.

[22] Indeed, in *Federal Express Corp.*, the state of California essentially conceded that the state was preempted from regulating Federal Express' ground transportation of packages that were also transported on a Federal Express interstate or intrastate flight.

58 Consider also *Chouest v. American Airlines,* 839 F. Supp. 412 (E.D.La. 1993), which also involved ground transportation by an airline. In that case, the court held that a state law was not preempted by 49 U.S.C. § 41713(b)(1).[23] The state law at issue was not a regulatory law like RCW 81.68. However, we do not believe this fact creates a critical distinction.

59 In any event, in *Chouest,* American Airlines provided ground transportation as part of a comprehensive vacation package that included the company's air transportation. The court ruled that the ground transportation was not preempted under 49 U.S.C. § 41713(b)(1) as a "service of an air carrier," because there was nothing to suggest the ground transportation was "integral to the air transportation services." *839 F. Supp. at 417.*

60 The *Chouest* court distinguished *Federal Express Corp.*. First, the court noted that the *Federal Express Corp.* decision relied on other sections of the federal statute where Congress expressed its intent to encourage the development of "expedited all-cargo air transportation." *839 F. Supp. at 417, citing Federal Express Corp., 936 F.2d at 1079, which in turn cited, inter alia, 49 U.S.C. § 1302(b)(1), now codified as 49 U.S.C. § 40101 (b)(1).* The court found no similar federal policy applicable to ground transportation of passengers.

61 The *Chouest* court also noted that in *Federal Express Corp.,* the company's surface transportation was a fully integrated part of its package delivery service, unlike the ground transportation offered by American Airlines only to those customers who purchased vacation packages. *839 F. Supp. at 417, citing Federal Express Corp., 936 F.2d at 1078.*

62 Staff considers the *Chouest* case to have some similarities to Kenmore Air's situation, but ultimately, that case has some analytical flaws and fundamental factual

[23] In its decision, the Ninth Circuit referred to 49 U.S.C. § 1305(a)(1), which is currently codified as 49 U.S.C. § 41713(b)(1).

differences that either confirm or do not change Staff's conclusion that the Commission is preempted from regulating Kenmore Air's ground transportation.

63 First, Kenmore Air's ground transportation services are an important part of its airline services, in the sense that Kenmore Air's ground transportation service is not simply an adjunct to a different business (tour services), as it was for American Airlines in *Chouest.* Rather, Kenmore Air's ground transportation better enables customers to use Kenmore Air's air transportation services.

64 Second, the *Chouest* court was correct to say that in *Federal Express Corp.,* the Ninth Circuit noted an intent by Congress to develop "expedited all-cargo air transportation," and that there is no similar expression of intent regarding passenger ground transportation by airlines. However, that argument is ultimately unhelpful because there is nothing in the actual words of 49 U.S.C. § 41713(b)(1) that would permit the Commission to apply that section to ground transportation of packages but not ground transportation of passengers.

65 Consequently, based on the language of 49 U.S.C. § 41713(b)(1) and the relevant case law, Staff concludes the Commission is likely to be held preempted from regulating Kenmore Air's ground transportation services.

VII. Relief Sought

66 For the reasons stated above, the Commission should grant Staff's Motion for Summary Determination, conclude that Seatac Shuttle is not entitled to relief as a matter of

law because Commission regulation of Kenmore Air's ground transportation services is preempted by 49 U.S.C. § 41713(b)(1), and enter an order dismissing the complaint.

DATED this 21st day of December, 2007.

Respectfully submitted,

ROBERT M. MCKENNA
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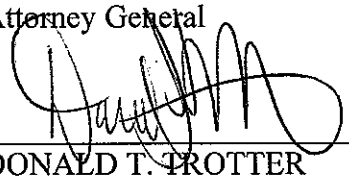

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