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FEDERAL RELATIONS:
Authority of the Illinois
Aeronautics Board to Regulate the
Intrastate Services of Interstate
Commuter Airlines Operating Under
Subsection 1386(b)(4) of the
Federal Aviation Act of 1958, As Amended

Robert L. Donahue, Chairman
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Dear Mr. Donahue:

I have your letter wherein you inquire whether section 105(a)(1) of the Federal Aviation Act of 1958, as amended (49 U.S.C.A. § 1305(a)(1)) would prevent the Illinois Aeronautics Board from regulating the intrastate services of interstate commuter airlines operating under section 416(b)(4) of the Federal Aviation Act of 1958, as amended (49 U.S.C.A. § 1386(b)(4)). For the reasons hereinafter stated, it is my opinion that the Illinois Aeronautics Board may not establish safety requirements and standards for such commuter flight crews and aircraft to be enforced by banning the operations of

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non-complying air crews and equipment, without contravening the Federal pre-emption provision of 49 U.S.C.A. § 1305(a)(1).

Subsection 401(a) of the Federal Aviation Act (49 U.S.C.A. § 1371(a)) provides that "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation".

Subsection 1386(b)(4) of the aforementioned Act specifically provides that:

"Subject to paragraph (5) of this subsection, any air carrier in air transportation which provides (A) passenger service solely with aircraft having a maximum passenger capacity of less than fifty-six passengers, or (B) cargo service in air transportation solely with aircraft having a maximum payload capacity of less than eighteen thousand pounds, shall be exempt from the requirements of subsection (a) of section 401 of this title [49 U.S.C.S. § 1371], and of such other sections of this Act as may be prescribed in regulations promulgated by the Board, if such air carrier conforms to such liability insurance requirements and such other reasonable regulations as the Board shall from time to time adopt in the public interest. The Board may by regulation increase the passenger or property capacities specified in this paragraph when the public interest so requires.

* * *

(Emphasis added.)

Subsection 1305(a)(1) of the Act provides that:

"(a)(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

* * *

(Emphasis added.)

Because subsection 1305(a)(1), as indicated above, pre-emptes the areas relating to rates, routes, or services of any air carrier having "authority" under subchapter IV to provide interstate transportation, and because commuter airlines with interstate routing are, under certain conditions, "exempt" from the certification requirements of subsection (a) of section 401 (49 U.S.C.A. § 1371), you have inquired whether the Federal pre-emption provided in subsection 1305(a)(1) should be read as applying only to carriers operating under the affirmative approval of the Civil Aeronautics Board in the form of a Federal certificate obtained pursuant to subsection 1371(a) and not to those air carriers, such as commuter lines, which are "exempt" from the certification requirements of subsection 1371(a). Such a reading of the statutes would mean that the Federal pre-emption found in 1305(a)(1) would not apply to commuter airlines with interstate routing operating under the exemption from certification found in subsection 1386(b)(4), thus allowing a State to regulate the intrastate services of those interstate airlines.

Section 4 of the Illinois Carriers Act (Ill. Rev. Stat. 1979, ch. 15 1/2, par. 504) provides that the Illinois Aeronautics Board:

" * * * is granted and vested with the right, power and authority to promulgate and administer economic and safety rules and regulations over air carriers, consistent, so far as practicable, with federal rules and regulations. The Board shall be vested with broad discretion in promulgating such rules and regulations. Without limiting the right, power and authority of the Board, to the extent necessary to enable it to perform its functions, it may approve or disapprove the maximum or minimum, or maximum and minimum rates, fares, and charges of each scheduled air carrier, require the filing of such reports and other data of air carriers as the Board may deem necessary, cause the examination of any aspect of an air carrier's economic or operational condition, approve or disapprove the schedules of the scheduled air carriers, and adopt a program, rules and regulations necessary to effectuate its duties hereunder." (Emphasis added.)

"Air carrier" is defined in section 2 of the Illinois Air Carrier Act (Ill. Rev. Stat. 1979, ch. 15 1/2, par. 502) as:

" * * * any scheduled air carrier or charter air carrier which is engaged in the transportation of persons or property by aircraft in intrastate commerce. However, the term 'air carrier' as used in this Act shall not include, and this Act shall not apply to, any air carrier operating within the State of Illinois pursuant to the provisions of a certificate of public convenience and necessity issued by the Civil Aeronautics Board under the Federal Aviation Act of 1958, as now or hereafter amended." (Emphasis added.)

As indicated above, it is clear that the authority of the Illinois Aeronautics Board under section 4 of the Illinois Air Carrier Act extends only to air carriers engaged in intrastate commerce and does not extend to any interstate carrier operating within

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the State of Illinois pursuant to the provisions of a certificate of public convenience and necessity issued by the Civil Aeronautics Board. Consequently, if air carriers which are exempted under 49 U.S.C. § 1336(b)(4) are viewed as not "having authority under subchapter IV" of the Federal Act to provide interstate air transportation, the subsection 1305(a)(1) Federal exemption provision would not apply, thus allowing the Illinois Aeronautics Board to regulate the intrastate operation of exempted interstate air carriers pursuant to the authority contained in section 4 of the Illinois Act.

As indicated above, 49 U.S.C.A. § 1336(b)(4) provides that:

" * * *

(4) Subject to paragraph (5) of this subsection, any air carrier in air transportation which provides (A) passenger service solely with aircraft having a maximum passenger capacity of less than fifty-six passengers, or (B) cargo service in air transportation solely with aircraft having a maximum payload capacity of less than eighteen thousand pounds, shall be exempt from the requirements of subsection (a) of section 1371 of this title, and of such other sections of this chapter as may be prescribed in regulations promulgated by the Board, if such air carrier conforms to such liability insurance requirements and such other reasonable regulations as the Board shall from time to time adopt in the public interest. The Board may by regulation increase the passenger or property capacities specified in this paragraph when the public interest so requires.

* * *

(Emphasis added.)

Because paragraph (5) of the subsection applies only to air carriers operating in the State of Alaska or points in both

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Alaska and Canada, paragraph (5) is not relevant for the purpose of this discussion.

Federal regulations specifically dealing with the class of air carriers exempted have been promulgated under subsection 1386(b)(4) of the Federal Act and have been entitled Classification and Exemption of Air Taxi Operators. (14 C.F.R. 298.1 et seq.) 14 C.F.R. 298.1 provides that:

"This part establishes a classification of air carriers known as 'air taxi operators,' provides certain exemptions to them from some of the economic regulatory provisions of Title IV of the Federal Aviation Act and specifies procedures by which such air carriers may obtain authority to conduct operations, and establishes rules applicable to their operations in air transportation in all States, Territories and possessions of the United States." (Emphasis added.)

Additionally, footnote #1 to 14 C.F.R. 298.1 specifies in part that:

"This Part does not provide exemption from the safety regulatory provisions of the Act which are administered by the Department of Transportation through the Federal Aviation Administration, and air taxi operators in the conduct of their operations must observe all applicable safety standards and requirements." (Emphasis added.)

14 C.F.R. 298.2(f) defines "commuter air carrier" as follows:

"(f) 'Commuter air carrier' means an air taxi operator which (1) performs at least five round trips per week between two or more points and publishes flight schedules which specify the times, days of the week and places between which they are performed, or (2) transports mail by air under a contract or contracts with the United States Postal Service when the total amount of the contract or contracts is estimated at the beginning of any reporting period (January 1 and July 1) to be in excess of \$20,000 over the next 12 months." (Emphasis added.)

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"Air taxi operator" is defined in section (b) of 14 C.F.R. 298.2 to mean:

" * * * an air carrier coming within the classification of 'air taxi operators' established by § 298.3."

Consequently, subsection 1386(b)(4) and Part 298 of the Federal Regulations exempt qualifying air taxi operators and commuter air carriers from certain requirements to which other interstate air carriers are subject. 14 C.F.R. 298.11 specifies the extent of the exemption authority granted to qualifying air taxi operators pursuant to 1386(b)(4) of the Act.

However, as an initial matter and before detailing the extent of the exemption authority which exists pursuant to 1386(b)(4) and the regulations promulgated thereunder, it is necessary to look at the precise language of the subsection 1305(a)(1) Federal exemption provision which provides, in part, that no State "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation". (Emphasis added.) Subchapter IV of the Federal Aviation Act relates generally to Air Carrier Economic Regulation and encompasses sections 1371 through 1389 of the Federal Act. The section 1386(b)(4) exemption, by its own terms, exempts qualifying air carriers only from "the requirements of subsection (a) of 1371 of this title, and of such other sections of this chapter as may be prescribed in regulations promulgated by the Board * * *". (Emphasis added.)

Despite the fact that exempted carriers are excused from obtaining a certificate under section 1371(a), they are not exempted, either by statute or by regulation from all the requirements of subchapter IV of the Federal Act.

14 C.F.R. 298.11 which, as discussed above, sets forth the extent of the air taxi operator exemption, provides as follows:

"Air taxi operators are exempt from the following provisions of Title IV of the Act:

(a) Subsection 401(a);

(b) Section 403; except that the requirements of that section shall apply to: (1) Tariffs for through rates, fares, and charges filed jointly by air taxi operators with air carriers or with foreign air carriers subject to the tariff-filing requirements of section 403 of the Act; and (2) Tariffs required to be filed by air taxi operators which embody the provisions of the counterpart to CAB Agreement 18900 as specified in Subpart G of this part;

(c) Subsection 404(a), except for the requirements that air taxi operators shall provide safe service, equipment, and facilities in connection with air transportation; shall provide adequate service insofar as that requires them to comply with Part 252 of this chapter; shall observe and enforce just and reasonable joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices as provided in tariffs filed jointly by air taxi operators with certificated air carriers or with foreign air carriers; and shall establish just, reasonable, and equitable divisions of such joint rates, fares, and charges as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers;

(d) Subsection 404(b), except that the requirements of that subsection shall apply to through service provided pursuant to tariffs filed jointly by air taxi operators with air carriers or with foreign air carriers;

(e) Subsection 405(b);

(f) Subsections 407(b), (c), and (d);

(g) Subsection 408(a); except that no exemption is granted hereby for any air taxi operator to enter into any of the transactions or relationships prohibited by subsection 408(a) with any person who operates large aircraft for compensation or hire, or who engages in air transportation from which the air taxi operator is excluded by the limitations imposed by this part;

NOTE: The above exemption is applicable to air taxi operations only. It does not relieve other persons subject to section 408(a) from the obligations of that section with respect to any relationships they may have with respect to air taxi operators. For additional exemptions from section 408(a) applicable to air taxi operators, see Part 299 of the Board's Economic Regulations.

(h) Subsection 409(a); except that no exemption is granted hereby for any air taxi operator to enter into any of the relationships prohibited by subsection 409(a) with any person who operates large aircraft for compensation or hire, or who engages in air transportation from which the air taxi operator is excluded by the limitations imposed by this part; and

(i) Subsection 412(a): Provided, That air taxi operators shall not be relieved from filing with the Board a true copy, or, if oral, a true and complete memorandum of every contract or agreement (whether enforceable by provisions of liquidated damages, penalties, bonds, or otherwise) affecting air transportation, between any air taxi operator and any person (excluding air carriers) who operates large aircraft for compensation or hire." (Emphasis added.)

Because exempted air taxi operators are not excused from compliance with subchapter IV as a whole, they have some authority under subchapter IV of the Act to provide interstate air transportation and consequently their regulation has been pre-empted by the Federal authority in accordance with subsection 1305(a)(1) of the Federal Act.

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In addition, other factors indicate that a scheme of Federal regulation of exempted air taxi operators does exist. You will note that the exemption found in subsection 1386(b)(4) is not an absolute exemption, even though the statute provides that certain specified providers of services "shall be exempt" from the certification requirements of subsection 1371(a) and from other sections of the Act as prescribed in Board regulations. Thereafter, the statute provides that those certain air carriers shall be exempt from certification requirements of subsection 1371(a) only "if such air carrier conforms to liability insurance requirements and such other reasonable regulations as the Board shall from time to time adopt in the public interest". Regulations concerning liability insurance requirements are found at 14 C.F.R. 298.31 - 298.34. Air taxi operators exempted under 14 C.F.R. 298.11 are not immune from antitrust laws. (See, 14 C.F.R. 298.12.) The exemption from any provision of title IV of the Act provided in 298.11 may be of limited duration. (See, 14 C.F.R. 298.13.) Every air taxi operator, whether or not he is also a commuter air carrier, is required to register with the Board within 30 days of commencement of operation and re-register every 2 years thereafter. (See, 14 C.F.R. 298.21 - 298.23.) Commuter air carriers are required to file reports with respect to such matters as points served, traffic carried and flight and rate schedules. (See, 14 C.F.R. 298.60 - 298.61.)

Consequently, even assuming a carrier obtains an exemption under 1386(b)(4), it does not appear that there is an absence of jurisdiction or lack of control by the Civil

Aeronautics Board which would lead one to infer that the Federal authority is not exercising control over this aspect of interstate air transportation.

Moreover, prior to the addition of the specific pre-emption provision at subsection 1305(a)(1) of the Federal Act (added by P.L. 95-504, §4a, Oct. 24, 1978, 92 Stat. 1708), the Supreme Court of Nebraska in Pioneer Airways, Inc. v. City of Kearney (1977), 256 N.W.2d 324, 326, held that any assertion of jurisdiction by the State public service commission over the intra-state flights of certain interstate air taxi operators, also in this case "commuter air carriers" under 14 C.F.R. 298.2, exempted under 49 U.S.C.A. § 1386 would be intrusion into the field in which Congress has asserted jurisdiction. Although that case dealt with an earlier version of section 1386 prior to the 1978 addition of subsection 1386(b)(4) by Public Law 95-504, § 31, 32, it appears that the specific holding in the case is pertinent. Appellees in the Kearney case contended that Congress had not pre-empted the field of regulation as to exempted air taxi operators under the premise that there was a considerable distinction between an air carrier operating pursuant to a certificate of public convenience and necessity and an air carrier operating as an air taxi operator under the exemption provision. Appellees pointed out that a certified air carrier may only operate over routes and with conditions as determined by the Board, while an exempted air taxi operator may go in and out of business at will. Thus, it was argued that Congress had not pre-empted the field as to air taxi operators and that the

public service commission could enter the field to the extent of regulating those portions of interstate flights originating and terminating in Nebraska. However, the Court did not accept the argument that by exempting air taxi operators from certain requirements, Congress intended to abandon the field of regulation of air operators. In rejecting the argument, the Court, at page 327, stated that " * * * an exemption under Title 49 U.S.C. section 1336 is at best a partial exemption with the Board maintaining sufficiently strong controls to monitor the activities of these groups". The Court reasoned that even though the Civil Aeronautics Board granted air taxi operators an exemption which covers many provisions of the chapter, such an exemption must be specifically applied for, granted and renewed. The Court also pointed out that even with the exemption, air taxi operators are still subject to various reporting requirements and economic conditions. Consequently, the Nebraska Court refused to interpret the exemption provision as an intention on the part of Congress to abandon the field of air taxi regulation. Rather the Court interpreted the exemption provision as indicative of the intent that full regulation of these groups would work an undue burden. Accordingly, the Court stated on page 327 that:

" * * * Such a determination does not show that Congress intended to abandon the field but instead shows an intention that such field should not be fully regulated. Thus, it is clear that any assertion of jurisdiction by the Commission would be an intrusion into a field in which Congress has asserted jurisdiction.

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Therefore, the Court concluded that Congress had pre-empted the field of interstate air transportation with regard to routes and points to be served by commuter air carriers to the exclusion of conflicting regulations by States. The specific pre-emption provision of subsection 1305(a)(1), as discussed above, makes Federal pre-emption in this area even more apparent.

You have inquired whether, if the Federal pre-emption provided in 1305(a)(1) does include those carriers exempted from obtaining certification under 1371(a), the Illinois Aeronautics Board may establish safety requirements and standards for flight crews and aircraft to be enforced by banning the operations of non-complying air crews and equipment. As indicated above, subsection 1305(a)(1) of the Act clearly states that no State or political subdivision thereof "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation". The broad terms, "rates, routes, or services" would appear to encompass safety requirements and standards for flight crews and aircraft. Consequently, it appears that the Illinois Aeronautics Board may not so regulate the intrastate services of a commuter airline operating under 1386(b)(4).

Very truly yours,


ATTORNEY GENERAL