From:	Goldberg, Roy
To:	Commission-Public-Records; Ramels, Pete
Subject:	[EXTERNAL] Flying Food Group, LLC. -- Written Comments to Port of Seattle Commission re Proposed Resolution 3789 – to Enact Minimum Wage and Worker Retention
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Enclosed please find the written comments in opposition to Proposed Resolution 3789, submitted on behalf of Flying Food Group, LLC. Please confirm receipt and that the comments will be placed into the Commission docket in connection with the meetings scheduled for tomorrow relating to the proposed resolution.

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May 10, 2021

VIA ELECTRONIC MAIL

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Re: Proposed Resolution 3789 – to Enact Minimum Wage and Worker Retention Requirements Applicable to Certain Employers Located at Seattle-Tacoma International Airport (Application of SeaTac Proposition 1 to Airline Catering Kitchen Workers)

Dear Commission Clerk and General Counsel Ramels:

These written comments are respectfully submitted on behalf of our client, Flying Food Group, LLC ("Flying Food"), which occupies leased catering kitchen space at 2300 S 154th St, SeaTac, Washington, 98188, at which it employs persons involved in preparation of meals that Flying Food provides to airlines operating at Seattle-Tacoma International Airport ("SEATAC" or "Airport"). Flying Food objects to proposed Resolution 3789, which would apply the SeaTac Proposition 1 minimum wage requirements to Flying Food's catering kitchen employees who do not access the Airport as part of their job duties, and is to be discussed during the Port meetings scheduled for tomorrow, May 11, 2021. The proposed Resolution is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. 151, *et seq*. Its selected and targeted application to a handful of businesses at SEATAC demonstrates that it is not a minimum labor standard of general application.

There is no legal predicate for application of SeaTac's minimum wage ordinance to catering kitchen workers who do not access SeaTac terminal pursuant to their job duties. The trade union Unite Here, which is behind Resolution 3789, has argued in the past that airport sponsors have authority to impose minimum wage laws on airline catering companies because of the so-called "market participant exception" to the Commerce Clause and other laws against a state or local government interfering in the relationship between a private employer (such as Flying Food) and its employees who do not access the airport as part of their job responsibilities.

However, the market participant exception does not apply to the application of the SeaTac minimum wage ordinance to Flying Food catering kitchen employees who do not access the airport terminal because the Port does not procure airline catering services from Flying Food. Rather, the Port's only relationship to the airline catering market is through permitting and leasing, which is not intended to serve any proprietary or commercial interest of the City. *See Smith v. Dep't of Ag. of the State of Georgia*, 630 F.2d 1081, 1083 (5th Cir. 1980) (market participant exception not applicable because the state of Georgia neither produced the goods to be sold at market, nor engaged in the actual buying or selling of the goods); *South-Central Timber Dev't v. Wunnicke*, 467 U.S. 82, 98 (1984) (court plurality) (Alaska was a regulator because it did not actually participate in the timber-processing market); *Metro. Mil. Ass'n of Commerce v. Mil. County*, 431 F.3d 277, 278 (7th Cir. 2005) (market participant exception is limited to vindicating the principle that "[t]he state has the same interest as any other purchaser in imposing conditions in contracts *with its sellers* that will benefit the state *in its capacity as a buyer*") (emphasis added); *Aeroground, Inc. v. City and County of S.F.,* 170 F. Supp. 2d 950, 958 (N.D. Cal. 2001) (a "different situation would exist here if defendants purchased Aeroground's cargo-handling services. But defendants do not assert that they contracted directly with Aeroground in this regard").

Importantly, Resolution 3789 is not a minimum labor standard of general application. Rather, it is clearly directed solely to companies whose operations interface with SEATAC. The Commission Agenda Memorandum which accompanies proposed Resolution 3789 states:

> This bill authorizes a municipality, including the Port of Seattle, that controls or operates an airport -- **having had more than twenty million annual commercial air service passenger enplanements on average over the most recent seven full calendar years**; that is located within the boundaries of a city; that has passed a local law or ordinance setting a minimum labor standard that applies to certain employers operating or providing goods and services at the airport -- to enact a minimum labor standard that applies to **employees working at the airport**, so long as the minimum labor standard meets, but does not exceed, the minimum labor standard in the city's law or ordinance. SEA has had more than twenty million annual commercial air service passenger enplanements on average over the most recent seven full calendar years (2014-2020). (Emphasis added)

There is only one airport in the Port's jurisdiction which falls under this definition: SEATAC. In *520 South Michigan Avenue Associates, Ltd. v. Shannon*, 549 F.3d 1119 (7 th Cir. 2008), the court, in a case stemming from Unite Here's activities, held that a Hotel Room Attendant Amendment to the Illinois state One Day Rest in Seven Act was preempted by the NLRA. As in *520 South Michigan*, Resolution 3789 unlawfully "intrudes upon the parties' collective bargaining process and alters the 'free play of economic forces.'" In *520 South*, United Here argued that the challenge law was a "minimum labor standard" to which NLRA preemption does not apply. The Seventh Circuit rejected this argument. The court reasoned that, "While the Attendant Amendment facially affects union and nonunion employees equally, for several reasons we conclude that it does not constitute a genuine minimum labor standard." *Id.* at 1130. The Attendant Amendment was "not a statute of general application" because it targeted a specific hotel. *Id.* The law's "narrow scope of application . . . serve[d] as a disincentive to collective bargaining." *Id.* at 1133. The same holds true here: Unite Here has used the Resolution process to target companies in a particular industry at a single airport, in order to circumvent engaging in collective bargaining with catering entities that serve airlines at SEATAC. *See also Chamber of Commerce v. Bragdon,* 64 F.3d 497 (9th Cir. 1995) (specifically targeted prevailing wage law was unlawful).

Moreover, Flying Food employees who work in the Flying Food catering kitchen are not "working at the airport." Rather, they are working in a private business that does not have any relationship to the Airport terminals or runways. Those Flying Food employees who access the terminals and the runways at SEATAC are paid and receive benefits consistent with Resolution 3789.

The U.S. Supreme Court has recognized that the market participant doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 92, 97 (1984). A state can choose its own trading partners but not claim it is exercising contractual rights in order "to govern the private, separate economic relationships of its trading partners," by restricting their "post-purchase activity." So, even assuming, for the sake of argument, that the Port could regulate wage levels for airlines operating at a Port airport (and we do not agree that this is the case), the Port cannot extend that "market participant" reach to "post-purchase activity," which includes the contractual relationships between the carriers and their catering vendors.

Significantly, Flying Food does not have realistic competitive alternatives to leasing catering kitchen space from the Port. In *Western Oil and Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984), the Ninth Circuit held that regulations computing "rent" for leasing of state-owned tidelands and submerged lands based on volume of oil in interstate and foreign commerce passing over leased property violated the commerce clause and the import-export clause. California contended that its leasehold activities fell outside the reach of the Commerce Clause, because it carried on a proprietary function when it leased tide and submerged lands. The state further asserted that it was merely one of many participants in the market competing for leases. The court rejected this argument, stating, "California's role cannot be said to be one of a market participant. The State owns and controls tidelands and submerged lands in its sovereign capacity." *Id.* at 1343.

The Ninth Circuit stated that, "Although some of the lands are in the possession of local State entities or private interests, this does not mean that California becomes one of many competitors. The permanency of plaintiffs' facilities does not permit them to 'shop around'. There is no other competitor to which they can go for the rental of the required strip of California coastline. The Commission has a complete monopoly over the sites used by the oil companies." *Id.* The court added that, "The companies have no choice but to renew their leases despite the volumetric rate, as the oil, gas and petroleum derived products cannot be transported to plaintiffs' facilities without traversing the state-owned lands. This control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce. We therefore reject the State's contention that its leasing activities are not subject to Commerce Clause scrutiny." *Id.*

Similarly here, the Port's leasing activities are subject to Commerce Clause scrutiny and, relatedly, the market participant exception does not apply.

For the above stated reasons, on behalf of Flying Food, it is respectfully requested that the Port Commission should decide not to adopt Resolution 3789.

Sincerely,

STINSON LLP

Roy Goldberg

Roy Goldberg

Counsel for Flying Food Group, LLC

Copy: Flying Food Group, LLC