

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

SEATAC SHUTTLE, LLC, C-1077)	DOCKET TC-072180
)	
Complainant,)	
)	ORDER 02
v.)	
)	
KENMORE AIR HARBOR, LLC,)	DENYING PETITION TO
)	INTERVENE and DISMISSING
Respondent.)	COMPLAINT
.....)	

1 *Synopsis: This is an Administrative Law Judge’s Initial Order that is not effective unless approved by the Commission or allowed to become effective pursuant to the notice at the end of this Order. If this Initial Order becomes final, the complaint filed by Seatac Shuttle, LLC, will be dismissed because the Commission’s jurisdiction over the Respondent is preempted by federal law.*

MEMORANDUM

2 On November 13, 2007, Seatac Shuttle, LLC (Seatac Shuttle), filed with the Washington Utilities and Transportation Commission (Commission) a formal complaint alleging that Kenmore Air Harbor, LLC (Kenmore Air), is in violation of certain sections of WAC 480-30 and RCW 81.68. These violations are alleged to result from Kenmore Air providing scheduled passenger service via auto transportation over a regular route without the authority required under RCW 81.68 and WAC 480-30.

3 Kenmore Air answered the complaint on December 4, 2007, and included affirmative defenses and a counterclaim seeking damages and attorney fees.

- 4 On December 21, 2007, Commission regulatory staff (Commission Staff or Staff)¹ filed a Motion for Summary Determination. Pursuant to an agreed schedule and procedure, Kenmore Air answered in support of Staff's motion on January 10, 2008. Seatac Shuttle filed its Answer opposing Staff's motion on January 17, 2008.²

DISCUSSION AND DECISION

I. Statement of Facts

- 5 Taken together, Staff's motion and its appendices, Kenmore Air's answer and Seatac Shuttle's answer establish as undisputed all facts material to the Commission's decision concerning whether federal law preempts state jurisdiction in this matter.
- 6 Kenmore Air provides commuter airline service between Boeing Field, near Seattle, Washington, and Oak Harbor, Washington. Approximately 95 percent of Kenmore Air's passengers use its commuter airline service in conjunction with ground transportation that Kenmore Air provides at no additional cost between Boeing Field and Sea-Tac International Airport (Sea-Tac).³ Sample passenger tickets show point-to-point transportation between Oak Harbor and Sea-Tac. Seatac Shuttle's complaint focuses on this route.⁴
- 7 Kenmore Air is identified by the United States Department of Transportation, Federal Aviation Administration, as an "air carrier" under Certificate

¹ In formal proceedings, such as this, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an "*ex parte* wall" separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners' policy and accounting advisors from all parties, including regulatory Staff. *RCW 34.05.455*.

² The Commission also accepted the parties' proposal that, if the Commission denies Staff's motion after consideration, SeaTac will then, within 20 days of the order denying the motion, file its response to Kenmore Air's counterclaim, and the Commission would set a date for a new pre-hearing conference to schedule the remainder of the case.

³ See Staff Motion, Appendix 3. There is no dispute that Kenmore Air recovers the costs of the ground transportation component of its service in its fares.

⁴ Staff Motion at ¶ 9 (citing: KenmoreAir.com.) A copy of Kenmore Air's schedule between Boeing Field and Oak Harbor is contained in Appendix 2 to Staff's motion. Although not the focus of Seatac Shuttle's complaint, Kenmore Air also has routes between Boeing Field and points in the San Juan Islands and on Vancouver Island, British Columbia, Canada.

GJRA163A.⁵ Kenmore Air’s Certificate further describes the company as an “Air Taxi Operator and Commuter Air Carrier.”

8 Kenmore Air provides the ground transportation component of its service on this route using 14 and 20 passenger vans that are operated in conjunction with the arrival and departure times of the company’s flight schedules. The vans carry Kenmore Air’s customers approximately seven miles, over public roads, between the two Seattle-area airports. Kenmore Air transports only its own airline passengers by van.

9 Seatac Shuttle is an auto transportation company operating under Commission-issued Certificate C-1077. Seatac Shuttle is authorized to provide auto transportation service between Oak Harbor and Sea-Tac. Thus, there is intermodal competition between Kenmore Air and Seatac Shuttle in the market for transportation services between Oak Harbor and Sea-Tac.

10 There being no material facts in dispute, we turn to the question whether the Commission’s jurisdiction in this matter is preempted by federal law.

II. Preemption

11 Staff argues the Commission lacks jurisdiction to decide the questions presented by Seatac Shuttle’s complaint due to preemption under the federal Airline Deregulation Act (ADA).⁶ The relevant provision of the ADA, now codified at 49 U.S.C. § 41713(b)(1)⁷, states:

Except as provided in this subsection, a state, political subdivision of a state, or political authority of at 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.

⁵ Staff Motion, Appendix 2 also contains Kenmore Air’s air carrier certificate, Kenmore Air’s DOT registration and its aircraft equipment list.

⁶ Staff makes several other arguments in its motion. However, because we decide our jurisdiction is preempted by federal law we need not, and do not, reach these additional arguments.

⁷ The ADA was formerly codified at 49 U.S.C. § 1305, following its enactment in 1978. Congress amended the law in 1994 and it was recodified at 49 U.S.C. § 41713.

12 The parties' arguments present two underlying questions we must answer to determine whether this provision preempts the Commission from exercising any jurisdiction it otherwise might have to determine the principal issue raised by Seatac Shuttle's complaint:

- Is Kenmore Air an "air carrier" within the meaning of 49 U.S.C. § 41713(b)(1)?
- If so, does the ground transportation component of Kenmore Air's Oak Harbor to Sea-Tac route relate to its prices, routes or services as an air carrier?

The Commission determines, for the reasons discussed below, that the answer to both questions is "yes." Accordingly, the Commission's jurisdiction over the ground operations of Kenmore Air is preempted under 49 U.S.C. § 41713(b)(1).

A. Kenmore Air is an "air carrier" as that term is used in 49 U.S.C. § 41713(b)(1).

13 Seatac Shuttle argues that although Kenmore Air has an Air Carrier Certificate issued by the Federal Aviation Administration, it is not an "air carrier" for purposes of the ADA. The ADA defines air carrier to mean: "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." Air transportation, in turn, is defined to mean: "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft."

14 We take as true for purposes of discussion Seatac Shuttle's position that Kenmore Air provides only intrastate service in terms of point-to-point transportation on its route from Oak Harbor to Sea-Tac via Boeing Field.⁸ Many, if not most, of Kenmore Air's passengers on this route, however, use its commuter service to connect to interstate or international flights departing from or arriving at Sea-Tac International Airport. Thus, Kenmore Air meets the ADA definition of air carrier

⁸ See Seatac Shuttle Answer at unnumbered ¶¶ between numbered ¶¶ 3 and 4. In fact, Kenmore Air provides foreign air transportation between the state of Washington and one or more points in Canada, but that route does not appear to be implicated here unless there are flight schedules with Sea-Tac as an originating or terminating location.

because it is a commuter airline that indirectly provides foreign and interstate air transportation.

B. The ground transportation component of Kenmore Air's operations relates to its prices, routes or services as an air carrier.

- 15 The United States Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), emphasized that the phrase “relating to” in the original language of the ADA was intended to “express a broad preemptive purpose.”⁹ The Court focused on the ordinary meaning of the phrase: “to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association or connection with.”¹⁰ Thus, we ask generally whether Kenmore Air's ground transportation bears some relation to its air transportation. Kenmore Air's service is predominantly one used by customers who wish to fly out of or into Sea-Tac and who either depart from or have as their ultimate destination Oak Harbor. The air and ground transportation components of this service are parts of a piece. It is inescapable that the one is related to the other.
- 16 Looking at the question more from Seatac Shuttle's perspective, as expressed in its arguments, we ask the question whether Kenmore Air's ground transportation is “too tenuous, remote, or peripheral” to the company's air transportation to be considered “related to a price, route, or service” of Kenmore Air as an air carrier.
- 17 Taking the question from this perspective, we arrive at the same answer. The cost of Kenmore Air's ground transportation is taken into account in setting fares and, thus, relates to price. The seven miles of public highway between Sea-Tac and one of the two airports where Kenmore Air flights terminate or originate (*i.e.*, Boeing Field) unquestionably are a vital part of the route that Kenmore Air markets to the public. The service Kenmore Air provides to most of its customers, to the extent relevant, is transportation between Oak Harbor and Sea-Tac., not transportation between Oak Harbor and Boeing Field.¹¹ There is simply nothing

⁹ Prior to amendment in 1994, the general preemption provision preempted states from enacting or enforcing laws or regulations “relating to the rates, routes, or service of any air carrier.” The slight changes in language in the 1994 version of this provision are not such as to suggest any change in Congressional intent.

¹⁰ *Morales*, *supra*, 504 U.S. at 383, 112 S.Ct. at 2037.

¹¹ Seatac Shuttle's Complaint is essentially limited to Kenmore Air's route between Oak Harbor and Seatac via Boeing Field. *See* Seatac Shuttle Answer at ¶ 9. Our determinations here have no implications for ground transportation that Kenmore Air might provide from Boeing Field to

that is “tenuous, remote, or peripheral” about the ground transportation component of Kenmore Air’s service between Oak Harbor and Sea-Tac.

18 While the ground transportation component of Kenmore Air’s operation undoubtedly could be provided by another company, including an unaffiliated, regulated auto transportation company, this is not the operating model upon which Kenmore Air elects to rely. The model it has chosen is one that falls within the preemptive scope of the ADA. The Commission is without jurisdiction to determine Seatac Shuttle’s complaint.

III. Petition To Intervene.

19 On January 7, 2008, Pacific Northwest Transportation Services, Inc. (Pacific Northwest), filed a petition to intervene in this proceeding. The only interest Pacific Northwest identifies is the fact that it is a certificated airporter. Pacific Northwest asserts that operation of a regularly scheduled transportation service to any airport in Washington, without proper authority, “economically affects every regulated operator.”

20 Since we determine that the Commission lacks jurisdiction in this matter, we do not determine that Kenmore Air is providing transportation without proper authority. Accordingly, the stated basis for Pacific Northwest’s interest, even if otherwise sufficient to support intervention, is simply not present. In any event, a general statement of interest as a participant in the same industry as the Complainant is not sufficient to justify intervention in an adjudicatory proceeding.

21 The Commission determines that Pacific Northwest’s petition to intervene should be denied.

FINDINGS AND CONCLUSIONS

22 Having discussed above all matters material to this decision, the Commission now makes the following summary findings of fact and conclusions of law incorporating by reference any pertinent portions of the preceding discussion:

other destinations (*e.g.*, to downtown Seattle locations; *see id.*). Thus, Seatac Shuttle’s suggestion that if the Commission finds preemption under the facts relevant here “Kenmore may now use Boeing Field as a bus terminus throughout the state with no oversight” is misdirected.

- 23 (1) There are no material facts in dispute.
- 24 (2) Kenmore Air is an “air carrier” as that term is used in 49 U.S.C. § 41713(b)(1).
- 25 (3) The ground transportation Kenmore Air provides between Boeing Field and Sea-Tac International Airport is related to the air transportation price, route, and service that Kenmore Air provides between Oak Harbor and Boeing Field as part of a single route used primarily by passengers connecting to flights to or from interstate and foreign destinations.
- 26 (4) Because Kenmore Air’s ground transportation, of which Seatac Shuttle complains, is related to a price, route, or service of an air carrier that provides air transportation, the Commission is preempted by federal law and accordingly lacks jurisdiction to hear Seatac Shuttle’s complaint.
- 27 (5) Commission Staff’s Motion for Summary Determination should be granted and Seatac Shuttle’s complaint should be dismissed.

ORDER

THE COMMISSION ORDERS:

- 28 (1) Pacific Northwest Transportation Services, Inc.’s petition to intervene is denied.
- 29 (2) Commission Staff’s Motion for Summary Determination is granted.
- 30 (3) Seatac Shuttle, LLC’s complaint is dismissed.

DATED at Olympia, Washington, and effective February 4, 2008.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the Order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition To Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 81.01.060(3), as amended in the 2006 legislative session, provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and eight copies of any Petition or Answer must be filed by mail delivery to:

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