BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Seatac Shuttle, LLC., C-1077,	:	Docket No. TC-072180
	:	
	:	ANSWER OF SEATAC
Complainant,	:	SHUTTLE, LLC. TO STAFF
	:	MOTION FOR SUMMARY
v.	:	DETERMINATION
Kenmore Air Harbor, LLC	:	
	:	
	:	
Respondent.	:	

_____

I. INTRODUCTION

1. Seatac Shuttle, LLC, ("Seatac Shuttle") agrees with Staff that Kenmore Air Harbor, Inc. ("Kenmore") meets the definition of an "auto transportation company" as defined in RCW 81.68 and WAC 480-30 and that there is no exemption provided it under WAC 480-30-011. Seatac Shuttle does not, however, agree with Staff's conclusion that Kenmore is exempt from any form of regulation under its claim of preemption afforded to airlines in the *A.D.A* as codified in *49 U.S.C. s 41713 (b)(1).* Indeed, Kenmore would have the Commission only consider the issue of preemption to the exclusion of the original complaint. The question now before the Commission is "does federal preemption exist in this case and if so to what degree does it preempt WAC 480-30?" Without that determination being made no resolution of the broader question of preemption as it applies to passenger ground transportation can be expressed or inferred. Therefore no Order dismissing Seatac's complaint should be entered.

II. DISCUSSION

STAFF IS CORRECT IN FINDING THE KENMORE MEETS THE CRITERIA FOR AN "AUTO TRANSPORTATION COMPANY"

2. Staff paints a clear an undisputable picture of how and why Kenmore meets the definition of an "auto transportation carrier"[1]. Kenmore relies upon its claim of federal preemption as its primary defense to the complaint. Its claim of preemption under WAC 480-30-011(i) rely on unsupportable arguments [2].

STAFF IS INCORRECT IN SUPPORTING KENMORE'S CLAIM OF FEDERAL PREEMPTION

3. Staff motion relies on a broad brush interpretation of *49 U.S.C. s 41713(b)(1)* not supported in case law or statute. Both Staff and Kenmore rely heavily on *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.)* and *Chouest v. American Airlines, 839 F. 412 (E.D.La 1993)* neither of which case deals with the ground transportation of passengers by an airline. Both Staff and Kenmore rely heavily on Kenmore being qualified under *49 U.S.C. s 41713* as an air carrier, a position that is not supported by in *New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435 (D. Mass. 1985)* or *Menshawy v Egypt Air, 276 N.J. Super.121. 647 A2d 491.*

1. **Motion on behalf of Commission Staff for Summary Determination para(s) 18-33**
2. **Answer of Kenmore Air Harbor inc. to Staff Motion for Summary Determination para(s) 3-15**

Is Kenmore qualified as an air carrier?

Kenmore is in the business of transporting passengers by air under operating certificate issued by the FAA. This is factual and is not disputed by either Staff or Seatac Shuttle [3]. However, does that certificate in and of itself qualify Kenmore as an "air carrier" for the purposes of *49 U.S.C. s 41713*? The short answer is no. Kenmore does not meet the test of providing interstate, overseas, or foreign transportation (*Menshawy)*. Quite the contrary, Kenmore Air Express provides only intrastate service and Kenmore Air Harbor does not provide any measurable amount of ground transportation to any international passengers, which in and of themselves constitute only a small percentage of their overall business, certainly not enough to meet the bar of not being "too tenuous, remote, or peripheral a manner." *Morales v. Trans World Airlines, 504 U.S*

4. Further reinforcing the **interstate** qualification, the court found *in New York Airline* that the intent of Congress in enacting *49 U.S.C.A. § 1305(a) (now (b)(1))*, which prohibits any state or political subdivision from regulating the rates, routes, or services of interstate air carriers, was to regulate the jurisdiction of federal and state governments over **interstate air carriers**. In *Arapahoe County Public Airport Authority v. F.A.A., 242 F.3d 1213 (10th Cir. 2001)* the position of the court with respect **to interstate** commerce and the application of preemption was once again restated.

3. Kenmore is the possessor of an air carrier operating certificate issued by the FAA but in the current instance does not meet the test for "air carriers" under 49 U.S.C.A. § 41713

Is Kenmore's provision of ground transportation significant or integral to its operation?

5. Seatac disagrees with staff's position that Kenmore's ground transportation services are an important part of its airline services (*Motion on behalf of Commission Staff for Summary Determination para(s) 63*). Staff has not identified any other scheduled air carrier that provides optional ground transportation to its air passengers, nor has Kenmore. Air carriers historically do not provide ground transportation to and from their flights. From Boeing Field and Lake Union numerous ground transportation options and facilities exist for the flying passenger to connect with not only Seatac Airport but all other local and connecting destinations. No other airline has felt the need to rely on airline operated ground shuttles to conduct its business from a major metropolitan airport.

6. It is however, traditional in the airline industry to enforce the through ticking terms of a fare. If a passenger departs a flight from an intermediate stop they are accessed penalties and or their return ticket may be cancelled. While Kenmore claims that they have a through ticket arrangement, no obligation to use that through ticket is required. Its ground transportation is purely optional and not part and parcel of the air operation. No need or impact on service has been demonstrated by Kenmore; as such its optional ground transportation cannot be integral to the provision of air service.

7. Kenmore has no "through ticketing" arrangement with any other airline. Its claim of through ticketing is predicated on it own provision of scheduled shuttle service.

8. The court addressed the issue of significance as a test when applying preemption in Trinidad v. American Airlines, Inc., 932 F. Supp. 521 (S.D.N.Y. 1996), in which it stated that some state actions may affect airline services in too tenuous, remote, or peripheral a manner to have a preemptive effect. The court went on to state that courts should be reluctant to infer preemption in such cases because enactment of the provision defining the preemptive reach of the statute implies that matters beyond that reach are not preempted. In *Morales v. Trans World Airlines, 504 U.S.* the court revisited the concept of significance, **"[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect." 463 U.S., at 100, n. 21, 103 S.Ct., at 2901, n. 21.**

9. Kenmore operates two separate air services, Kenmore Air Express, (KAE) and Kenmore Air Harbor (Kenmore) under one operating certificate. KAE is purely a domestic, intrastate carrier and Kenmore provides intrastate service to the San Juan Islands and limited floatplane service to Victoria, B.C. KAE started operations in May of 2005 with land plane service between Oak Harbor, Washington and Boeing Field in Seattle Washington. Concurrent with this service KAE began scheduled van service as an option to its passengers between Boeing Field and Seatac International Airport. Kenmore would have the Commission believe that this scheduled ground transportation, optional as it may be, is integral to its air transportation service because it completes the connection between its base of operations and the destination of essentially all of its passengers, Seatac. Having made this claim to the Commission [4] KAE and its parent

Kenmore instituted flights to Boeing Field with scheduled ground shuttle service to down town Seattle. Passengers utilizing this shuttle service had no intention of connecting to continuing flights nor is there any compelling reason why KAE must provide this ground transportation. [5] In both instances there are many ground transportation options available to KAE and its passengers. KAE has opted to provide that ground transportation in an effort to avoid the requirements of RCW 81.68. Kenmore has neglected to inform the Commission of its Lake Union operation and its fee for service shuttle service originating there nor has the Commission investigated it.

Do *Federal Express* and *Chouest* have the effect of conferring preemption in this matter?

10. Both Staff and Kenmore cite *Federal Express* though Staff freely admits that this case is not directly on point [6]. We agree that the case is not on point, further we see no application in this particular instance. If anything it bolsters our position that no preemption exists. *Federal Express* is about an interstate, international air carrier engaged exclusively in the carriage of cargo. The court's decision did not address the issue of optional ground transportation of passengers. *Federal Express* provides door-to-door cargo service for its customers and has done so from its inception. It has created an innovative industry predicated on this service through the melding of both the air and

5. Appendix A Advertisement of Kenmore Air

6. Motion on behalf of Commission Staff for Summary Determination para(s) 52-64
Answer of Kenmore Air Harbor inc. to Staff Motion for Summary Determination para(s) 8

ground components. The decision of the court relied on Congress' intent to promote an interstate air cargo service free of restriction by individual states. "**In particular, in 1977, Congress sought the "encouragement and development of an expedited all-cargo air service system**,"*49 U.S.C.App. § 1302(b)(1)*, and Congress sought under the same heading, "Factors for all-cargo air service," the "encouragement and development of an integrated transportation system,"*49 U.S.C.App. § 1302(b)(2*)." *Federal Express*

11. The court went on to say in *Chouest* " **There is nothing in the record that suggests that the ground transportation portion of plaintiffs' vacation was essential or integral to the air transportation services provided by American**. **Admittedly, American must owe some of its success to the use of "package" deals such as the one it provided plaintiffs. But I do not believe that Congress intended to exempt from the application of state laws any "transportation" services American wishes to provide, including, e.g., tour bus services or car rental services. Therefore, I conclude that defendant has not carried its burden of showing preemption so as to provide the court with jurisdiction under 28 U.S.C. § 1331"**

12. The court in *Chouest* further stated that "**the *Federal Express* case involved all-cargo service, whereas this action involves the carriage of persons, rendering unhelpful the statutory language relied on by the Ninth Circuit as evidence of Congress' intent". The court in essence said preemption is not implied to the ground transportation of passenger by an airline. The court went on to deny preemption even though the provision of the optional ground transportation**

through its (American's) vacation packages "Defendant has failed to identify, and I am unable to find, any language in the statute or in the legislative history that supports defendant's preemption argument. Finally, defendant has in no way demonstrated that the ground transportation provided as part of American's European vacation package is "integral" to the air transportation services provided by American as required by the Ninth Circuit in the *Federal Express* decision."

13. The conclusion must be that there is no presumption of preemption, there is no case that either Staff or Kenmore points to that offers any foundation for preemption. Kenmore and Staff do not provide us or the Commission with any cases or rulings that point to the provision of ground passenger transportation directly by an airline. Why, because there are none. There are none because the provision of ground transportation by an air carrier is neither traditional, historical nor integral. The issue has never arisen and therefore been tested by the courts.

Does providing preemption to Kenmore serve to provide a more competitive and market driven fare structure in the airline marketplace?

14. Kenmore does not compete with any other airline on its routes. It enjoys a virtual monopoly over its route structure. It is able to set its fares and routes free from the economic factors which drive a multi-air-carrier served market. In Martin v. Eastern Airlines, Inc., 630 So. 2d 1206 (Fla. Dist. Ct. App. 4th Dist. 1994), the court stated that the purpose of the ADA is to rely on competitive market forces to further innovation,

efficiency, and low prices as well as variety and quality of air transportation services. Koutsouradis v. Delta Air Lines, Inc., 427 F.3d 1339 (11th Cir. 2005) further reaffirmed this concept of airline competition by finding that the "Purpose of the Airline Deregulation Act's (ADA) preemption provision is to increase reliance on competitive market forces rather than pervasive federal regulation.

15. In the absence of any air carrier competition preemption is not warranted, justified or proved.

Does ownership of an operating entity qualify it for preemption?

16. Kenmore owns the shuttles that it operates in scheduled service. Kenmore would have the Commission therefore believe that it is a service of Kenmore as defined in case law. Meer ownership does not confer service status. By that logic any ancillary business owned by Kenmore would be preempted and that argument was rejected by the court in *Federal Express.* To be considered a service it must pass the test of not being "**too tenuous, remote, or peripheral".** Clearly a ground transportation system that is optional and only serves a minority portion of Kenmore's passengers (Lake Union and Boeing Field) and is advertised as available to points other than connecting flights is **tenuous, remote, and peripheral** to Kenmore's operations as an airline. Under Kenmore's theory any operations conducted by it would be preempted under ADA, not a position that is reflected by the courts.

Is convenience a test for preemption?

17. Staff relies upon "convenience" as a crucial component of its determination of preemption, *Motion on behalf of Commission Staff for Summary Determination para(s) 47.* The court offers a series of tests for the determination of preemption: a two part test *Osband v. United Airlines, Inc.981 p.2d 616 (Colo. Ct. App. 1988)* and a three part test *Jetblue Airways Corp. Privacy Litigation, 379. Supp. 2d 299 (E.D. N.Y. 2005),* "convenience" is not one of the test defined by either court. In no case cited by either Staff or Kenmore was convenience as relied upon by Staff, a determining factor in granting preemption.

Is Kenmore preempted from specific provisions of WAC 480-30?

18. As stated previously, Seatac Shuttle does not agree that any preemption is applicable in this case for all of the reasons stated above. However, in a situation where an airline is preempted by *49 U.S.C.App. § 1302(b)(2)*, it is not preempted to those state regulations relating to safety and insurance. *Harrel v. Champlain Enterprises Inc., 200 A.D.2d 290, 613 N.Y.S.2d 1002 (3d Dep't 1994) points the way* in its decision in determining that "….the word "services" is not coextensive with airline safety and the traditional role of state law is to be maintained..". Accordingly, the WUTC has both the authority and obligation to enforce those provisions of the WAC (480-30) relating to safety in general, insurance, reporting and the public safety. As a qualified ground carrier, which it is in Staff's opinion (*Motion on behalf of Commission Staff for Summary*

Determination para(s) 33) Kenmore must, perforce, at a minimum abide by those provisions of RCW 81.68 and WAC 480-30 that any qualified carrier is required to as the relate to public safety.

SUMMARY

19. Kenmore is not preempted from regulation under *49 U.S.C.App. § 1302(b)(2)*. Their ground operation has no basis as a regular, customary or integral part of any airline operation. All cases cited by both Staff and Kenmore do nothing to point to any exclusion for airlines providing, scheduled ground transportation. Kenmore is essentially an ***intrastate*** air carrier. True it holds an air carrier operating certificate issued by the FAA, but other than a few non-connecting flights from British Columba, Canada, it operates exclusively within Washington State. All cases cited by Staff and Kenmore refer to airlines that operate under a *CFR 14 Part 121* Air Carrier certificate, Kenmore does not. *CFR 14 Part 135* carriers such as Kenmore are limited to nine (9) passenger seats in scheduled operations and are not generally viewed as international or interstate carriers. They are the smallest link in the air carrier system, commonly referred to as "puddle jumpers". They are granted interstate, and on a limited basis international authority by their certificates but they are not what one would commonly refer to as an "airline". One, for instance could not book a flight from Seatac to Los Angles or Chicago on a scheduled Part 135 air carrier. By far and away the most common use of a Part 135 certificate is for air charter, which in the case of business aviation providers may well go from coast to coast, abet on an on- demand, non-scheduled basis. Part 121 on the other hand is scheduled domestic (interstate) or international operations. American Airlines

operates under Part 121, as does United and Alaska and every other passenger air carrier originating flights from Seatac International Airport. There is nothing in either the statute or case law with would presume Congress's intent was to provide preemption for small, 9 seat, intrastate carriers, in the cases previously cited the word ***interstate*** was specifically used by the courts.

20. Regulating the scheduled, ground shuttle of Kenmore may have an "effect" upon Kenmore, but it will not affect the day to day air service that it provides. In *Miller v. Northwest Airlines, 253 N.J. Super. 618, 602 A.2d 785 (App. Div. 1992),* the court found that state law claims that merely have an "effect" on airline services are not preempted. The ground operation of Kenmore is of **too tenuous, remote, or peripheral a manner" to have pre-emptive effect.**

21. Even if an airline is to enjoy the preemption afforded under ADA, the states retain the right to regulate in the interest of public safety, *Harrel v. Champlain Enterprises Inc.*.

22. Staff has with its Motion has neither proven nor adequately supported its (and Kenmore's) theory of preemption. Theirs is untested supposition. Questions of definition, services, relating to, routes and rates all still stand, they are not resolved by Staff's Motion or by Kenmore's Answer. With a lack of consistency off application in the courts and no reasonably clear rulings for guidance, Staff and Kenmore have drawn conclusions virtually from thin air. Following Staff's logic Kenmore may now use Boeing Field as a bus terminus throughout the state with no oversight.

RELIEF SOUGHT

23. For the reasons stated above, the Commission should deny Staff's Motion for Summary Determination, proceed with the adjudicative process and schedule a pre-hearing conference.

Respectfully submitted this 17th day of January, 2008.

Seatac Shuttle, LLC.

Michael Lauver
Vice President
mike@seatacshuttle.com
360-679-4003