August 23, 2002

Critical Air Medicine, Inc.
Corporate Headquarters
Attn: Sagi Kfir, Esq.
General Counsel
4141 Kearny Villa Road
San Diego, CA 92123

Re: City of Austin, Texas Ordinance - Cease and Desist Notice to Critical Air Medicine, Inc., Regarding Air Ambulance Operations within the City of Austin

Dear Mr. Kfir:

This is in response to your original request dated May 31, 2002, and various subsequent submissions, for an opinion as to whether the City of Austin, Texas' (City) attempt to enforce a City Ordinance, in particular, Section 6-3-27, through the above-referenced Cease and Desist Notice is preempted by Federal law.

By letter of May 20, 2002, the City notified Critical Air Medicine, Inc., (Critical Air) that it had violated Section 6-3-27 of the City Ordinance that states as follows:

> It shall be unlawful for any person, including a medical transfer services provider, other than an employee of the EMS Department officially on duty, or an agency of the United States, to furnish, operate, conduct, maintain, advertise for, or otherwise be engaged in the operation of an emergency ambulance or the providing of emergency service in the city.

The City further advised Critical Air that a violation of the provision is a misdemeanor and subjects the violator to a fine of not less than $100.00. Finally, the City ordered Critical Air to:

> Cease and desist from any and all transfers of patients, including patients requiring emergency care, between points originating and ending within the corporate limits of the City of Austin.

It appears from a reading of the definition section of the City Ordinance, that Critical Air is a medical transfer service provider using an aircraft as an ambulance.

The issue is whether the City's attempt to prohibit Critical Air, through the enforcement of City Code Section 6-3-27, from providing air ambulance services within the city limits of Austin, Texas, is preempted by 49 USCS §41713 (formerly, Section 105 of the Federal Aviation Act; 49 USC §1305).

Critical Air holds Air Carrier Operating Certificate Number IBUAl21E, issued November 8, 1984, by the Federal Aviation Administration (FAA) pursuant to 49 USCS §44705. Critical Air has been issued Operations Specifications by the FAA authorizing it to conduct air ambulance operations in accordance with 14 CFR Part 135 in various states and within the City of Austin. Further, Critical Air is a registered Air Taxi Operator under 14 CFR Part 298 with the Department of Transportation (DOT) (copy attached).

The pertinent statutes and regulations concerning the issues in this matter are administered generally by DOT as they involve economic regulation. As you are aware, 49 USCS §41713(b)(1) [Preemption of authority over prices, routes, and services] provides that:

> ...a State, political subdivision of a State, or political authority of a least 2 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 [49 USCS 41101 et seq.]. [See also 14 C.F.R. Section 399.110, the DOT regulation setting forth DOT general policy regarding the prohibition of state economic regulation of federally authorized carriers.]

49 USCS §41101 requires that an air carrier may provide air transportation only if the air carrier holds a certificate of public convenience and necessity issued by DOT under 49 USCS §41102, except as otherwise provided by law. The pertinent exception in the Critical Air situation is found in Part 298 of 14 CFR, issued by DOT, under the authority of 49 USCS §40109. Part 298 establishes a classification of air carriers known as "air taxi operators," and provides certain exemptions to them from some of the economic regulatory provisions of Subtitle VII of Title 49 of the USC, and specifies procedures by which such air carriers may obtain authority to conduct operations,

and establishes rules applicable to their operation in interstate air transportation.

In particular, Section 298.3 establishes the class of air carriers designated as "air taxi operators," which directly engage in the air transportation of persons and among other things, have registered with the DOT in accordance with Section 298.21. Section 298.11 specifically exempts "air taxi operators" from the requirements of 49 USCS §41101 for a certificate of public convenience and necessity so long as they are properly registered under Section 298.21. Critical Air is properly registered under Part 298 as an "air taxi operator."

By Section 298.2, Definitions, "Air Transportation" means interstate air transportation as defined in 49 USCS §40102(a)(25) that reads:

> "interstate air transportation is the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation by mail by aircraft (1) between a place in (i) a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States; (ii) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii; (iii) the District of Columbia and another place in the District of Columbia; or (iv) a territory or possession of the United States and another place in the same territory or possession; and (2) when any part of the transportation is by aircraft. NOTE: Operations wholly within the geographic limits of a single State are not considered "interstate air transportation: if in those operations the carrier transports no more than a *de minimus* volume of passengers or property moving as part of a continuous journey to or from a point outside the State.

It is well-settled, however, that Congress intended to include air carriers exempted from DOT certification pursuant to 49 USCS §40109 (formerly Section 416) within the scope of the preemption provision of 49 USCS §41713 regardless of whether the carrier operates interstate or intrastate or both. See Hughes Air Corp. v. Public Utilities Commission, 644 F.2d 1334 (9th Cir. 1981). Since Critical Air Medicine, Inc. is a Part 298 air carrier, the State of Texas, or any political subdivisions thereof, including the City of Austin, is preempted from controlling entry into the field of interstate air ambulance service. Accordingly, the City's attempt to control air ambulance services through

prohibiting services within the City limits of Austin is preempted.

The City argues that it is only regulating intrastate transportation, not interstate transportation. The June 16, 1986, opinion from then DOT General Counsel Jim J. Marquez, addressed the requester's concern that air ambulances, which receive DOT exemption authority under now 49 USCS §40109 and operate as so-called "Part 298 air taxis" may, in fact, not conduct interstate air transportation and be "air carriers" in name only. He goes on to say however, that the definition of "air carrier" for purposes of section 105 (now 49 USCS §41713) is well-settled, and includes an air carrier with exemption authority under Part 298. Therefore, the issue of intrastate versus interstate transportation is not relevant, as the preemption provision of 49 USCS §41713 is applicable to Part 298 registered air taxis. Furthermore, Critical Air operates air ambulance services in numerous states.

The City's May 20, 2002, cease and desist notice and subsequent enforcement of Section 6-3-27 of the Code of the City of Austin against Critical Air constitutes a "...law, regulation, or other provision having the force and effect of law related to a ... route ... of an air carrier..." 49 USCS §41713(b)(1). As stated, since Critical Air is an "air carrier" within the meaning of the Federal Aviation Act of 1958, as amended (FAA Act), 49 USCS § 40101 *et seq.,* it is included within the scope of §41713 and the City's preclusion of Critical Air from being able to operate within the City limits is preempted "route" regulation. Again, under Federal law and DOT policy, it matters not whether the actual operations are "interstate" or "intrastate" within the meaning of the FAA Act.

The City cites the case of Sea Air NY, Inc. v. City of New York, 250 F.3d 183 (2nd Cir. 2001) in support of its position that Critical Air is not engaged in interstate transportation. In the Sea Air case, the court held that the sightseeing flights of Sea Air that took off from and landed in New York City did not constitute interstate transportation even though the flights flew into air space in New Jersey. However, this case is distinguishable from the Critical Air situation since Sea Air, a sightseeing operator, is not an FAR Part 135 certificated entity nor does it hold a Part 298 exemption from DOT that would provide it with the preemption protection of 49 USCS §41713.

Finally, as pointed out in your letter of July 22, 2002, the State of Texas, Office of Attorney General, has held that even intrastate flights conducted by air carriers are outside the jurisdiction of the State of Texas' regulations, which in our opinion includes any political subdivision thereof such as the City of Austin. The Attorney General issued an opinion dated March 4, 1988, stating:

> [T]he Act [Texas' 1981 aeronautical legislation] does not reach entities offering interstate air service. They are outside the jurisdiction of the [Texas Aeronautics] Commission even if they offer some service solely between points within Texas. The Commission has no jurisdiction over interstate carriers and has no authority to impose any burden on or extend benefits to them under the Texas Aeronautics Act.

Of course, it appears that we all agree that the State of Texas or a political subdivision thereof as authorized may regulate the delivery of medical services (for example, staffing requirements, personnel qualifications, equipment requirements, and sanitary conditions) so long as the FAA has not occupied those fields from an air safety standpoint.

In conclusion, it is our opinion that the City's attempt to prohibit Critical Air, through the enforcement of City Code Section 6-3-27, from providing air ambulance services within the city limits of Austin, Texas, is preempted by 49 USCS §41713 (formerly, Section 105 of the Federal Aviation Act; 49 USC §1305).

This response has been coordinated with the FAA's Office of Chief Counsel, Washington, D.C., and the General Counsel's Office, Office of the Secretary, DOT.

Sincerely,

Lynette Word
Regional Counsel
Southwest Region

Attachment

cc: Kathryn Boccella (with attachment)
Assistant City Attorney, City of Austin, Texas