[Service Date October 31, 2008]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

SEATAC SHUTTLE, LLC, C-1077,	)	DOCKET TC-072180
	)	
Complainant,	)	ORDER 03
	)	
v.	)	FINAL ORDER DENYING IN
	)	PART PETITION FOR
KENMORE AIR HARBOR, LLC,	)	ADMINISTRATIVE REVIEW;
	)	UPHOLDING INITIAL ORDER;
Respondent.	)	REMANDING ISSUE FOR
	)	CONSIDERATION
. . . .	)	

1 ***SYNOPSIS:*** *The Commission denies in part Seatac Shuttle, LLC's Petition for Administrative Review of the Initial Order , and affirms the Initial Order's decision that federal law governing air carriers preempts the Commission from regulating the price, route or service of Kenmore Air Harbor, LLC,'s ground operations between Boeing Field and SeaTac Airport, and Lake Union and SeaTac Airport. This Order remands to the Administrative Law Judge the issue of whether the Commission is preempted from regulating the safety of Kenmore Air's ground transportation operations. This Order also affirms the Initial Order's denial of a petition to intervene by another auto transportation carrier.*

SUMMARY

2 **PROCEEDING:** This matter arises from a formal complaint Seatac Shuttle, LLC (Seatac Shuttle), filed with the Washington Utilities and Transportation Commission (Commission) alleging that Kenmore Air Harbor, LLC (Kenmore Air), is in violation of certain sections of RCW 81.68 and WAC 480-30. Seatac Shuttle alleges these violations result from Kenmore Air providing scheduled auto transportation passenger service over a regular route without the authority required under RCW 81.68 and WAC 480-30.

3 **APPEARANCES.** Michael Lauver, Vice President, Seatac Shuttle, Oak Harbor, Washington, represents the complainant. Brooks E. Harlow, Miller Nash, LLP, Seattle, Washington, represents the respondent, Kenmore Air. Donald T. Trotter, Senior Counsel, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff).[1]

4 **PROCEDURAL HISTORY.** On November 13, 2007, Seatac Shuttle filed its complaint against Kenmore Air. Kenmore Air filed an answer to the complaint on December 4, 2007, denying all claims and asserting preemption under the Airline Deregulation Act (ADA).[2]

5 On December 21, 2007, prior to the date for a prehearing conference scheduled in this matter, Staff filed a motion for summary determination. Under an agreement by the parties, Administrative Law Judge Dennis J. Moss canceled the prehearing conference to allow briefing and decision on Staff's motion.

6 On January 7, 2008, Pacific Northwest Transportation Services, Inc. (Pacific Northwest), filed a motion seeking status as an intervenor in the proceeding.

7 After Kenmore Air and Seatac Shuttle filed answers to Staff's motion, Judge Moss entered an initial order, Order 02 in the proceeding, on February 4, 2008, granting Staff's motion to dismiss and denying Pacific Northwest's petition to intervene.

8 Seatac Shuttle filed a Petition for Administrative Review of the Initial Order on February 21, 2008. Kenmore Air and Staff filed answers to the petition on March 3, 2008.

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[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.*

MEMORANDUM

9 Seatac Shuttle contests the Initial Order's conclusions that Kenmore Air is an "air carrier" under the ADA and that the Commission is preempted under the ADA from regulating Kenmore Air.[3] Seatac Shuttle asserts the Initial Order is incomplete because it failed to take into consideration certain operations of Kenmore Air, as well as whether the Commission has jurisdiction over safety operations that are not related to price, route or service.[4] Seatac Shuttle also seeks review of the Initial Order's denial of Pacific Northwest's motion for intervention.[5]

A. Motion for Summary Determination

1. Standard of Review

10 In considering petitions for administrative review of initial orders, the Commission conducts *de novo* review of the issues decided in an initial order.[6] The primary issue in this case – whether the Commission is preempted from regulating Kenmore Air – was presented in a motion for summary determination. In resolving such motions, the Commission must determine whether there are any genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law.[7] We also follow the standards in the Washington superior court civil rules when considering motions for summary judgment.

11 The burden is on the moving party to show there is no genuine issue as to a material fact, and that, as a matter of law, summary determination is proper.[8] Material facts are those upon which the outcome of the litigation depends.[9] If the moving party

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[2] 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.
[3] Petition for Review, ¶¶ 3-5.
[4] *Id.*, ¶¶ 1-3, 6.
[5] *Id.*, ¶ 7.
[6] *See* RCW 34.05.464(4): "The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing…"
[7] WAC 480-07-380(2).
[8] *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).
[9] *Id.*

satisfies its burden, the non-moving party must present evidence showing that material facts are in dispute.[10] The non-moving party must present specific facts showing there is a genuine issue for trial, but may not rely on speculation or bare assertions that there are facts in dispute.[11] We must consider all the facts and inferences in the light most favorable to the non-moving party.[12] Finally, we must grant the motion only if, after considering all the evidence, we find reasonable persons would reach only one conclusion.[13]

12 To sum up, if upon review we determine that (1) Staff demonstrates that there are no material issues of fact in dispute, (2) Seatac Shuttle cannot refute this, and (3) Staff is correct as a matter of law that the Commission is preempted from regulating Kenmore Air, and Seatac Shuttle is not correct as a matter of law concerning the issues it raises on review, we must uphold the Initial Order and deny Seatac Shuttle's petition for review.

2. There are no material facts in dispute.

13 Seatac Shuttle claims that the Initial Order did not consider whether Kenmore Air's Lake Union operations are subject to preemption or whether preemption extends to the regulation of safety, insurance and licensing matters.[14] Seatac Shuttle also claims that "from the out set [sic] there has been confusion between the parties subject to the complaint" concerning the scope of the complaint and alleged violations by Kenmore Air.[15] We address first whether Seatac Shuttle's claims on review identify any material facts in dispute, and then turn to the merits of the claims.

14 As the presiding officer decided the issues based on the facts set forth in the pleadings, we restate the relevant facts from the pleadings. First, Seatac Shuttle's complaint asserts that "Kenmore Air (KA) is in violation of certain sections of WAC 480-30 and RCW 81.68" resulting from "KA providing scheduled passenger service

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[10] *Id.*
[11] *See* CR 56(e); *see also La Plante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Seven Gables Corp. v. MGM/UA Entertainment Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986).
[12] *Atherton,* 115 Wn.2d at 516.
[13] *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974).
[14] Petition for Review, ¶¶ 1-2.
[15] *Id.*, ¶ 2.

over a regular route with out [sic] the authority required under RCW 81.68 and WAC 480-30." The complaint does not address any particular facts concerning Kenmore Air, or any of Kenmore Air's schedules or routes.

15 In its motion, Staff established a number of basic facts about Seatac Shuttle and Kenmore Air, supported by documents attached to its motion:

- Seatac Shuttle is an auto transportation company operating under Commission-issued Certificate C-1077, which authorizes Seatac Shuttle to provide ground transportation service between Oak Harbor and the Seattle-Tacoma International Airport (Sea-Tac).[16]
- Kenmore Air is an "air carrier" and "commuter air carrier" authorized under Certificate GJRA163 issued by the United States Department of Transportation, Federal Aviation Administration (FAA).[17]
- Kenmore Air provides airline service between Boeing Field (near Seattle, Washington) and Oak Harbor, Washington, between Boeing Field and points in the San Juan Islands and on Vancouver Island, British Columbia, Canada, and out of Lake Union, located in Seattle, Washington.[18]
- Kenmore Air uses 14 and 20 passenger vans to transport exclusively its own airline customers between the company's terminal at Boeing Field and Sea-Tac and between Lake Union and Sea-Tac.[19]
- Each Kenmore Air customer is entitled to use this ground transportation service. Kenmore Air does not charge its airline customers separately for the surface segment of the overall operations.[20]
- Sample tickets for passengers using Kenmore Air's ground transportation service identify travel between "Seattle Tacoma" and "Oak Harbor," or for ticketless travel, from "Oak Harbor" to "Boeing Field," with ground transportation to "Seatac."[21]

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[16] Staff Motion for Summary Determination, ¶ 8; Appendix 1.
[17] *Id.*, ¶ 9; Appendix 2.
[18] *Id.*, ¶ 9, n.3; Appendix 2.
[19] *Id.*, ¶¶ 10, 11, nn.3, 8; Appendix 3.
[20] *Id.*, ¶ 10; Appendix 3.
[21] *Id.*, ¶ 13; Appendix 4.

16 Kenmore Air did not dispute Staff's statement of facts, and asserted that it operates the vans itself, without using an affiliate or separate corporation to provide ground transportation, and provides the service as an integral part of the "service of an air carrier."[22]

17 In response to Staff's motion, Seatac Shuttle agreed that Kenmore Air was "in the business of transporting passengers by air under operating certificate issued by the FAA," but disputed that Kenmore Air met the definition of an "air carrier" under federal law, specifically 49 U.S.C. § 41713.[23] Seatac Shuttle stated that Kenmore Air operates two companies – Kenmore Air Express or KAE, and Kenmore Air Harbor – with KAE providing service between Oak Harbor and Boeing Field and Kenmore Air Harbor serving both intrastate and international service to Victoria, B.C.[24] However, it failed to address the issue of ground transportation to and from Kenmore Air's Lake Union terminal. Finally, Seatac Shuttle asserted that KAE provides some service between Oak Harbor and Boeing Field with ground service to downtown Seattle, with no connection to continuing flights out of Sea-Tac.[25] Seatac Shuttle supported this claim by attaching to its answer a copy of an advertisement from Kenmore Air offering flights to Boeing Field for an "Oak Harbor to Seattle daytrip … including a shuttle between Boeing Field and downtown Seattle."[26]

18 The Initial Order determined that there were no material facts in dispute, focusing on Kenmore Air's ground transportation route between Boeing Field and Sea-Tac for flights that originate and terminate in Oak Harbor because the route competes with Seatac Shuttle's auto transportation route.[27]

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[22] Kenmore Air Answer to Motion for Summary Determination, ¶ 7; *see also* Seatac Shuttle Answer to Motion for Summary Determination, ¶ 16.
[23] SeaTac Shuttle Answer to Motion for Summary Determination, ¶ 3, n.3. 49 U.S.C. § 41713(b)(1) provides:

> 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 price, route, or service of an air carrier that may provide air transportation under this subpart.

[24] *Id.*, ¶ 8.
[25] *Id.*, ¶ 9.
[26] Appendix A to Seatac Shuttle Answer to Motion for Summary Determination.
[27] Initial Order, ¶ 10.

19 We agree with the Initial Order's finding that there are no material facts in dispute. Although Seatac Shuttle claims there is confusion about the parties subject to the complaint, i.e., Kenmore Air Harbor or KAE, and raises concerns about certain facts, Seatac Shuttle's claims do not demonstrate the initial order erred in reaching this conclusion.

20 SeaTac Shuttle agrees that Kenmore Air holds an air carrier certificate from the federal government, but disputes that it is an "air carrier" under the federal law. This is a question of law, not fact, and offers no support for its petition.

21 Although Seatac Shuttle asserts that there is confusion about the scope of the complaint, the parties, and Kenmore Air's operations from its Lake Union terminal, no party – including Seatac Shuttle – disputed Staff's recitation of facts, including that Kenmore Air provided ground transportation between its Lake Union terminal and Sea-Tac for its passengers taking flights to and from its Lake Union terminal. Staff's statement of facts also recognized all operations by Kenmore Air Harbor, LLC, and Kenmore Air Express by identifying all air routes the entities serve under the federal certificate.

22 Seatac Shuttle also offers in its answer that Kenmore Air is providing ground service between Boeing Field and downtown Seattle following flights from Oak Harbor to Boeing Field. No party disputes this asserted fact.

23 We find no error in the Initial Order's conclusion that there is no dispute about the material facts underlying Seatac Shuttle's complaint, even when viewed in a light favorable to Seatac Shuttle. We now proceed to address the questions of law presented by the complaint and Seatac Shuttle's petition for review.

B. The Initial Order did not err in not considering Kenmore Air's ground transportation service to and from its Lake Union Terminal.

24 Seatac Shuttle asserts that the Initial Order is incomplete and should be modified to consider Kenmore Air's operations out of its Lake Union terminal because it leaves open for a separate complaint questions about Kenmore Air's Lake Union

operations.[28] Kenmore Air responds that Seatac Shuttle did not explicitly contest its ground transportation routes related to its Lake Union operations in Seatac Shuttle's complaint or its answer to the motion for summary determination.[29]

25 In determining whether Kenmore Air is an "air carrier" under federal law, the Initial Order stated that, "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."[30] In a footnote to this statement, the order stated, "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."[31]

26 The Initial Order did not err by not considering Kenmore Air's Lake Union operations in resolving the pending questions. Although Seatac Shuttle as the complainant has the burden to plead and identify the facts in dispute, we may read its pleadings liberally to include Kenmore Air's Lake Union operations when reviewing the issues.[32] Nevertheless, even if the Initial Order had considered the Lake Union operations, the findings, conclusions and ultimate decision would not have been different.[33] As we discuss below, Kenmore Air is an air carrier under federal law, and we are preempted from regulating Kenmore Air's ground transportation related to its operations as an air carrier, whether or not we consider the company's Lake Union operations.

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[28] Petition for Review, ¶¶ 1-3.
[29] Kenmore Air Answer, ¶¶ 2-4.
[30] Initial Order, ¶ 14.
[31] *Id.*, n.8.
[32] WAC 480-07-395(4) provides "The commission will liberally construe pleadings and motions with a view to effect justice among the parties. The commission, at every stage of any proceeding, will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties."
[33] *See* Staff Answer, ¶ 5.

C. The Initial Order correctly finds Kenmore Air an "air carrier" under federal law.

27 It is an undisputed fact that Kenmore Air holds an "Air Carrier Certificate" from the FAA, verifying that the company has met the standards and rules for issuing the certificate and is authorized to operate as an "air carrier."[34] The certificate was originally issued in October 1964, and reissued in July 2004, in the name of Kenmore Air Harbor, Inc., d/b/a Kenmore Air Express, applying to both companies about which Seatac Shuttle complains.[35] The certificate further describes the company as an "Air Taxi Operator and Commuter Air Carrier."[36]

28 The Airline Deregulation Act (ADA) defines an "air carrier" as "a citizen of the United States undertaking *by any means, directly or indirectly*, to provide air transportation."[37] Air transportation is defined under the law as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft."[38]

29 In determining whether Kenmore Air is an air carrier, the Initial Order assumed as true Seatac Shuttle's argument that Kenmore Air provides only intrastate service between Oak Harbor and Sea-Tac via Boeing Field, and did not consider that Kenmore Air also provides international flights to and from Canada.[39] The Initial Order found that Kenmore Air indirectly provides foreign and interstate air transportation by using its commuter service to connect to interstate and international flights departing or arriving at Sea-Tac.[40]

30 Seatac Shuttle disputes that Kenmore Air is properly classified as an air carrier for its flights between Oak Harbor and Boeing Field, arguing that Kenmore Air does not have any ticketing arrangements with any interstate or foreign carrier, and does not carry mail.[41] In addition, Seatac Shuttle appears to contest the Initial Order's focus

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[34] *See* Staff Motion, Appendix 2.
[35] *Id.*
[36] *Id.*
[37] 49 U.S.C. § 40102(a)(2) (emphasis added).
[38] 49 U.S.C. § 40102(a)(5).
[39] Initial Order, ¶ 14, n.8.
[40] *Id.*, ¶ 14.
[41] Petition for Review, ¶ 4.

solely on Kenmore's intrastate operations.[42] In fact, Seatac Shuttle asserts that Kenmore Air cannot be separated from Kenmore Air Express, as they are the same company, and agrees that Kenmore Air provides foreign air transportation.[43]

31 We deny Seatac Shuttle's petition on this issue. The language of the ADA is clear – an air carrier is one that "undertakes, *by any means, directly or indirectly*, to provide air transportation."[44] Considering the facts in the light most favorable to Seatac Shuttle, the Initial Order reasonably determined that Kenmore Air, through its intrastate service between Oak Harbor and Boeing Field, with connecting ground transportation to and from Sea-Tac, indirectly provides foreign or interstate air transportation, and meets the definition of an air carrier. We conclude its air carrier certificate covers all of the carrier's operations, such that Kenmore Air is an "air carrier" under the law not just for its foreign operations, but for all of its operations, including the intrastate operations between Oak Harbor and Boeing Field.[45]

32 Consistent with the Initial Order, we find that Kenmore Air is properly classified as an "air carrier" under federal law.

D. The Initial Order correctly determines the Commission is preempted from regulating Kenmore Air under federal law.

33 The primary issue in this proceeding is whether the Commission is preempted from regulating Kenmore Air's ground transportation service, due to its status as an "air carrier." The ADA provides, in relevant part:

> 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 price, route, or service of an air carrier that may provide air transportation under this subpart.[46]

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[42] *Id*.
[43] *Id*., ¶ 2; Seatac Shuttle Answer to Motion for Summary Determination, ¶ 9.
[44] 49 U.S.C. § 40102(a)(2) (emphasis added).
[45] *See* 49 U.S.C. §§ 40102(a)(2) and (5).
[46] 49 U.S.C. § 14713(b)(1).

34 The Initial Order determined that the Kenmore Air's ground transportation operations relate to its prices, routes or service as an air carrier, and found the Commission does not have jurisdiction to consider Seatac Shuttle's complaint.[47] Specifically, the order followed a U.S. Supreme Court decision interpreting the phrase "relating to" in the ADA to "express a broad preemptive purpose."[48] The order determined that Kenmore Air's passengers use the company's ground transportation service predominantly when flying in and out of Sea-Tac, and that the air and ground transportation components of the service are of one piece. The order also found that Kenmore Air takes into consideration the cost of ground transportation in setting its price for the air travel, and that the operations are a vital part of the route and service to Sea-Tac that Kenmore Air markets to the public.

35 Seatac Shuttle claims the Initial Order erred in finding preemption, asserting that the order did not consider cases addressing the meaning of "service" under the ADA. Specifically, Seatac Shuttle asserts that Kenmore Air's ground transportation is not a "service of an air carrier," as the ground transportation service does not meet the tests a federal court has imposed for determining whether actions by airline personnel are "services" under the ADA, i.e., whether the service is "commonplace and ordinary," and "relate[s] directly to air travel."[49] Seatac Shuttle reads the law too narrowly.

36 Under *Morales*, states are preempted from enforcing or enacting state laws or rules that have "a connection to or reference to" the "price, route *or* service of an air carrier."[50] Kenmore Air's ground transportation service must meet only one of the three possible bases for preemption – price, route or service – for the statute to apply. We believe all three bases for exemption apply to Kenmore Air's operations.

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[47] Initial Order, ¶¶ 17-18.
[48] *Id.*, ¶ 15, quoting *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 383, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992).
[49] Petition for Review, ¶ 5, citing *Weiss v. El Al Israel Airlines, Ltd*., 471 F.Supp.2d 356, 360 (S.D. N.Y. 2006), quoting *Trinidad v. American Airlines, Inc*., 932 F.Supp. 521, 524-26, (S.D.N.Y 1996).
[50] *Morales*, 504 U.S. at 384; *see also* 49 U.S.C. § 41713(b)(1) (emphasis added); Staff Answer, ¶ 18.

37 First, we reject Seatac Shuttle's argument that Kenmore Air's ground operations are not a service of an air carrier under the ADA.[51] Two federal courts have rejected the argument that air transportation service must be provided solely by aircraft, relying on the fact that the ADA defines foreign and interstate air transportation as the transportation of passengers or property "when any part of the transportation or operation is by aircraft."[52] In *Philadelphia v. Civil Aeronautics Board*, the D.C. Circuit Court of Appeals found that air cargo transported by airplane and then subsequently by truck was a service under an airline's air carrier certificate.[53] In *Federal Express Corp. v. California Public Utilities Commission*, the Ninth Circuit found that the state commission was preempted from enforcing state regulatory statutes against Federal Express' purely intrastate ground transportation of packages, as the ground transportation was an integral part of the air delivery system the carrier provided to its customers.[54]

38 Furthermore, like the ground transportation in *Philadelphia* and *Federal Express*, it is clear that Kenmore Air's ground transportation is related to the price and route of its air transportation service: Kenmore provides ground transportation service only to its airline passengers, treats the ground operations as an integral part of its service, and takes into consideration the cost of ground transportation in setting its price for the air travel.[55]

39 We note that in *Chouest v. American Airlines*, a federal district court held that ground transportation provided as part of an American Airlines comprehensive vacation package that included air travel was not "integral to the air transportation service" as

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[51] In *Weiss v. El Al Israel Airlines, Ltd*., which Seatac Shuttle cites, the court found, in dicta, that "bumping" a passenger from an overbooked flight was a "service of an air carrier" under the ADA, preempting state tort laws. 471 F.Supp. 2d at 358-59; *see also* Staff Answer, ¶ 23. If bumping a prospective passenger that has not seen the inside of an airplane is a service, so is an airline providing ground transportation to a customer who has had a prior or subsequent trip on an airplane. *See* Staff Answer, ¶ 26.

[52] *Id*., ¶¶ 10-11; Staff Answer, ¶¶ 15, 22, citing *Philadelphia v. Civil Aeronautics Board*, 289 F. 2d 770 (D.C. Cir. 1961); *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d (9th Cir. 1991), cert. denied, 504 U.S. 979 (1992); *see also* 49 U.S.C. §§ 40102(a)(23) and (25)(B).

[53] 289 F. 2d 770 (D.C. Cir. 1961).

[54] *Federal Express*, 936 F.2d at 1076-77, 1079; Staff Answer, ¶ 15.

in *Federal Express*, and thus was not subject to preemption under the ADA.[56] The court likened American Airlines' role in this travel arrangement to that of a travel agent, finding that the ground transportation service was not "essential or integral to the air transportation services provided by American."[57] This case is distinguishable, however, as the service was offered only to those passengers purchasing vacation packages, and was not a fully integrated part of the airline's service. Kenmore Air's ground transportation service is available to all of its passengers and is a fully integrated part of its service as an air carrier, providing a connection for its customers from its hub at Boeing Field to other airlines at Sea-Tac. Kenmore Air's ground transportation service does not fall within the exception to *Federal Express* discussed in *Chouest*.

40 Thus, we concur with Kenmore Air's statement that its operations as an air carrier are subject to federal regulation and preemption, regardless of whether they are performed by aircraft or ground vehicles, and regardless of whether the passengers are engaged in intrastate or foreign transportation.[58] We uphold the Initial Orders' decision on this issue, reject Seatac Shuttle's petition, and find that we are preempted from considering Seatac Shuttle's complaint to enforce state laws and rules relating to the "price, route and service of an air carrier."

E. Federal preemption also applies to safety regulation.

41 Seatac Shuttle asserts that the Initial Order failed to resolve the question of whether Kenmore Air must comply with state laws and rules in RCW 81.68 and WAC 480-30 relating to bus safety.[59] It argues that, even if the Initial Order correctly found the Commission is preempted from regulating Kenmore Air's ground transportation

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[55] *See* Staff Motion for Summary Determination, ¶¶ 10-14; Kenmore Answer to Staff Motion for Summary Determination, nn.6, 8.
[56] 839 F.Supp. 412, 417 (E.D. La. 1993).
[57] *Id*. at 417.
[58] Kenmore Air Answer, ¶ 11.
[59] Petition for Review, ¶¶ 1, 6. Seatac Shuttle did not raise this claim in its complaint, but argued the issue in its answer to Staff's motion for summary determination. The Initial Order does not address Seatac Shuttle's argument.

operations, Kenmore Air must still comply with bus safety rules for those operations.[60]

42 The record on this issue is slim. The Initial Order did not address the issue as Seatac Shuttle did not clearly make this claim in its complaint, and no party briefed the issue on summary determination. Seatac Shuttle raises this issue for the first time in its petition for review, and only Staff discusses the issue in its answer.

43 In support of its claim, Seatac Shuttle cites only a New York state court decision finding that "airline safety and the traditional role of state law" is not preempted under the ADA.[61] Staff asserts that the case provides no guidance in this matter, as it concerns the applicability of state tort laws, not safety regulations.[62]

44 In response, Staff argues that state safety regulation is closely related to the "price" and "service" of an airline, and asserts that Congress did not intend to allow local regulation of such matters under the ADA.[63] Staff notes that in a similar preemption statute governing motor carriers of property, Congress expressly excluded from preemption "the safety regulatory authority of a State with respect to motor vehicles."[64] Staff argues that the lack of such qualifying language in the ADA suggests that state safety regulations are also preempted.

45 Generally, we do not address matters raised for the first time on review, particularly where both the factual record and the briefing are inadequate to make a fully informed decision. Because this matter was decided as a summary determination of the preemption issue in relation to Kenmore Air's status as an "air carrier" under the ADA, there are no facts in the record in relation to the safety regulation of its motor vehicles. We decline to consider the interplay between federal and state law governing safety regulation of ground transportation provided by air carriers in this context.

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[60] Petition for Review, ¶ 6.
[61] *Harrell v. Champlain Enterprises Inc.,* 200 A.D.2d 290, 613 N.Y.2d 1002 (1994).
[62] Staff Answer, ¶ 32.
[63] *Id.*, ¶ 33.
[64] *Id.*, ¶ 34, quoting 49 U.S.C. § 14501(c)(1) and (c)(2)(A).

46 We remand the complaint proceeding to the administrative law judge to (1) allow Seatac Shuttle the opportunity to amend its complaint to fully address the question of whether the Commission has jurisdiction over the licensing, insurance requirements and safety regulations governing Kenmore Air's ground transportation operations, and, if necessary, (2) consider the issue through hearing or briefing.

F. Petition to Intervene

47 In its Motion to Grant Intervenor Status,[65] Pacific Northwest asserts that it holds a certificate as an auto transportation company, that "[a]s a certificated airporter [it is] a stakeholder in the exercise of authority of the Commission," and further, that "[o]peration of a regularly scheduled service to an airport within the State of Washington without proper authority economically affects every regulated operator."[66]

48 After determining that the Commission lacks jurisdiction over Kenmore Air, the Initial Order denied Pacific Northwest's motion because the basis for Pacific Northwest's interest – operation without proper authority – is not present in this proceeding.[67] The Initial Order also found that "a statement of general interest as a participant in the same industry" as Seatac Shuttle is not sufficient to justify intervention.[68]

49 Seatac Shuttle seeks review of this decision, claiming that denying the petition is without merit, and that the national implications of the Initial Order's decision and its effect on all regulated carriers justify granting intervention. We disagree.

50 A presiding officer has discretion in granting petitions for intervention, and may grant a petition if the petitioner demonstrates it has "a substantial interest in the subject matter of the hearing or if the petitioner's participation is in the public interest."[69] The Commission has applied the principles of standing when considering petitions for

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[65] *See* para. 6, *infra*.
[66] Pacific Northwest Motion to Grant Intervenor Status, ¶¶ 3, 4.
[67] Initial Order, ¶ 20.
[68] *Id*.
[69] *See* RCW 34.05.443(1); WAC 480-07-355(3).

intervention, including whether the intervenor's interest in the proceeding falls within the "zone of interest" protected by the statute in question.[70]

51 We concur with Staff's assertion that Pacific Northwest's general statement of interest in the proceeding is not sufficient to justify intervention.[71] Pacific Northwest does not state a position about the dispute, and only expresses its interest in general as a certificated carrier and general concern about the economic effect of allowing auto transportation carriers to operate without proper authority. In this regard, it adds nothing to the fundamental interests asserted by Seatac Shuttle nor could its interests affect the preemption analysis. We find the Administrative Law Judge appropriately exercised discretion in denying the motion for intervention, given his decision on the issue of preemption, and deny Seatac Shuttle's petition on this issue.

FINDINGS OF FACT

52 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

53 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate the rates, rules, regulations, practices, and accounts of public service companies, including auto transportation companies.

54 (2) Seatac Shuttle is an auto transportation company and public service company, operating under Certificate C-1077 between Oak Harbor, Washington, and Sea-Tac Airport.

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[70] *See WUTC v. Advanced Telecom Group, Inc., et al*., Docket UT-033011, Order 20, Order Denying Petition for Review, ¶ 44 (Feb. 9, 2005); *see also In re Application of Aqua Express*, LLC, Docket TS-040650, Order 02, Order Granting in Part Motion to Strike Protest of Inlandboatmen's Union of the Pacific' Limiting Protest of Inlandboatmen's Union of the Pacific, ¶ 28 (Jun. 7, 2004), citing *Cole v. Washington Util. and Transp. Comm'n,* 79 Wn.2d 302, 305-307, 485 P.2d 71 (1971).

55 (3) Kenmore Air is authorized by the U.S. Department of Transportation, Federal Aviation Administration, to operate as an "air carrier" under Certificate GJRA163A.

56 (4) Kenmore Air provides airline service under its air carrier certificate between Boeing Field and Oak Harbor, Washington, between Boeing Field and points in the San Juan Islands and on Vancouver Island, British Columbia, Canada, and out of Lake Union, located in Seattle, Washington.

57 (5) Kenmore Air provides ground transportation service by van, transporting only its own airline passengers between Boeing Field and Sea-Tac and Lake Union and Sea-Tac.

58 (6) Kenmore Air, under the name Kenmore Air Express, provides some service between Oak Harbor and Boeing Field, with ground service to downtown Seattle, with no connecting flight in or out of Sea-Tac.

59 (7) The service Kenmore Air provides between Oak Harbor and Sea-Tac, via Boeing Field, competes with Seatac Shuttle's auto transportation service between Oak Harbor and Sea-Tac.

CONCLUSIONS OF LAW

60 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

61 (1) The Washington Utilities and Transportation Commission has jurisdiction over Seatac Shuttle.

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[71] *See* Staff Answer, ¶¶ 38-39.

62 (2) In resolving motions for summary determination and petitions for review concerning such motions, the Commission must determine whether there are any genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law.

63 (3) There are no material facts in dispute.

64 (4) Kenmore Air meets the definition of an "air carrier" under the Airline Deregulation Act because Kenmore Air provides foreign and interstate air service indirectly by providing service from Oak Harbor to Sea-Tac via Boeing Field for its customers connecting to flights out of Sea-Tac, service out of its Lake Union terminal, and provides foreign air transportation to Canada directly out of its Boeing Field terminal.

65 (5) States are preempted under 49 U.S.C. § 14713(b)(1) from enforcing any state law or regulation that relates to the price, route or service of an air carrier.

66 (6) Kenmore Air's ground transportation service relates to, or is in connection with, the price, route or service it provides to its customers under its air carrier certificate, and state regulation of its ground operations is therefore preempted.

67 (7) Generally, the Commission does not address matters raised for the first time in a petition for administrative review, particularly in the absence of an adequate factual record.

68 (8) A presiding officer has discretion in granting petitions for intervention, and may grant a petition if the petitioner demonstrates it has "a substantial interest in the subject matter of a hearing or if the petitioner's participation is in the public interest." *See RCW 34.05.443(1); WAC 480-07-355(3).*

69 (9) The presiding officer did not err in denying Pacific Northwest's petition to intervene in the proceeding because its general interest in the subject matter of the proceeding was not sufficient to justify intervention and could not have affected the outcome.

ORDER

THE COMMISSION ORDERS That:

70 (1) Seatac Shuttle, LLC's Petition for Administrative Review is denied as to whether Kenmore Air Harbor, LLC, is an air carrier under the Airline Deregulation Act, whether the Commission is preempted under federal law from regulating the price, route and service of Kenmore Air Harbor, LLC's ground transportation operations, and whether the Initial Order erred in denying a petition to intervene.

71 (2) The remaining issue on review, whether the Commission is preempted from regulating the safety of Kenmore Air's ground transportation operations, is remanded to the Administrative Law Judge for consideration.

72 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington and effective October 31, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.