BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SeaTac Shuttle, LLC, C-1077, Complainant, v. Kenmore Air Harbor, LLC (Certified), Respondent.	Docket No. TC-072180 ANSWER OF KENMORE AIR HARBOR, INC. TO STAFF MOTION FOR SUMMARY DETERMINATION

I. INTRODUCTION

1 Kenmore Air Harbor, Inc. ("Kenmore Air") agrees with the Staff that there are no material issues of fact[1] regarding federal preemption of Commission regulation of the operations of which SeaTac Shuttle, LLC ("SeaTac") complains. Thus, Kenmore Air agrees that it is appropriate to enter an Order dismissing the complaint on a summary determination. However, Kenmore Air does not agree with Staff that it meets the definition of an "auto transportation company" or that WAC 480-30-011 does not exempt it from WUTC regulation. Since determination of those issues is unnecessary to rule on the Staff's Motion, Kenmore Air urges the Commission to grant Staff's motion, but state no conclusion on those two extraneous issues in its Order.

[1] Staff's statement at ¶ 46 that Kenmore Air used Shuttle Express before starting it's own van services is a slight misstatement. Kenmore Air actually started its van service at the same time as it started land plane service to Boeing Field. This minor discrepancy is not material to the motion, however.

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II. DISCUSSION

A. Staff Is Correct That The Commission Is Pre-empted By Federal Law From Exercising Jurisdiction over Kenmore Air.

2 The only issue that the Commission needs to reach at this time is the second part of Staff's second statement of stated issue; *i.e.*, is the Commission's jurisdiction over the ground operations of Kenmore Air preempted by 49 U.S.C. § 41713(b)(1)? Kenmore Air is in full and complete agreement with the Staff that the answer is "yes" on this only issue that is essential to a decision on Staff's motion.

1. The Commission has the power to determine that federal law preempts it from granting SeaTac any relief it has sought or might seek against Kenmore Air.

3 Staff is correct that the Commission can consider whether federal law preempts the relief SeaTac seeks in its complaint. Indeed, Kenmore Air believes that the Commission must do so under both the Supremacy Clause of the U.S. Constitution[2] as well as state law.

4 The Commission's powers and duties regarding bus companies are to "regulate in the public interest, as provided by the public service laws, all persons engaging in the transportation of persons or property within this state for compensation." RCW 80.01.040(2) (emphasis added). It certainly could not be considered in the "public interest" for the Commission to violate federal law by seeking to regulate a carrier knowing that federal law preempts such regulation. Likewise, it is reasonable to believe that the legislature intended that the "public service laws" the Commission must follow to include any federal laws that impact the scope of the Commission's jurisdiction and

[2] United States Constitution, Article VI, Clause 2, states: " This Constitution, and the Laws of the United States . . . shall be the supreme Law of the land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

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powers. As discussed in the Staff motion and below, 49 U.S.C. § 41713, is the "public service law" that controls in this case.

2. The Commission is pre-empted from exercising any jurisdiction over Kenmore Air's services, including those complained of.

5 When Congress passed the Airline Deregulation Act ("ADA"), its purpose was "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." HR Conference Report No. 95-1779, p. 53 (1978). To ensure that this goal would not be frustrated by any state regulations, Congress included a broad preemption of any state regulation of airlines. That preemptive clause, which is now codified at 49 U.S.C. § 41713(b)(1) provides:

> Except as provided in this subsection, a state, political subdivision of a state, or political authority of at least two states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or **service** of an air carrier that may provide air transportation under this subpart.

Id. (emphasis added).

6 Kenmore Air is an "air carrier" under federal law. Attached to the Staff's motion, as part of Appendix 2, are copies of Kenmore Air's federal air carrier certificate and registration. Kenmore Air is a "commuter" carrier that operates as a regular scheduled airline. *Id*. Kenmore is a participating carrier of the International Airline Transportation Association and has an airline code number of "M5." *Id*. All Kenmore Air flights are listed to and from "SEA."[3] *Id*. In the Official Airline Guide ("OAG"), travel agents and the U.S. Navy are able to book connecting flights to and from other air carriers on Kenmore Air. *Id*.

[3] The three-letter airport identifier for Seattle-Tacoma International Airport.

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7 Kenmore Air operates the van service itself, not through an affiliate or separate corporation. *Id.* Nearly all of Kenmore Air's passengers must ride the courtesy van in order to commence or conclude their air travel on the Kenmore Air leg of their travel. *See, id.* Thus, the courtesy van service that Kenmore Air offers between air terminals such as Boeing Field and SeaTac is an integral part of the "service of an air carrier" as used in 49 U.S.C. § 41713.

8 Like the Staff, Kenmore Air has found no case directly on point with the facts of this case under § 41713. Kenmore Air agrees that the *Federal Express* case[4] is instructive. However, even without the *Federal Express* case for guidance, the Commission can readily see that state regulation is preempted based on the plain language of the statute and the undisputed facts in this case. The ground transportation portion of Kenmore Air's airline services is a "service of an air carrier" and therefore is exempt from state regulation.

B. The Commission Should Not Address Staff's Arguments That Kenmore Air Meets The Definition Of An "Auto Transportation Company" Or That WAC 480-30-011 Does Not Exempt Kenmore Air From WUTC Regulation.

9 The Staff's first stated issue is whether Kenmore Air meets the definition of an "auto transportation company" under RCW § 81.68.010 with regard to Kenmore Air's ground transportation services. Next, Staff asserts that Kenmore Air does not fall within the exemptions of WAC 480-30-011.[5] However, since the Staff's request for relief only seeks dismissal of the complaint "because Commission regulation of Kenmore Air's ground transportation services is preempted by 49 U.S.C. § 41713(b)(1)," there is no need to address either of these issues.

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[4] *Federal Express Corp. v. California PUC*, 936 F.2d 1075 (Ninth Circuit 1991), *cert. denied*, 504 U.S. 979 (1992).

[5] Staff concedes that the terms "interstate" and "intrastate" do not appear anywhere in WAC 480-30-011(l), but nevertheless argues that the Commission should not follow the plain and unambiguous language of that rule.

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10 Not only is there no need to address whether Kenmore Air would be—but for federal preemption—subject to regulation under state law, doing so could lead to future unintended consequences.[6] Staff's assertion that the Commission "cannot, by rule, create an exemption that is not authorized by law" does not seem consistent with the intent of several of the exemptions contained in WAC 480-30-011. While some of the exemptions have specific statutory grounds, such as Subsection (g)[7] others seem to go beyond the express statutory exemptions. Most notably, WAC 480-30-011(i) broadly exempts "private carriers who . . . transport passengers as an incidental adjunct to some other . . . business. . . ."[8] Likewise, Subsection (j) exempts transporting air crews or airline passengers between an airport and temporary hotel accommodations and Subsection (k) exempts substitute ground transportation for air transportation in emergency situations—both without regard to the interstate or intrastate nature of the overall transportation.[9]

11 If, as Staff asserts in its Motion, carrying passengers in motor vehicles and receiving compensation for some other business, such as such as parking lot or automobile dealer service shuttles, constitutes transportation "for compensation" then potentially long-standing exemptions from Commission regulation would fall and WAC

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[6] It would also lead to a fact issue of whether Kenmore Air transports persons "for compensation." Staff says yes because Kenmore Air covers the cost of the service "through the overall prices it charges the customer." But the focus is not on cost recovery, but whether the public "compensates" Kenmore Air for the ground transportation. Staff cites no evidence that the traveling public pays any more for the air service because Kenmore Air also offers the courtesy shuttle.

[7] Subsection (g) exempts "taxi cabs, hotel buses, or school buses," which exactly tracks the statutory exemption for such services. *See* RCW § 80.68.015.

[8] Presumably the other businesses also recover their costs of providing transportation services from their other charges, just like Staff asserts Kenmore Air does. Although Kenmore Air considers its shuttle service to be an integral part of its airline services, SeaTac asserts that it is "ancillary" and "not a function" of the air service. Appendix 6 to Staff Motion to Dismiss. If that were true, then WAC 480-30-011(i) would provide an additional ground for dismissal if the Complaint.

[9] And without conforming to the "three road miles beyond the corporate limits of the city or town" exemption contained in RCW § 80.68.015.

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480-30-011 would have to be significantly revised or discarded. Kenmore Air does not believe the Commission is so constrained.

12 The Commission is charged to regulate in the "public interest" and determines the scope of its jurisdiction consistent with this directive. *See* RCW § 80.01.040. Presumably, the Commission has not attempted to regulate courtesy shuttles and certain other passenger transportation services because there is no compelling public interest benefit in doing so and such regulation could raise a host of factual, legal, and practical issues. Similarly, there would be no public interest benefit to declaring Kenmore Air to be subject to Commission jurisdiction only to, in the next sentence, disclaim jurisdiction over Kenmore Air based on federal preemption.

13 Focusing on the matter that is actually before the Commission in this docket; *i.e.* a private complaint, and assuming for the sake of argument that the Commission were to agree with Staff that the exemptions in WAC 480-30-011 go too far; the appropriate response would be to initiate new rulemaking. The Commission should not grant relief to a complainant (including statements that would constitute *dicta*) contrary to the Commission's duly adopted rules.[10] In other words, the only appropriate response to Staff's arguments is to simply dismiss the complaint, because it conflicts with the Commission's existing rules.

14 Finally, the Staff motion asserts that Kenmore Air does not qualify for exemption from regulation as an auto transportation company under WAC § 480-30-011(l) because only 95% of Kenmore Air's ground passengers use a "through ticket" and that the "common arrangement" in that subsection does not apply when the ground transportation and air transportation are provided by the same corporate entity. It certainly is a rather ironic interpretation of Subsection (l) that Kenmore Air's ground operations would be

[10] For the Commission to adopt rules and then de facto re-write them or decline to follow them in an adjudicative proceeding could be viewed as arbitrary or capricious.

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exempt under the rule if Kenmore Air simply set up a separate corporate entity for those operations and that a "common arrangement" cannot exist with an airline if a single corporate entity provides both the air and ground transportation. As with the other issues that staff raises beyond the federal preemption question, there is no need for the Commission to rule one way or the other on Staff's interpretation of the WAC.

15 There is no need for the Commission to reach either of the issues regarding jurisdiction "but for" federal preemption at this stage of the proceeding, if ever. The Commission should address only the issue of federal preemption.

III. CONCLUSION

16 Based on the Staff's motion, and the foregoing, the Commission should dismiss SeaTac's complaint against Kenmore Air for a lack of jurisdiction, based on the preemptive effect of 49 U.S.C. § 41713(b)(1). The Commission need not and should not rule at this time whether Kenmore air is also exempt from regulation under WAC 480-30-011 or would, but for preemption or exemption, be subject to regulation as in "auto transportation company" under RCW 81.68.010.

Respectfully submitted this 10th day of January, 2007.

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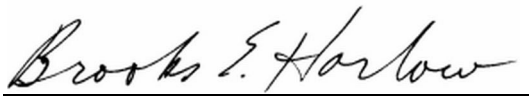

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