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, LLC TO PETITION FOR ADMINISTRATIVE REVIEW

1 Kenmore Air Harbor, LLC ("Kenmore Air") files this answer in opposition to the Petition For Administrative Review ("Petition") Of Seatac Shuttle, LLC ("Seatac"). Kenmore Air urges the Commission to reject the Petition and adopt Order 02, Denying Petition To Intervene And Dismissing Complaint, served on February 4, 2008, by Administrative Law Judge Moss as the final order in this docket.

Seatac Has Failed to Preserve Any Complaint It May Have Had Against Kenmore Air's Lake Union Operations

2 In the Petition, Seatac asserts that there has been "confusion" in this case. To the extent there is such confusion it arises solely from the vague and arguably improper complaint of Seatac. For example, in its petition Seatac criticizes Order 02 for leaving "open the question of Lake Union." However, close review of the complaint reveals no mention of the Lake Union operations of Kenmore Air. Since Seatac's certificate does not permit service to Lake Union,[1] quite naturally the Staff's motion focused on Kenmore

[1] Nor Kenmore, at the north end of Lake Washington.

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Air's Boeing Field and Seatac operations. This focus is bolstered by review of the Staff's communications with Seatac last year regarding its informal complaint.

3 Attached as Appendix 6 to Staff's motion to dismiss is a letter from Seatac to the WUTC dated August 23, 2007, wherein Seatac detailed at length the operations of Kenmore Air to which it was objecting. The discussion focuses solely on the operations between Boeing Field and SeaTac Airport and makes no mention of the seaplane operations out of Lake Union. The lack of any mention of any Kenmore Air's Lake Union operations until the Petition is not surprising, given that Seatac possesses no authority to serve Lake Union.

4 Seatac belatedly asserts that it raised the Lake Union operations in its answer to the Staff's motion to dismiss. However, the only times Lake Union are mentioned are in paragraphs 5 and 16 of the answer—where Lake Union is lumped together with Boeing Field with no attempt to distinguish the facts or the law regarding federal preemption between those two air terminals—and in paragraph 9 where Seatac stated that "Kenmore has neglected to inform the Commission of its Lake Union operation . . . ." However, Kenmore Air is not the complainant. Seatac is the complainant and has an obligation to at least put the Commission on notice in its complaint that it was questioning the Lake Union operations separate and apart from the Boeing Field operations. Seatac failed to do that.

5 Even setting aside the deficiencies in the complaint, as a party responding to the Staff's motion for summary determination, Seatac had the obligation to provide facts on which the Commission might reach a different conclusion regarding the Lake Union operations from the Boeing Field operations if any such facts existed. *See* WAC 480-07-380(2)(a) and CR 56(e) of superior court civil rules. Merely stating that the Commission "has not investigated" the Lake Union operations (because it has never been asked to do so) does not meet the non-moving party's burden of coming forward with evidence.

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Kenmore Air's Lake Union Operations Are Not Materially Different From The Boeing Field/SeaTac Airport Operations From a Pre-emption Perspective

6 Assuming that Kenmore Air's Lake Union operations were properly at issue before the Commission, those operations are also exempt from state regulation under the Airline Deregulation Act based on the undisputed facts in the record. Regardless of whether the air passengers arrive or depart Boeing Field or Lake Union, every single ground passenger has an immediate prior and subsequent movement by air. In each instance, the ground transportation portion is but one small part of a continuous movement that is a part of the "service of an air carrier." *See* 49 U.S.C. § 41713. As the administrative law judge correctly concluded, Kenmore Air's Boeing Field operations are exempt from WUTC regulation. That conclusion applies with equal force to Kenmore Air's Lake Union operations.

7 Seatac cites two New York state tort cases to support the assertion that the ground segment of Kenmore Air's provision of transportation is not a "service." Such tort cases are part of a long line of personal injury and similar claims which mostly, but not entirely,[2] hold fall outside of the scope of federal preemption. These cases simply have no bearing on the issue of a state agency's regulation of services and are readily distinguishable.

8 Not only do the tort cases not support Seatac's arguments in favor of state regulation, they cannot be squared with the statutory scheme. The argument that Kenmore Air is not an "air carrier" for purposes of federal preemption when it is involved in intrastate transportation is contrary to the definitions contained in the federal

[2] Moreover, even some tort cases are preempted as Seatac's own case, *Weiss v.El Al*, 471 F. Supp 2d 356 (S.D.N.Y. 2006) holds. Generally it has only been personal injury cases that survive under state law against claims of federal preemption. The tort cases also provide no support for Seatac's argument that state safety and insurance regulation survives federal preemption.

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statute. An "'Air carrier' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2). In turn, "'air transportation' means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(4) Thus, because Kenmore Air undertakes to provide foreign and interstate air transportation, it is an air carrier, certified as such, and subject to both the benefits and burdens of federal regulation as to **all** its operations, not just its interstate and foreign operations.[3]

9 The "once an interstate 'air carrier' always an interstate 'air carrier'" interpretation is evident from 49 U.S.C. § 40102 subsections (a) (2) and (5). The interpretation is confirmed by the definition of an "**intra**state air carrier" which "means a citizen of the United States undertaking by any means to provide **only** intrastate air transportation." 49 U.S.C. § 40102(a)(26)(emphasis added). Reading the statute as a whole leaves room for but one interpretation. In enacting the statute, Congress *could* have carved out and preserved a regulatory role for the states with regard to the intrastate operations of interstate carriers. Congress did not do so. Instead, Congress clearly defined a carrier for purposes of federal law as one which conducts foreign interstate operations to any extent and provided that intrastate carriers are only those which **never** provide any interstate or foreign service.

10 Finally, Seatac argues that the ground portion of Kenmore Air's passenger transportation services are not part of Kenmore Air's "service" of air transportation. Again, this is contrary to case law and the statute. For example, in *Philadelphia v. Civil Aeronautics Board*, 289 F.2d 770 (D.C. Circuit 1961), the court rejected the argument of petitioner City of Philadelphia that to constitute "air transportation" a service must be entirely by aircraft. As the court noted, such a narrow interpretation of air transportation

[3] *See also, U.S. v. Garrett*, 984 F.2d 1402 (5th Circuit, 1993) (aircraft was engaged in "interstate air transportation" even though defendant was ticketed on a flight that was wholly within the state of Louisiana).

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services is not supported by the language of the federal statute. Indeed, the statute states that, "'interstate air transportation' means a transportation of passengers or property by aircraft as a common carrier . . . when any part of the transportation is by aircraft." 49 U.S.C. § 40102(a)(25) (emphasis added).

11 As the court in *FedEx* case[4] concluded, and this Commission should hold, the ground shuttle operations of Kenmore Air are part of its air transportation service. As an interstate air carrier, Kenmore Air's services are subject to federal regulation and preemption, regardless of whether they are performed by aircraft or ground vehicles and regardless of whether the passengers are in any particular movement are engaged in interstate or foreign commerce. Only such an interpretation can be squared with Congress' intent, the language of the Federal statute, and relevant cases.

CONCLUSION

12 The well-reasoned Order 02 should be upheld as a final order. Seatac's attempts to introduce new facts and arguments at this stage regarding Lake Union operations should be rejected. Regardless, as an "air carrier" subject to federal regulation, Congress' broad preemption of state regulation applies to all of Kenmore Air's air terminals as well as to the ground transportation of its airline passengers. The Commission should allow the initial decision to stand as is.

[4] *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.).

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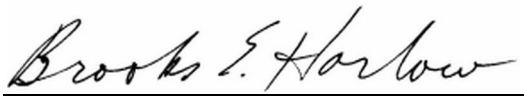

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CERTIFICATE OF SERVICE
Docket No. TC-072180

I hereby certify that a true and correct copy of the foregoing was forwarded via electronic mail and first class mail, postage fully prepaid, in sealed envelopes, to the following:

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Dated at Seattle, Washington, this 3rd day of March, 2008.

/s/ Carol Munnerlyn
Secretary

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