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March 3, 2008

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

Re: *Seatac Shuttle LLC v. Kenmore Air Harbor LLC*
Docket TC-072180

Dear Ms. Washburn:

Enclosed for filing in the above-referenced docket are the original and 12 copies of the Response on Behalf of Commission Staff to Seatac Shuttle LLC's Petition for Administrative Review, and Certificate of Service.

Sincerely,

DONALD T. TROTTER
Senior Counsel

DTT:klg
Enclosures
cc: Parties

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SEATAC SHUTTLE LLC, Complainant, v. KENMORE AIR HARBOR LLC, Respondent.	DOCKET TC-072180 RESPONSE ON BEHALF OF COMMISSION STAFF TO SEATAC SHUTTLE LLC'S PETITION FOR ADMINISTRATIVE REVIEW

I. INTRODUCTION

1 In Order 02 in this docket, Commission Administrative Law Judge Dennis Moss granted Staff's Motion for Summary Determination and dismissed the complaint of Seatac Shuttle, LLC (Seatac). Seatac seeks administrative review of that decision. For the reasons stated below, Order 02 reached the correct conclusions about preemption. Therefore, the Commission should deny the Petition for Administrative Review (Petition).

2 At the outset, we observe that in several respects, Seatac's Petition fails to meet the requirements of WAC 480-07-825(3), which states in pertinent part:

> A petition that challenges the summary or discussion portion of an initial order must include a statement showing the legal or factual justification for the challenge, and a statement of how the asserted defect affects the findings of fact, the conclusions of law, and the ultimate decision.

3 Under this rule, petitioners such as Seatac are required to explain the materiality of their points and arguments. The Commission and the other parties have no basis to respond when a petitioner fails to explain the significance of the issues they raise.

4 For example, Seatac posits there is "confusion among the parties" about the corporate structure of Kenmore Air.[1] Staff cannot respond because Seatac fails to demonstrate the significance of this alleged "confusion" to the findings, conclusions of law and the ultimate decision in Order 02.

5 Similarly, Seatac complains that Order 02 is "incomplete" because it does not address Kenmore Air's operations out of Lake Union.[2] Again, Staff cannot respond because Seatac fails to demonstrate how this affects the findings, conclusions or ultimate decision.

I. ANALYSIS

6 In its Petition, Seatac identifies no disputed material issues of fact. Therefore, we address Seatac's legal arguments.

A. Kenmore Air is an "air carrier" for purposes of preemption under 49 U.S.C. § 41713

7 The ALJ correctly ruled that Kenmore Air is an "air carrier" for purposes of preemption under 49 U.S.C. § 41713; that the company's ground transportation services are directly related to its airline "services"; and therefore, such ground transportation is subject to preemption under 49 U.S.C. § 41713.

8 In making this ruling, the ALJ concluded that Kenmore Air meets the definition of "air carrier" in 49 U.S.C. § 40102(a)(2) because it provides foreign and interstate air transportation "indirectly;" that is, its service connects with foreign and interstate flights arriving and leaving from Sea-Tac Airport.[3]

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[1] Petition for Administrative Review (Petition) at 1, ¶ 2.
[2] *Id.* at 1, ¶ 1.
[3] Order 02 at 4-5, ¶ 14. In its motion, Staff did not discuss the issue whether Kenmore Air was an "air carrier" under the "indirectly" language of 49 U.S.C. § 40102(a)(2). The cases Staff reviewed that address the term "indirectly" typically required the person to have arranged interstate air travel. *E.g., Railway Express Agency, Inc. v. Civil Aeronautics Bd.,* 345 F.2d 445 (D.C. Cir. 1965). Because Staff concludes that Kenmore Air is clearly a "direct" air carrier, Staff did not further analyze the "indirect" air carrier issue.

9 However, it was not necessary for the ALJ to analyze whether Kenmore Air provides foreign or interstate transportation "indirectly," as that term is used in the definition of "air carrier" in 49 U.S.C. § 40102(a)(2), because preemption applies so long as Kenmore Air has some interstate or foreign air carrier operations.

10 Kenmore Air's operations between Canada and Seattle's Lake Union clearly meet the definition of an "air carrier" in 49 U.S.C. § 40102(a)(2),[4] and the federal government has issued Kenmore Air an air carrier certificate.[5] Thus, there can be no dispute that Kenmore Air is an "air carrier" for purposes of the Airline Deregulation Act, and Seatac admits as much.[6]

11 Seatac's argument is simply that Kenmore Air is not an "air carrier" as to its flights between Oak Harbor and Boeing Field.[7] Seatac frames the issue correctly: "Does that certificate in and of itself qualify Kenmore as an 'air carrier' for purposes of 49 U.S.C. § 41713?"[8] As a matter of law, the answer is yes, and that answer is found in the words of the preemption statute itself: 49 U.S.C. § 41713(b)(1), which preempts state statutes and regulations "related to a price, route or service of an air carrier that may provide air transportation under this subpart."

12 There are no words in 49 U.S.C. § 41713(b)(1) that limit preemption to the *interstate or foreign* operations of the air carrier. Rather, preemption applies to all "prices, routes or services" of the "air carrier." Because Kenmore Air qualifies as an "air carrier," all of its

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[4] 49 U.S.C. § 40102(a)(2) defines "air carrier" as: a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." "Air transportation" means foreign or interstate transportation or transportation of mail by aircraft. 49 U.S.C. § 40102(a)(5).
[5] Staff Motion for Summary Determination, Appendix 2 contains a copy of the air carrier certificate.
[6] Seatac's Answer to Staff Motion for Summary Determination at 3, the un-numbered paragraph between ¶ 3 and ¶4, first two sentences.
[7] Petition at 2-3, ¶ 4.
[8] Seatac's Answer to Staff Motion for Summary Determination at 3, the un-numbered paragraph between ¶ 3 and ¶ 4, third sentence.

all of its operations benefit from federal preemption as to state regulations "related to a price, route or service."

13 This natural reading of the preemption statute is confirmed by 49 U.S.C. § 41713(b)(2), which states in pertinent part: "[preemption under 49 U.S.C. § 41713(b)(1)] does not apply to air transportation provided entirely in Alaska ..." Obviously, if Seatac's theory is correct that Kenmore Air's intrastate routes are not subject to preemption, there would be no need for Congress to carve out an exception for intrastate routes in Alaska. Therefore, it is Seatac's theory that must be wrong.

14 In other words, Seatac's argument is doomed by the fact that Congress made no similar exception to preemption for the intrastate Washington operations of an air carrier. If Seatac is correct that federal preemption does not apply to an air carrier's intrastate routes, Section 41713(b)(2) is surplusage. However, that section is not surplusage because Congress needed to create an exception for an air carrier's intrastate Alaska operations due to the fact that the broad preemption language in 49 U.S.C. § 41713(b)(1) would otherwise apply to preempt state price, route and service regulation of such intra-Alaska operations.

15 If more support is required, the Commission should consider the Ninth Circuit's decision in *Federal Express Corp. v. California Public Utilities Commission,* 936 F.2d 1075 (1991), which Staff addressed in detail in its Motion for Summary Determination at ¶¶ 52-65.[9] In that case, the court held that 49 U.S.C. § 41713(b)(1) preempted the California Public Utilities Commission from enforcing state regulatory statutes against Federal Express' purely intrastate ground transportation of packages (*i.e.,* the packages were transported between points in California by Federal Express' trucks, and the packages had

[9] Order 02 did not discuss this case, nor did Seatac in its Petition. Nonetheless, we commend it to the Commission because it confirms the result reached in Order 02.

no prior or subsequent airplane transport). The message of *Federal Express* could not be clearer: preemption under the ADA applies to the intrastate services of air carriers, and to more than just transportation of passengers on an airplane.

16 For any or all of these reasons, the Commission should find that because Kenmore Air is an air carrier, the Commission is preempted from enforcing laws and rules "related to a price, route or service" of Kenmore Air, and that includes the ground transportation at issue.

B. Kenmore Air's ground service is directly related to Kenmore Air's flights. That ground service is therefore a "service" subject to preemption under 49 U.S.C. § 41713

17 The second issue Seatac raises in its Petition is whether Kenmore Air's ground transportation constitutes a "service" as that term is used in 49 U.S.C. § 41713(b)(1). Seatac apparently acknowledges the Supreme Court's conclusion in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) that the Airline Deregulation Act's (ADA) preemptive sweep is extremely broad. Seatac's complaint is that the ALJ should have looked to a federal court decision from the Southern District of New York for guidance on what is a "service" for purposes of ADA preemption.[10]

18 In fact, there was no need for the ALJ to look beyond *Morales* to get the correct answer in this case. Indeed, it does not take great analytical effort to conclude that Kenmore Air's ground transportation meets the *Morales* standard of "in connection with or reference to a … service" of an air carrier. On the other hand, it takes considerable effort to conclude the opposite.

19 Seatac has never provided a convincing explanation why Kenmore Air's ground service is *not* directly connected to its airline services. Perhaps that is because the facts

[10] Petition at 3, ¶ 5.

directly linking Kenmore Air's ground transportation to its airline transportation are crystal clear and undisputed: Kenmore Air provides ground service only to its airline customers; 95% of those customers use the ground service; and Kenmore Air treats its ground service as an integral part of its air service.[11] As the ALJ correctly concluded: "There is simply nothing that is 'tenuous, remote or peripheral' about the ground transportation component of Kenmore Air's service between Oak Harbor and Sea-Tac."[12]

20 Indeed, Kenmore Air's ground service is more directly connected to its actual flights than the airline fare advertising which the *Morales* Court held to be free from state regulation under the preemption provisions of the ADA. Seatac has no answer to this.

21 The ALJ's conclusion that Kenmore Air's ground transportation is "related to or connected with" its air transportation is not only supported by the facts and the *Morales* decision, but other provisions of the federal air carrier statutes as well. For example, 49 U.S.C. § 40102(24)(B) and (25)(B) define "interstate air commerce" and "interstate air transportation" respectively as including transportation between the states "when *any part of the transportation* is by aircraft." (Emphasis added). Thus, Congress plainly contemplated that more than one mode of transportation may be used by an air carrier.

22 Historically, federal regulators considered an airline's ground transportation to be part of an air carrier's service. For example, in *City of Philadelphia v. Civil Aeronautics Bd.*, 289 F.2d 770 (D.C. Cir. 1961), the airline carried cargo by airplane from California to Newark, New Jersey, and then by truck to Philadelphia, Pennsylvania. The court affirmed a Civil Aeronautics Board decision that considered the ground transportation to constitute service under the airline's air carrier certificate.

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[11] Staff's Motion for Summary Determination at 4-5, ¶¶ 11-13, and documents referred to therein.
[12] Order 02 at 5-6, ¶ 17.

23 Notwithstanding all this, Seatac implores the Commission to consider dicta from *Weiss v. El Al Israel Airlines, Ltd.,* 471 F. Supp. 2d 356 (S.D. N.Y. 2006). Seatac focuses on one issue in *Weiss*, which was whether the airline's act of "bumping" a prospective passenger because of an overbooked flight was a "service," and therefore state tort laws purporting to govern that conduct were subject to preemption under 49 U.S.C. § 41713.

24 The Commission should note that the *Weiss* court ruled first that the Plaintiff did not timely raise this issue,[13] so anything the court has to say on it is dicta. However, the court's further analysis supports the ALJ's order in this case.

25 Indeed, the *Weiss* court acknowledged the broad scope of ADA preemption, and quoted *Morales* for the proposition that claims "in connection with or reference to airline … services" were preempted.[14] The court went on to find that "bumping" a prospective airline passenger was indeed a "service" of the airline, and thus state tort law purporting to address that activity was preempted.

26 This analysis supports Order 02, not Seatac, because Kenmore Air's ground service is more directly related to the actual provision of air transportation than the "service" the *Weiss* court held subject to preemption: *i.e.,* each Kenmore Air ground transportation passenger has an actual prior or subsequent airline movement by Kenmore Air, while the prospective passenger in *Weiss* never saw the inside of an airplane. If state regulation of the "service" in *Weiss* is subject to preemption, then surely Kenmore Air's ground transportation is, too.

27 The court did go on to analyze two different tests used by various courts, primarily in tort cases, to determine whether an activity is a "service" subject to ADA preemption. For

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[13] 471 F. Supp. 2d at 358-59.
[14] *Id.* at 359, quoting *Morales,* 504 U.S. at 384.

reasons unexplained, Seatac elects to describe only one of these tests, and argues that because ground transportation is not "commonplace and ordinary," it does not constitute a "service" for purposes of ADA preemption.[15]

28 Seatac's argument is superficial and ultimately unavailing. First, Seatac cites no case in which these tests were applied to services as directly related to air transportation as in the instant case. Second, as we noted earlier, in the *City of Philadelphia* case, the court affirmed a decision of the Civil Aeronautics Board that considered an airline's ground transportation to be part and parcel of its airline transportation under its air carrier certificate. Third, in the *Federal Express* case, the court preempted state regulation of an air carrier's intrastate ground transportation of packages, even though that transportation was intrastate, and no airplane was involved. The *City of Philadelphia* and *Federal Express* cases cannot be reconciled with Seatac's position.

29 Moreover, unlike *Weiss,* the instant case is not a tort case. There is no need for the Commission to apply one, two, or more "tests" developed by courts to help analyze marginal fact patterns. This is not a marginal case because the facts plainly show the direct interrelationship between Kenmore Air's ground transportation and its airline service. That is a sufficient basis for ADA preemption under the Supreme Court's decision in *Morales.*

C. Kenmore Air is not subject to WAC 480-30

30 Seatac argues that even if ADA preemption applies, Kenmore Air must still comply with the provisions of WAC 480-30 that relate to bus safety,[16] because according to Seatac, the "price, route or service" scope of ADA preemption does not apply to safety.[17]

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[15] Petition at 3, ¶ 5.
[16] Petition at 4, ¶ 6. Seatac did not raise this issue in its complaint, so Staff did not address it in the Staff motion.
[17] Petition at 4, ¶ 6.

31 If Seatac's theory is correct, one would expect to find many states that regulate the safety of airplanes and other transportation equipment an airline uses to make flights within that jurisdiction. Interestingly, Seatac fails to provide a single example of such state regulation. Instead, Seatac offers only *Harrell v. Champlain Enterprises, Inc.,* 613 N.Y.2d 1002 (1994), and claims it stands for the proposition that state airline safety regulation is not preempted.

32 In fact, *Harrell* offers the Commission no guidance here, because that case involved general state tort laws, not safety regulation by a regulatory body such as the Commission. In the ADA, Congress was focused on state regulatory laws, not choice of law issues that might apply when a person seeks to recover damages from a personal injury resulting from the negligent acts of an airline employee.

33 Indeed, it is readily apparent that state safety regulation is closely related to "price" and "service" of an airline. For example, safety regulation would likely affect service by addressing equipment standards (*e.g.,* number of doors on an airplane) or practices (*e.g.,* use of seat belts), and it would likely affect price by imposing compliance costs. There is no reason to believe Congress intended to allow local regulation of such matters when it enacted the ADA.

34 It is pertinent to note that Congress used the same "related to a price, route or service" language to preempt state regulation of motor carriers of property. *49 U.S.C. § 14501(c)(1).* However, for motor carriers deregulation, Congress expressly excluded from such preemption "the safety regulatory authority of a State with respect to motor vehicles," among other things. *49 U.S.C. § 14501(c)(2)(A).*

35 This strongly suggests Congress believed that when preempting state regulation using the phrase "related to a price, route or service" without qualification (as Congress did when enacting the ADA), that state-imposed safety standards are included in the broad sweep of such unqualified preemptive language.

36 The bottom line is that Seatac has failed to demonstrate that state regulation of airline safety is free from the preemptive effects of the ADA.

D. The ALJ properly denied the intervention of Pacific Northwest Transportation Services, Inc.

37 Finally, Seatac contests the ALJ's denial of the intervention petition of Pacific Northwest Transportation Services, Inc. (PNTSI). PNTSI itself has not deemed it appropriate to challenge the ALJ's denial of its intervention petition, so it is difficult to see how Seatac is prejudiced. Therefore, we challenge PNTSI's standing to challenge this ruling.

38 In any event, there was more than sufficient cause for the ALJ to deny the PNTSI intervention petition. First, as the ALJ pointed out, the petition provided only a general statement of interest by PNTSI: "Operation of a regularly scheduled service to an airport within the state of Washington without proper authority economically affects every regulated operator."[18] The ALJ effectively ruled that in this case, "proper authority" existed through an act of Congress via the preemption provision of the ADA.[19] Therefore, the interest enunciated in PNTSI's petition has no weight in this case.

39 Second, the ALJ was also correct to note that PNTSI's general statement of interest is insufficient to justify intervention.[20] Moreover, the Petition is deficient because it fails to

[18] Motion to Grant Intervenor Status at ¶ 4.
[19] Order 02 at 6, ¶ 20.
[20] *Id.*

state PNTSI's position with respect the matter in controversy, as required by WAC 480-07-355(1)(c)(iii).

40 Against all this, Seatac says the ALJ should have granted PNTSI's intervention petition because this case is "precedential and therefore regulated carriers will be affected."[21] Such a general proposition is insufficient to confer standing because every Commission order is likely to be precedential in some way. PNTSI presents no unique interest in that regard. Perhaps that is why PNTSI did not use this "precedential" rationale to support its own intervention petition. It is inappropriate for Seatac to impute such an interest to PNTSI.

41 For all these reasons, the Commission should conclude that the ALJ properly denied the petition of PNTSI.

III. CONCLUSIONS

42 For the reasons stated above, the Commission should deny Seatac's Petition. In doing so, the Commission should adopt the analysis of "air carrier" supplied in Part II.A of this Response, in place of the ALJ's analysis of the term "indirectly" in 49 U.S.C. § 40102(a)(2).

DATED this 3rd day of March, 2008.

Respectfully submitted,

ROBERT M. MCKENNA
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Counsel for Washington Utilities and Transportation Commission

[21] Petition at 5, ¶ 7.

Docket TC-072180
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the attached document upon the persons and entities listed on the Service List below by depositing a copy of said document in the United States mail, addressed as shown on said Service List, with first class postage prepaid.

DATED at Olympia, Washington this 3rd day of March, 2008.

KRISTA L. GROSS

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