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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of: Maricopa Ambulance, LLC, Applicant.	Case No. 2015A-EMS-0190-DHS **RURAL/METRO INTERVENORS' POST-HEARING MEMORANDUM (Hon. Diane Mihalsky)**

The Rural/Metro Intervenors, by and through their attorneys undersigned, submit herewith their Post-Hearing Memorandum in this matter. For the reasons set forth herein, and based upon all matters of record in this proceeding, it is respectfully requested that Applicant Maricopa Ambulance LLC's ("Applicant") application for a Certificate of Necessity be denied.[1]

DATED this 29th day of February, 2016.

Squire Patton Boggs (US) LLP

By: /s/ *Lawrence J. Rosenfeld*
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[1] The Rural/Metro Intervenors, by this reference, incorporate herein the matters set forth in the Post-Hearing Memorandum submitted by Intervenor AMR.

I. PUBLIC NECESSITY

Pursuant to A.R.S. § 36-2233(B)(2), an applicant for a CON must demonstrate that public necessity requires its proposed service or any part of the service. As to this critical evidentiary showing – as with all other evaluative factors – the burden of proof rests squarely upon the applicant, A.A.C. R2-19-119(B), and the standard of proof is "preponderance of the evidence", A.A.C. R2-19-119(A).

More specifically, as BEMSTS Guidance Document GD-099-PHS-EMS explains, the CON statutes and rules "establish a requirement that anyone seeking to start an ambulance service . . . must be able to demonstrate that there is a public necessity for the proposed service." In order to establish public necessity, an applicant must prove that "an identified population needs or requires all or part of the services of a ground ambulance service," A.A.C. R9-25-901(45). Public necessity in this context includes a review of whether there is a public need for additional ambulance transports that the incumbent providers are not meeting; the extent to which granting a new CON will adversely financially impact the current providers (A.A.C. R9-25-903(B)(2)); and whether the existing providers' performance is "substandard" (as defined in A.A.C. R9-25-901(46)). In addition to addressing all of the matters identified in A.A.C. R9-25-902(A)(1) and (A)(2), as there are here multiple established, presently-certificated providers in the proposed service area, all of the following circumstances must <u>also</u> be considered:

- Whether ground ambulance service presently exists throughout the entirety of the applicant's proposed service area (A.A.C. R9-25-903(A)(4)(a));
- Response times (including the actual response times achieved by the certificated providers and the response times proposed by the applicant (A.A.C. R9-25-903(C)(2)); and whether each of the certificated providers in the applied-for service area is compliant with the response times approved by DHS (A.A.C. R9-25-903(A)(4)(b)));

- Whether certificate holders are available throughout the entirety of the applicant's proposed service area (A.A.C. R9-25-903(A)(4)(c)); and
- Whether emergency medical services are available throughout the entirety of the applicant's proposed service area (A.A.C. R9-25-903(A)(4)(d)).

With respect to many of these evaluative criteria, there is no factual dispute whatsoever, all of which militate towards denial of this application.

- Ground ambulance service does exist throughout the entirety of Applicant's proposed service area.
- Certificate holders are available throughout the entirety of Applicant's proposed service area.
- Emergency medical services are available throughout the entirety of Applicant's proposed service area.

Let us turn, then, to the remaining factors pertinent to the public necessity inquiry.

A. Adverse Financial Impact Upon Incumbent Providers.

In its proforma ARCR [MA1, at 0096], Applicant stated that, in its first year of operations, it planned to do 24,519 transports. What Applicant was unable to do, however, was to provide any specificity whatsoever as to how many of Applicant's projected 6130 ALS transports, or how many of its projected 18,389 BLS transports would be taken from each of the incumbent providers – data that, as Mr. Gibson acknowledged, is essential to undertaking an assessment of the adverse financial impact each of these providers would suffer were Applicant to be certificated (Vol. 8, pp. 1699-1702). Nor could Mr. Gibson tell us how many of these 24,519 interfacility transports would come from any of the facilities that Applicant anticipated principally serving during its first year (Dignity Health, HonorHealth, etc.) (Vol. 8, pp. 1695-96). Indeed, as it turned out, no such analysis was engaged in by Applicant in deriving its 24,519 transport number. Instead, that figure was simply "backed into" [*id.*].

Applicant thus made not even the pretense of attempting to address this essential element of the "public necessity" analysis, despite its clear understanding of the criticality of this assessment vis-à-vis the ultimate determination on its application. Indeed, its own witness, Dr. David Argue, nicely explained why Arizona's regulatory model wisely requires this assessment:

> Q. Do you have any knowledge as to why the regulations include, as a factor to be considered under circumstances where there is already at least one other provider serving the area, the consideration of financial impact? And that's yes or no.
>
> A. I believe I –
>
> Q. That's just yes or no, and I'll follow up if need be.
>
> A. Yes.
>
> Q. Okay. And what do you understand would be the motivation or the rationale for including that as a factor?
>
> A. I believe that the motivation for that would be concern that an ambulance -- or a specific service area may, if -- may end up with multiple ambulance services provided in that area, ultimately potentially making any of those financially unstable because of insufficient demand to make it an economic prospect to serve that area.

Vol. 11, p. 2164, l. 3-21.

But Applicant did not ask Dr. Argue to undertake this study:

> Q. All right. And I'm assuming, because you didn't testify to this on direct -- and, again, this is a yes or no. -- I'm assuming, Dr. Argue, that you didn't undertake any review or analysis of the extent to which Maricopa Ambulance's entry into this service area would impact financially the existing CON holders; isn't that true?
>
> A. I'm sorry. Could you repeat the question again? I heard all the words. I just want to make sure that I -- I want to understand exactly what it is you are asking.
>
> Q. Absolutely.

> Am I correct, Dr. Argue, that you did not personally undertake any review or analysis of the extent to which Maricopa Ambulance's entry into this service area would impact existing – impact financially existing CON holders?
>
> A. That is correct, I did not evaluate the impact of Maricopa Ambulance's entry into the service area having an impact on others.

Vol. 11, p. 2164, l. 22 - p. 2165, l. 16.

Nonetheless, even without having attempted to compute the actual adverse financial impact, Dr. Argue conceded that, by virtue of Maricopa Ambulance taking 24,519 interfacility transports from the existing certificated providers, those providers would indeed by financially impacted by this loss:

> Q. In your opinion, if Maricopa Ambulance were to do 24,000 interfacility ambulance transports in its first year of operation, do you admit of the possibility -- I'll put it that way, to make it clearer. Would you admit of the possibility that there could be a decided financial impact on some or all of the existing providers? That's a yes or no.
>
> A. Okay. I think that question was worded differently, notwithstanding the part that you said, but the very first word in your question was if.
> If Maricopa Ambulance –
>
> Q. That's a yes –
>
> A. -- achieves contracts that allows it to transport 24,000 patients, then, yes, it will have an impact on Rural/Metro or whoever the other incumbent holder of that contract is.
>
> Q. A financial impact that you have not endeavored to quantify -- yes or no -- is that correct?
>
> A. Yes, that is correct.

Vol. 11, p. 2170, l. 8 - p. 2171, l. 1.

It is not an overstatement to say that, as to this factor, there has been an abject failure of proof by Applicant. That said, we recognize that, in Case Management Order

No. 13, the ALJ indicated that she views the adverse financial impact assessment as an "affirmative defense", as to which the burden of proof thus lies with the Intervenors. While we respectfully disagree with this view (as there is nothing in A.A.C. R2-19-119(B) that provides that the burden of proof, as to any of the "public necessity" factors, shifts away from the CON applicant), we nonetheless observe that, even if that were the case, Applicant's inability to articulate the basis upon which it arrived at the projected number of first-year transports (other than telling us that the number was "backed into"), made it impossible for the incumbent CON-holders to attempt a meaningful adverse financial impact analysis. Indeed, Ms. Ponczak (Applicant's CFO) concluded that, in order for any existing CON-holder to determine what adverse financial impact it would suffer were Applicant to be certificated, that CON-holder would need to know how many transports it stood to lose:

> Q. Would you agree that in order to determine the effect that Maricopa Ambulance getting a CON would have financially on any of the existing ambulance providers, we would have to know how many of these 24,519 transports came from any other particular provider?
>
> A. I don't know that I could answer that question.
>
> Q. You would agree that assuming that an ambulance provider is making a profit on a given ambulance transport, that if it loses that transport, it loses that profit?
>
> A. Correct.
>
> Q. So if we wanted to determine how Maricopa Ambulance, doing 24,519 largely interfacility transports in its first year, would impact any of the intervenors in this room, we would have to know how many of those 24,519 transports were coming from that particular CON holder; is that true?
>
> A. I presume.
>
> Q. To your knowledge, has Maricopa Ambulance done any analysis of how many transports will be taken from each of the existing CON holders in the first year?

A. I understood that David Lindberg was doing some of that analysis, or attempting to.[2]

Q. You have no information on that subject?

A. I do not.

Vol. 6, p. 1214, l. 17 - p. 1215, l. 19 (*emphasis added*).

During Intervenor AMR's case-in-chief, Mr. Kasprzyk confirmed that Applicant had not provided information sufficient to allow AMR to assess the adverse financial impact it would experience were Applicant to be certificated:

Q. Mr. Kasprzyk, if AMR of Maricopa were to do a financial impact analysis, what information do you think we would need to get from the applicant itself with regard to transports AMR of Maricopa would otherwise do?

A. I have a very limited financial background from what I do, but I can tell you that putting those types of analyses together requires a tremendous amount of information to be able to realize what the impact would be. There's just no simple methodology to do that. You want to be accurate, and it's going to be complex.

Q. Would you need to know how many trips that AMR Maricopa projects doing, it would not be able to do because those trips went to Maricopa Ambulance?

A. That would be one part of it.

Q. And to the best of your knowledge, have we received that specific information from them?

A. The only information that we had available is what's been entered into evidence as far as their projected ARCR. No significant detail beyond that, to the best of my knowledge.

Vol. 13, p. 2572, l. 20 - p. 2573, l. 16.

[2] Although Mr. Lindberg was in fact later called as a witness by Applicant, his testimony was limited to a computation of response times. He offered no evidence on lost transports.

And what makes this failure by Applicant to provide any meaningful data to allow an adverse financial impact analysis to be done even more disconcerting is that, because almost all of Applicant's proposed 24,519 transports will be the more reliably collectible prescheduled/interfacility transports, the impact on the existing CON-holders of a loss of those transports (thereby increasing the percentage of 911 transports in their transport mix), may well be exacerbated, as even Ms. Ponczak reluctantly recognized:

Q. I think you testified that collection percentages are higher, I believe you said that, at least in your direct examination a week ago, that collection rates are higher for interfacility transports than they are for 911 transports?

A. Can you repeat that?

Q. Sure. That collection percentages -- you can look at it as the bad debt side or the collection side, either way --

A. Yeah.

Q. -- but collection percentages are higher, i.e., bad debt percentages lower, for interfacility transports as compared to 911 transports?

A. Generally, yes.

Q. So you would expect, in your experience, that if a provider's mix of transports is skewed more heavily toward 911 as opposed to interfacility, it would have a lower collection percentage and a higher bad debt percentage than would a provider who's got the opposite mix?

A. Correct.

Q. And am I understanding your testimony correctly that most of the transports that Maricopa Ambulance is projecting it will do in year one, 24,519, that those are almost exclusively projected to be interfacility transports?

A. Correct; very small percentage of 911.

Q. Do you know what the percentage is of 911 in that number?

A. I believe it's less than 5 percent.

Q. So to the extent that Maricopa Ambulance takes away from the other providers almost exclusively interfacility transports, that will increase the percentage of 911 transports that the other ambulance providers do, at least as to those who do 911 transports?

A. It sounds like as a percentage, yes.

Q. And that would drive up the bad debt percentage of the existing providers?

A. It may.

Vol. 6, p. 1215, l. 20 - p. 1217, l. 10

As Applicant has neither addressed the issue of adverse financial impact, nor provided sufficient data to allow Intervenors to do so, consideration of this factor tips sharply against Applicant in the assessment of public necessity.

B. Response Times

In the assessment of public necessity, there are two aspects to the response time analysis: 1) the difference between the actual response times being achieved by the certificated providers in the pertinent service area vs. the response times proposed by the Applicant (A.A.C. R9-25-903(C)(2)); and 2) the certificated providers' compliance with their DHS-approved response times (A.A.C. R9-25-903(A)(4)(b)). We now address each of these, in turn.

1. Achieved vs. Proposed Response Times.

As a prefatory matter, we note that it is a bit difficult to understand precisely what Applicant is proposing regarding its response times. In its application, Applicant sets forth two sets of response times: one set of fractals that applies in jurisdictions where Applicant places a substation, and a different set of fractals in jurisdictions where it has no substation. (MA1 at 0078) The Notice of Hearing (Doc. 2) reflects that these are the response times Applicant proposes.

However, in its Application, Applicant explains that all of its initial locations will be posting locations – that is, it will have no substations (MA1 at 0016),[3] and that these

[3] As Mr. Blackburn explained, posting locations are significantly different than ADHS filed suboperation stations:

Q. Could you tell Judge Mihalsky what the difference is between a substation and a posting location?

A. A substation is a physical location where there may or may not be some garage space for vehicles, but there is a space for the crew to be able to exit the

[fn. continues on next page]

posting locations are not to be deemed substations (MA1 at 0017). Mr. Blackburn confirmed this during his cross-examination:

> Q. Let's take a look at another part of the application, Page 17, again, still Maricopa Ambulance Exhibit 1 in evidence, Page 17.
>
> And here's, again, where you – where Maricopa Ambulance indicates that the locations, the ambulance locations, listed in the application are posting locations only, correct?
>
> A. Correct.
>
> Q. It says, "As such, there will be no shared communications systems between Maricopa Ambulance and those NextCare facilities." Is that also correct?
>
> A. That's correct.
>
> Q. And it also says that these are posting locations and not ADHS-BEMSTS filed suboperation stations, right?
>
> A. Yes, that's correct.
>
> Q. So as this application presently stands, there are no suboperation stations proposed, correct?
>
> A. Correct.

> vehicle, maybe an office space or a small kitchenette-type facility. A posting position is a geographical area where a unit goes to stay, post, to prepare to respond within that given area.
>
> Q. I have some questions for you. So -- and I'm going to put another exhibit up there in a moment. So, for example, a posting location would not have sleeping quarters?
>
> A. Correct.
>
> Q. Would it have shower facilities?
>
> A. No.
>
> Q. Would it have a place where the ambulance personnel could sit and eat their meals?
>
> A. No, it does not.
>
> Vol. 2, p. 385, l. 16 – p. 386, l. 11.

Vol. 2, p. 374, l. 8 - p. 375, l. 2.

Mr. Blackburn further testified that, in fact, Applicant's application nowhere commits to putting a substation anywhere within its service area (Vol. 2, p. 375, l. 15-25) and, consistent with this testimony, Ms. Ponczak confirmed that Applicant's proforma ARCR includes no expenses for either the lease or the purchase of even a single substation location:

Q. Let's stay on this exhibit [MA167] and go to Page 00 -- the Bates number is 167-0016. And the title of this document is Allocation of Other Operating Expenses, correct?

A. Correct.

Q. On Line 4 there's an entry for Rent/Lease?

A. Uh-huh.

Q. Yes?

A. Correct.

Q. And the expense shown there is $480,000, correct?

A. Yes.

Q. And in order for us to determine what the $480,000 consists of, we would look at Page 13, Line 20, Column K?

A. Yes, that's what that says.

Q. So let's go to that, which is 0024. So do you see -- this is Page 24 of Exhibit -- 0024 of Maricopa 167. And do you see what the entries are that comprise the 480,000 Rent/Lease expense?

A. Yes, I see Line 1 and Line 2.

Q. 1 is for a primary operations center for $240,000?

A. Uh-huh.

Q. Yes?

A. Correct.

Q. And the second is for a secondary operations center for $240,000?

A. Correct.

Q. And that gets us to the 480, right?

A. Yes.

Q. And so would you agree that there is no rent or lease expense shown on Maricopa 167 for any ambulance suboperation stations?

A. Correct.

Q. And would you agree that if there were going to be suboperation stations, there would be some cost, either a purchase cost or a lease cost, associated with that?

A. Yes, there would be.

Q. Is any such cost reflected anywhere in Maricopa 167, to your knowledge?

A. Not to my knowledge, no.

Vol. 6, p. 1195, l. 1 - 1196, l. 19.

As a consequence, Mr. Blackburn agreed that unless and until Applicant establishes a substation, all of its responses will be governed by the slower response times proposed in its Application, rather than the more stringent response times with which Applicant would be required to comply had it established any substations:

Q. And I believe that you testified that for any city where Maricopa Ambulance has a filed suboperation station, there would be a certain set of response times, and that would be under Section I?

A. Correct.

Q. And for any city within Maricopa County where it didn't have a filed suboperation station, the response times would be Section II?

A. Correct.

Q. And fair to say that the Section II.a. and b. response times are slower than the Section I.a. and b. response times?

A. True. Correct.

Q. So just by way of example, in Section I there would be -- or what Maricopa Ambulance is proposing is that there be a requirement of a 10-minute response 90 percent of the time; while in Section B [sic] it would be a 10-minute response 80 percent of the time, correct?

A. That's correct.

Q. So if Maricopa Ambulance had a CON, in order to determine response time compliance, one of the inquiries that would need to be made would be whether a call -- in determining whether a particular call was compliant, would be, first, to determine whether the 911 response was to a city where there was a filed suboperation station or not?

A. Correct.

*****

Q. And so if we were to go back to the proposed response times, as the application presently stands, there would be no part of your proposed service area where you would have to -- Maricopa Ambulance would have to achieve a 10-minute response time 90 percent of the time; is that true?

A. Correct.

Q. It would be sufficient, for purposes of measuring CON compliance, if Maricopa Ambulance throughout its service area was achieving a 10-minute response time 80 percent of the time, true?

A. Correct.

Q. And there's nothing in the application itself that commits Maricopa Ambulance to ever putting an ambulance substation in any portion of its proposed service area; is that true?

A. Could you repeat the question?

Q. Sure.

Q. Can you find anywhere in this application where Maricopa Ambulance promises that it will ultimately put a suboperation station anywhere within its service area?

A. No. [4]

Vol. 2, p. 373, l. 5 - p. 374, l. 7; p. 375, l. 3-25 (*emphasis added*).

Stated mildly, it is difficult to reconcile the testimony offered by Applicant regarding what it is proposing as its response time compliance requirements. For purposes of the present analysis, however, we will give Applicant the benefit of every doubt: we will assume that the more stringent cumulative response times it proposed will need to be met with respect to the universe of calls it responds to across the jurisdictions in its service area where it has posting locations (even if these jurisdictions don't have DHS-filed suboperation stations); and we will also presume that Applicant will establish at least one actual substation, at some as-yet-unidentified location within its proposed service area, in its first year (despite having not accounted in its proforma ARCR for the expense associated therewith). Based on these assumptions, let us compare Applicant's proposed response times with the response time tolerances the Rural Metro Intervenors are actually achieving. [5] (A "response time tolerance" is the measure used to determine response time compliance. It is based upon a rolling 12-month period. *See* A.A.C. R9-

[4] It bears mention here that shortly after Mr. Blackburn so testified, Mr. Gibson testified that Applicant would be willing to treat its posting locations as substations for purposes of response time compliance (Vol. 8, p. 1721, l. 5 - p. 1723, l. 7), although no actual amendment to its Application was submitted prior to the close of evidence. Mr. Gibson also testified, on the heels of Mr. Blackburn's testimony, that Applicant would "guarantee" one substation in the first year (Vol. 8, p. 1718, l. 9-14) – but then conceded that the proforma ARCR fails to account for any such expense (Vol. 8, p. 1719, l. 1- p. 1720, l. 23). Inconsistently with applicant's newly-minted "guarantee", Mr. Gibson testified that no amendment to the proforma ARCR would be made "at this time" to account for this additional expense (Vol. 8, p. 1720, l. 24 – p. 1721, l. 4).

[5] We exclude two of the Rural/Metro Intervenors – American Ambulance and ComTrans – from this comparison. As Mr. Rivera explained, American Ambulance is a BLS provider only, and thus has no mandated CON response times. ComTrans is a niche provider, which only responds to behavioral health calls. (Vol. 13, p. 2601, l. 9 – p. 2602, l. 3).

25-901(36). The rolling twelve months reflected herein is the period August 1, 2014 – July 31, 2015).

Applicant (Proposed)	R/M Maricopa (Actual; RM117)	SW (Actual; RM 116)	PMT (Actual; RM115)	SWARA (Actual; RM 119)
I. Substation in Jurisdiction				
90% in 10 mins	92.3%	91.3%	90.1%	n/a[6]
95% in 15 mins	98.0%	98.6%	98.2%	98.3%
100% in 20 mins	99.1%	99.7%	99.5%	99.8%
II. No Substation in Jurisdiction				
80% in 10 mins	n/a[4]	77.9%	85%	88.1%
90% in 15 mins	n/a[4]	93.0%	97.9%	98.3%
100% in 20 mins	97.3%	98.0%	100%	99.8%

This data admits of but one conclusion: what Applicant is proposing to do is no better than (and in most instances is not as good as) what the Rural/Metro Intervenors are achieving, across the board, for a year's worth of ambulance transports, consisting of a universe of 60,960 emergency transports. Based on this data, Mr. Rivera opined as follows:

> Q. Have you had the opportunity to compare, using Exhibits 114 through 117 and Page 78 of Maricopa 1, how Rural/Metro, the Rural/Metro intervenors, are actually performing with respect to their response times in both of these categories as compared to what Maricopa Ambulance is simply proposing?
>
> A. Yes. Looking at the exhibits that you and I just reviewed told me two things. One, it validated, it helped to validate what we were looking at before in those seven communities, the strength of our response time -- rather, the team's response times with the ambulances within this area. So in an effort to kind of complete that loop, looking at our response times in our CONs validated the response times in Avondale, Glendale, and so on.

[6] "N/A" means that, for that particular CON, there is no comparable fractal.

> Secondly, when I went back and reviewed this, I was able to see quite clearly that overall, in the fractiles that are directly comparable between what Maricopa is proposing and what we're actually doing, we're actually performing higher than what they're proposing to do. We're performing better than what they're proposing to do.

Vol. 13, p. 2610, l. 18 – p. 2611, l. 16.

Thus, if in fact Applicant believes (as it must, having proposed the response times it has) that those response times are sufficient to meet the public need, it is clear as can be that the Rural/Metro Intervenors are meeting the need – admirably so – and that there is thus no "public necessity" for an additional provider of 911 services.[7]

2. Current Providers' Response Time Compliance

Looking at RM 114 through 117, it is indisputable that the Rural/Metro Intervenors are response-time compliant. Indeed, factoring in the 1.5% allowance provided by DHS when measuring response time compliance (as attested to by Mr. Jaramillo; *see* Vol. 10, p. 2102, l. 21 – p. 2103, l. 4), the Rural/Metro Intervenors are achieving (if not surpassing) twenty-three of the twenty-four response time fractals reflected therein.[8]

Moreover, as Mr. Jaramillo also testified (Vol. 10, p. 2098, l. 7 – p. 2102, l. 12), by letters dated August 3, 2015, ADHS notified each of these CON-holders that it "is compliant with [its] response times"; *see* RM148, at, respectively, RM0545 (PMT); RM0546 (Southwest); RM05467 (R/M Maricopa); and RM0550 (SWARA).

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[7] At pp. 57-58 of its Memorandum, Applicant argues that Intervenors' response time fractals are based on transports, rather than on calls, thus suggesting that there is some "problem" in making these comparisons. Perhaps this might be a valid argument had Applicant adduced evidence to support the notion that Intervenors respond slower when responding to a call that does not result in a transport than to a call that does result in a transport. There is no such evidence in this record – and, intuitively, such a contention seems irrational, given that when Intervenors dispatch an ambulance, they have no way of knowing, in advance, whether that call will result in a transport, and thus there would be no reason to believe that there would be something inherent in responding to a call that does not produce a transport that would result in those response times being materially different than the response times for calls that do result in transports.

[8] The only fractal that slightly misses is SW Maricopa at the "80% in 10 minutes" fractal at Section B. Taking into account the 1.5% DHS allowance, SW Maricopa "misses" by six-tenths of one percent (.006, stated as a decimal) – or 16 transports out of the universe of more than 60,000 911 transports accomplished during the 8/1/14-7/31/15 time frame.

Thus, as to the second prong of the response time analysis as it relates to the assessment of "public necessity", here too consideration of this factor demonstrates that the public need is being fully and satisfactorily met by the Rural/Metro Intervenors.[9]

3. Contractual Response Time Compliance

Although not specifically addressed in the statutes or regulations pertaining to response time compliance as it relates to the assessment of public necessity, we nonetheless believe it instructive to round out the response time discussion by looking at how the Rural/Metro Intervenors are faring with respect to response time compliance in jurisdictions where they have committed, by contract with cities, to response times which are, in most instances, more stringent than the response times mandated by their CONs. For purposes of this analysis, the Rural/Metro Intervenors presented testimony on their 911 responsiveness in seven jurisdictions that were selected for study by Applicant's witness, David Lindberg. (As is discussed later in this Section, Mr. Lindberg's study was badly flawed.) In addition to those jurisdictions, the Rural/Metro Intervenors' study includes as well the City of Mesa, as this is a jurisdiction that Mr. Lindberg testified he attempted to analyze, but had not been able to do so.

RM156 is an exhibit about which Mr. Rivera testified. Specifically, what this exhibit provides is a fifteen-month analysis of Rural/Metro Intervenors' response times, month-by-month, for the eight jurisdictions studied. With the exception of Glendale, which has no current contract with any of the Rural/Metro Intervenors, the "Code 3

[9] In a textbook case of "bootstrapping", Applicant argues, at p. 19, that public necessity requires its service because "[i]n situations where the existing providers cannot respond to a call quickly enough. …[Applicant] could fill that gap." The point here is that, in order to obtain a CON, Applicant first has to establish that this is fact occurring, to the point where an additional provider is needed – something that this record does not bear out. If Applicant's argument – that CONs should issue because there might be a circumstance where the existing providers cannot handle the demand – was accepted as valid, this would essentially justify the issuance of an unlimited number of CONs. As is more fully discussed at Section II of this Memorandum, that's just not how this State's regulatory model works.

Requirement" column reflects the response time measure set forth in the particular contract. (For Glendale, this exhibit uses the "90% in 10 minutes" parameter.)

Mr. Rivera provided an insightful explanation as to how to view this data. As he explained:

> Q. The exhibit contains all of the individual numbers for each of these regions for each of these 15 months, and anyone reading it can read those numbers, so I'm not going to ask you to go line by line for each. I think for these purposes, what I would like to know, Marco, is, when you're looking at a document like this and data like this, how do you analyze it, as a business analyst, substantively in terms of determining the quality and the rapidity, if you will, of the performance as compared to the benchmarks that you've identified?
>
> A. In analyzing, I take a holistic approach. I don't look at one or two or three months. I don't look at one or two or three cells on this table to draw my conclusion. I look at it as a system as a whole. So using this specific example, I look at performance across all of the eight communities that we have listed, how they interplay. That tells me a lot about the interoperability of the operation, especially in an area like this where, for the most part, our ambulances are moving relatively fluidly from one area to the next to provide support. I then look at trends over time. Not only, again, each line, but how they're moving together in all eight communities over the time frame July to September; are there variances; how big are the variances. If there's a variance below 90 percent, how long did that sustain; by how much was that variance; was it 2 percent, 3 percent, 6 percent. And I measure that against, again, the whole trend over time, and I look for patterning. And then there's a continued discovery, because, again, these numbers are being looked at very, very diligently by the operation here to discover what is playing into those variances, what are the root causes, what are the contributors. Do we have hospital delays; do we have extended task times; what may be playing into those numbers and those variances. So, again, not just cell by cell. That would be like rating pizza solely on pepperoni. And I'll apologize for my analogies. If it's not food, it will be Star Wars. So my apologies to the audience now. Here is my first food analogy. To look at one cell would be to look at just the pepperoni on a pizza. Looking at each cell would be an incomplete picture. We have to look at it as a whole. It has to be holistic.

Q. And in terms of the opinions you're going to express here today, is that what you did?

A. That is what I did, yes. I looked at the patterns over these eight communities over this time frame.

Vol. 13, p. 2593, l. 25 – p. 2596, p. 2.

Having reviewed the data contained in RM156 through this critical lens, Mr. Rivera reached these conclusions regarding Rural/Metro Intervenors' response time performance in these jurisdictions:

Q. So as you look at this overall, at the overall performance and including the several-month decline that you saw and then the rebound, what is your overall assessment of how the system is performing in these eight jurisdictions?

A. I was able to draw a couple conclusions. One, the system's relatively stable. The staffing challenge that the team experienced notwithstanding, the system is stable. They're able to affect change. They're able to monitor effectively. They're able to identify the problem and react to it. Overall, it's a stable system. There's certainly, not only from what Kevin had said, a fluidity in the system, ambulances are moving through the different communities in Maricopa County, supporting each other, supporting each of the systems, but there's not great variation in the data; again, outside the staffing issue that we talked about. Secondarily, that the team's diligence is obvious. They're not disengaged in any way, shape or form, and the data supports that. They are watching this day-to-day, and because they're able to watch the gauge, they can react and make effect so that we can get to the calls in the times that we need to get to them. Those are the main conclusions I was able to draw from this specific exhibit over these eight communities.

Vol. 13, p. 2599, l. 12 – p. 2600, l. 14.[10]

Indeed, the overall extraordinary response time performance by the Rural/Metro Intervenors in these jurisdictions – which, to reiterate, sets faster response time parameters

[10] A propos of Mr. Rivera's testimony, Mr. Stock explained that due to staffing challenges occasioned by AMR's entry into this market (and its hiring of a good number of Intervenors' field personnel), there was a temporary dip in response times during the very early part of 2015, which Intervenors were able to satisfactorily address, as the data in the succeeding months of 2015 substantiates (Vol. 13, p. 2650, l. 11 – p. 2652, l. 17).

than does ADHS pursuant to the CONs issued to the Rural/Metro Intervenors – serves only to further confirm that, from the standpoint of 911 response times, public need is being more then amply met, and, concomitantly, that there is no need for another private ambulance service provider.

To complete this discussion, we comment briefly on MA178 – the exhibit prepared by Mr. Lindberg wherein he attempted to analyze the Rural/Metro Intervenors' 911 response times in the jurisdictions listed in RM156 (excluding Mesa). We now know – based on the testimony of Mr. Lindberg – that his computations are inaccurate. Specifically, Mr. Lindberg confirmed these defects in his methodology:

- Mr. Lindberg failed to account for contract exceptions:

  Q. Okay. You're familiar, I take it, with contracts that Rural/Metro and perhaps other ambulance providers that you've worked with enter into with municipalities or with facilities?

  A. Correct.

  Q. And would you agree with me that in terms of how facilities or municipalities calculate response time compliance per their specific contract specifications is not what you did here; it's not the same as the mathematical exercise you undertook here?

  A. I'm not sure I understand the question.

  Q. Sure. Don't those contracts provide for certain allowances, where not every call is counted in determining whether there is contractual compliance?

  A. Okay, for municipalities, are you talking about like exceptions?

  Q. Exceptions.

  A. Yes, that is -- that is the case in some contracts, correct.

  Q. Can you give us an example of one or two of those exceptions, what you've seen in your experience?

A. Let's say in Buffalo, snow and can't get through roads.

Q. Okay.

A. They could ask for an exception for a certain response.

Q. Can you think of others maybe in contracts in this county?

A. In this county there might be some for harsh weather, but that's pretty rare.

Q. Anything other than weather-related exceptions?

A. Not that I can think of off the top of my head.

Q. Road closures, maybe?

A. Depends on the contract.

Q. Okay. Sure.

A. Yeah.

Q. And I'm not asking for a specific contract. Just things in your experience that you've seen.

A. Yes.

Q. Anything else you could think of not weather-related?

A. Not off the top of my head, no.

Q. Okay. But you recognize that those exceptions exist?

A. They can exist, yes.

Q. And am I correct that in the computation you undertook, you did not account for any exceptions?

A. That's correct.

Vol. 9, p. 2004, l. 23 - p. 2006, l. 23.

- Mr. Lindberg included in his analysis calls that did not result in transports:

Q. Okay. So you didn't -- in Goodyear your numbers don't at all reflect whether or not the numbers that you're showing are compliant with the Goodyear contract?

A. I based it on the CON, not the contract.

Q. Right. And, again, you based it on the CON, but you did not -- you counted all of the calls?

A. Correct.

Q. And when I say you counted all of the calls, you included, in fact, every call; not just the calls that resulted in transports, right?

A. Correct.

Q. Let's take a look -- I'm sorry I didn't ask you for this sooner. I want to look at 42A and 40A. So looking here, Mr. Lindberg, this is the CON for PMT in Maricopa County, correct?

A. Correct.

Q. And this is in evidence. And I'm going to scroll down to the second page, 2 of 2 of this document.

Q. Can you, to begin with, tell us what the difference is between a call and a transport?

A. Well, I generally don't call them a call. I call them a response.

Q. Okay. A response and a transport?

A. Yes. So you can have multiple responses. However, the crew can get canceled en route or could arrive on scene and the patient's signed out AMA, and so they're not transported, and so it wouldn't be a transport.

Q. Right. Against medical advice is AMA?

A. Could be, yes.

Q. So the universe is responses, and a subset of the universe is transports?

A. That's correct.

Q. And you use the larger, the umbrella number, the responses?

A. The responses, correct.

Q. And when you were measuring in your – going back to your 178, when you were measuring the, let's say, PMT, so here's City of Scottsdale –

A. Okay.

Q. -- you included all calls, all responses, correct?

A. All responses.

Q. Okay. You did not limit it to transports?

A. Correct.

Q. But you recognize, don't you, that the CON for PMT is based on a 90 percent 10-minute parameter for transports, not for responses; is that true?

A. You're correct.

Vol. 9, p. 2008, l. 25 to p. 2010, l. 25.

- Mr. Lindberg included in his calculations the response times of <u>every</u> ambulance unit that arrived at an accident scene, rather than just the <u>first</u> ambulance to arrive, contrary to how the regulations define "response time":

Q. Okay. Yesterday you were asked to define response time. Do you remember that?

A. Uh-huh.

Q. You have to say yes.

A. Yes.

Q. And you said, quite accurately, it was the elapsed time between dispatch of the ambulance and arrival on scene.

A. For our unit -- for the units being dispatched out of City of Phoenix, yes.

Q. For the units being dispatched out of the City of Phoenix. Okay.

A. Correct.

Q. And you know there is a definition of response time in the regulations, and it's very close to what you testified to. So you're aware that there is a definition in the actual ambulance regulatory –

A. I haven't read that, no.

Q. I'll read it.

A. Okay.

Q. And it's close to what you said, but I want to ask you about one specific thing.

A. Okay. Yeah.

Q. So this is R9-25-901(47), and it says "Response time means the difference between the time a certificate holder is notified that a need exists for immediate dispatch and the time the certificate holder's first ground ambulance vehicle arrives at the scene." And then it continues. "Response time does not include the time required to identify the patient's need, the scene, and the resources necessary to meet the patient's need."

Okay?

A. Okay.

Q. So I want to go back to the first of those two sentences.

"The difference between the time a certificate holder is notified that a need exists for immediate dispatch and the time the certificate holder's first ground ambulance vehicle arrives at the scene."

First, okay?

A. Yes.

Q. Did you find in the data any incidents, for any of the computations you did, any incidents where there were multiple vehicles arriving at the scene?

A. The data would not allow that to be analyzed.

Q. So there could be, in the data that you looked at, multiple units responding to that scene?

A. Correct.

Q. And you would have included in your computation the response time of each of those vehicles?

A. Correct.

Q. Not just limited to the first?

A. Correct.

Q. I'm not being critical.

A. No.

Q. Because you're telling me you couldn't do it with the data set you had.

A. I know where you're going. Yeah, you're correct.

Q. But you would agree with me –

A. Yes.

Q. -- that for purposes of measuring response times, you would extract from that data set the second, third, fourth, et cetera, vehicles from the scene, and would not look to their response times in calculating the overall CON-compliant response time for that provider?

A. Ideally, yes.

Q. Ideally and by definition under the statute, under this regulation, right?

A. Correct.

Vol. 9, p. 2015, l. 3 - p. 2018, l. 1.

The Lindberg exhibit, we respectfully submit, is unreliable, and should therefore be disregarded in its entirety.

4. Mobile Integrated Healthcare Service.

Applicant attempted to establish a public necessity for its service by making much of its incipient foray into the Mobile Integrated Healthcare Service ("MIHS") arena. But that effort too consisted of little more than "sound and fury, signifying nothing."[11] Here's what Applicant's witnesses testified to on this subject:

- Applicant does not need a CON to offer MIHS, as ambulances are not required to operate this service. (Blackburn, Vol. 2, p. 377, 1. 2 - p. 379 1. 11)
- Even if it obtained a CON, Applicant is not guaranteeing that it will offer MIHS. (Blackburn, Vol. 2, p. 278, 1. 12-18)
- Applicant isn't even close to determining what this service would cost (Blackburn, Vol. 2, p. 378, 1. 19 - p. 379, 1. 24), nor has its funding source (Enhanced Equity Fund) committed to financing it (Blackburn, Vol. 2, p. 384, 1. 2-14).
- The witness Applicant called to testify regarding MIHS, Mr. Zavadsky, is a consultant and published author on this subject. He testified that he undertook no study to determine whether it would be financially feasible for Applicant to

[11] William Shakespeare, Macbeth, Act 5, Scene V.

participate in an MIHS program, nor whether it would be operationally feasible for it to do so (Vol. 2, p. 333, 1. 1, 12). Nor has Mr. Zavadsky done any needs assessment to express an opinion as to whether the existing ambulance providers in Maricopa County have sufficient resources to provide MIHS (Vol. 2, p. 337, 1. 17-24). Moreover, although the exhibit Applicant submitted at the hearing relating to MIHS (MA32) lists a large number of community "stakeholders" who would need to buy into that program in order to make it viable, Mr. Zavadsky made no determination as to whether any of them – local governments, fire departments, hospitals and healthcare systems, healthcare payors, or any other potential stakeholders - have any interest whatsoever in partnering with Applicant on an MIHS program (Vol. 2, p. 335, 1. 25 - p. 337, 1.16).

In stark contrast, the Rural/Metro Intervenors and Intervenor AMR are truly engaged in discussions with community stakeholders – most particularly the AHCCCS program – with respect to the adoption and implementation of MIHS in this service area, as Mr. Stock described in his testimony (Vol. 13, p. 2634, 1. 2 - p. 2636, 1. 21; *See also* RM152). Additionally, Mr. Stock confirmed that Rural/Metro already has an MIHS program up and successfully running, in San Diego, one that it itself funded. Mr. Zavadsky's book, portions of which were admitted into evidence, specifically touts the success of this program; *see* RM153.

Moreover, Mr. Zavadsky acknowledged that AMR (and, in particular, Mr. Scott Bourn of AMR) has been front and center as an innovator in the development of MIHS programs. (Vol. 2, p. 300, 1. 11 - p. 302, 1. 2)

There is not an iota of testimony on this record to support the notion that there is a public necessity for Applicant based on its exploration of the possibility of maybe offering MIHS.

5. The "Safety Net" Argument.

Applicant sprinkles throughout its Memorandum the argument that it should be certificated as a "safety net", just in case Intervenor AMR goes out of business. While we presume that AMR will address this argument in its Memorandum, we note here, simply stated, that there is no evidence in this record to provide a basis for this speculative "concern". Perhaps recognizing this, Applicant seeks to connect unconnectible dots by arguing that, several years ago, Rural/Metro filed a Chapter 11 reorganization proceeding – and thus, we suppose, Applicant is asking the ALJ to accept the proposition that if it could happen to Rural/Metro, it could happen to AMR. Not only does that argument prove nothing as to AMR, it also misses a rather salient point as to Rural/Metro: The Rural/Metro Intervenors, during the pendency of Chapter 11, continued to fulfill their CON obligations (and have done so as well at all times since), as even Applicant itself conceded. (Blackburn, Vol. 1, p. 233 l. 14 - p. 235, l. 2).

Moreover, while Applicant introduced as an exhibit an ADHS contingency plan to provide service in the event Rural/Metro's Chapter 11 adversely impacted its ability to fulfill its CON requirements (MA53J), it failed to tell the rest of the story. But Mr. Yanofsky, called as a witness by the Rural/Metro Intervenors, did close the circle:

> Q. I just have a couple of questions for you. You have Exhibit Maricopa 53J on the screen in front of you. Are you familiar with this document?
>
> A. Somewhat, yes.
>
> Q. And you're aware this is a memorandum prepared by the Bureau, directed to Will, meaning the then Director, Will Humble; is that correct?
>
> A. Yes.
>
> Q. All right. And this was prepared on the heels of Rural/Metro filing its Chapter 11 bankruptcy petition; is that true?
>
> A. It could have been at that point, or it could have been at the point where a bond payment was not made in California.
>
> Q. Okay. But it was prepared at a point where there was some uncertainty as to the financial future of Rural/Metro?

A. That's a true statement, yes.

Q. All right. And if you look at the first paragraph of this document, does it appear to you that its purpose was to assess, quote, what would happen and our response if there were a partial or complete failure of Rural/Metro Corporation?

A. Yes.

Q. And so this was a contingency plan in the event if there was a partial or complete failure of Rural/Metro Corporation?

A. It's an accurate statement. I think this was the beginning of that, yes.

Q. And the document itself addresses, if there were a partial or complete failure of Rural/Metro, what the Bureau's response would be, both with respect to 911 transportation needs in the county and interfacility transportation needs within the county; is that a fair statement?

A. Yes.

Q. And the document sets forth the available resources or remedies that the Department and the Bureau would have if that were to occur; is that true?

A. Just looking through the --

Q. Sure. Take your time.

A. -- the other pages that are associated with the memo. Yes.

Q. Going back to the top of the first page, if you would, Ithan, and I want to use the exact words here. The reference, again, is to a partial or complete failure of Rural/Metro Corporation. Was there a complete failure of Rural/Metro Corporation, to your knowledge?

A. No.

Q. Was there a partial failure?

A. No.

Q. Were any of the steps that are described in this contingency plan ever implemented?

A. No.

Vol. 13, p. 2621, l. 9 – p. 2623, l. 14.

Indeed, if anything, the contrast between Rural/Metro having successfully persevered through its bankruptcy reorganization filing, and the abandonment of service

by FirstMed Ambulance incident to its filing bankruptcy liquidation proceedings, nicely illustrates how to responsibly – or irresponsibly – deal with financial difficulties.[12]

C. No Showing of "Substandard Performance"

Continuing to examine the factors identified as relevant to the issue of whether or not public necessity requires Applicant's proposed service, we turn next to the matter of whether Applicant, on this record, established that the ambulance services currently available in its proposed service areas are "substandard." A.A.C. R9-25-901(46) defines "substandard performance" as follows:

a. Noncompliance with A.R.S. Title 36, Chapter 21.1, Articles 1 and 2 [A.R.S. §§ 36-2201 through 36-2246], or 9 A.A.C. 25, for the level of ground ambulance services provided by the certificate holder;

b. Failure to ensure that an ambulance attendant complies with A.R.S. Title 36, Chapter 21.1, Articles 1 and 2, or 9 A.A.C. 25, for the level of ground ambulance services provided by the certificate holder; or

c. Failure to meet the requirements of 9 A.A.C. 25, Article 10.

This record is bereft of any such showing as to the Rural/Metro Intervenors, as to any of these considerations.

1. Applicant failed to show that the Rural/Metro Intervenors were "noncompliant" under A.A.C. R9-25-901 (46)(a).

Over the course of fourteen hearing days, Applicant made not the slightest attempt to establish that, as to any statute or any regulation referenced in A.A.C. R9-25-901(46)(a), the Rural/Metro Intervenors were in any respect noncompliant. Indeed, to the

[12] In attempting to deflect the substantial evidence regarding FirstMed's questionable behavior incident to its bankruptcy filing, Applicant argues, at p. 41 of its Memorandum, that the evidence consisted of "uncorroborated allegations and media accounts" - apparently failing to appreciate the irony of this assertion, given that, as discussed at Sections I(D) and II(B) of this Memorandum, it relied on precisely this type of evidence in attempting to demonstrate public necessity. Moreover, the evidence marshalled against Applicant here regarding FirstMed's shutdown consisted of far more than "uncorroborated allegations" – including, for example, the testimony of Applicant's witnesses, documents prepared by the Applicant, and court filings submitted under oath.

contrary, in calendar year 2015, DHS renewed the CONs of each Rural/Metro Intervenor CON-holder whose CON was then due to expire. Thus:

- The CON for Southwest Ambulance was renewed, for a three-year period, on March 25, 2015 (MA42A).
- The CON for American Ambulance was renewed, for a three-year period, on July 24, 2015 (MA43A).
- The CON for PMT was renewed, for a three-year period, on September 14, 2015 (RM149).
- The CON for Rural/Metro (Maricopa) was renewed, for a three-year period, on September 21, 2015 (RM150).

As Mr. Jaramillo explained, three years is the maximum time period for which a CON can be renewed; *see* (Vol. 8, p. 2104, l. 4-8). *See also* A.R.S. § 36-2235(B) ("…if the holder of the certificate meets all requirements, applies for a renewal and pays the fees prescribed in § 36-2240, the director shall renew the certificate for a term of three years without public hearing or waiver unless cause is shown to set a hearing to consider denial or renewal for a shorter term.")

Mr. Jaramillo further testified that, as to each of the Rural/Metro Intervenor CONs that came up for renewal in 2015, there were no non-compliance issues:

Q. Todd, are there circumstances under which the Director might opt to renew a CON for less than the maximum three-year period –

A. Yes.

Q. -- allowed by contract –

A. Excuse me.

Q. -- or allowed by statute?

A. Excuse me. Yes.

Q. That's okay. Can you talk about some of those circumstances?

A. Those circumstances often revolve around response time compliance. Upon renewals, providers are required to submit response time tolerance data, which is the most recent 12-month data, to determine if they are or are not in compliance with response times. If they are out of compliance with response times, and which was discussed, outside of the 1.5 percent variance, there are discussions that happen within the Bureau, both internally as well as with the applicant or prospective applicant, trying to figure out what may be issues or may be contributing to the factors that -- why they would be out of compliance with their response times.

And in determining those factors, oftentimes the Bureau will renew a certificate for a one-year period and then request response times again on a one-year period. And if they are deemed to be in compliance over that, I guess, next 12-month period, the Bureau will extend their certificate the additional two years, which would have granted them the original three-year period.

Q. Thank you for that explanation. Are there other factors as well that the Director might consider in determining whether to not renew a CON for the full three years?

A. The Director may, yes.

Q. Do you know what any of those factors might be?

ALJ MIHALSKY: And for the record, I'm going to jump in. RM-150 is admitted.

MR. ROSENFELD: Oh, thank you, Your Honor.

THE WITNESS: There could be other factors, such as investigations that are currently open regarding submission of ARCRs that are required, any numerous things that the Director may feel need to be addressed prior to assessing those.

BY MR. ROSENFELD:

Q. Things that might call into question the capability of the CON holder to fulfill the terms and conditions of its CON?

A. That's correct.

Q. Things that might raise questions about whether the CON holder is complying with all of its statutory requirements?

A. Correct.

Q. Things like questions about whether the CON holder is able to fulfill and continuing to fulfill the requirements set forth in the regulations?

A. Correct.

Q. And I take it that if a CON is renewed for the full three years, that would indicate that there are no such issues?

A. At the time of renewal, yes.

Q. Correct. And all of the CONs we have reviewed here that have been renewed have all been renewed this year?

A. Correct.

Vol. 10, p. 2106, l. 17 - p. 2109, l. 10.

2. Applicant failed to show that the Rural/Metro Intervenors were "noncompliant" under A.A.C. R9-25-901(46)(b).

A.A.C. R9-25-901(46)(b) references the same statutes and regulations cited in subsection (46)(a). The difference between the two subsections is that subsection (46)(a) pertains to the ambulance service itself, while subsection (46)(b) addresses compliance with the pertinent statutes and rules by ambulance personnel (referred to in (46)(b) as "ambulance attendants"). No assertion whatsoever was made by Applicant that any of the Rural/Metro Intervenors' ambulance personnel were in any respect non-compliant with their statutory and regulatory obligations.[13]

[13] We suppose that, obliquely, Applicant may have been attempting to suggest something along these lines in the testimony it offered relating to its exhibit MA165, wherein Mr. Blackburn, without any direct knowledge of the circumstances, appeared to suggest that an instruction given by Rural/Metro Assistant General Manager Barbie Marr (not an "ambulance attendant") to Sheila Bryant, the Pre-Hospital Coordinator at Tempe St. Luke's Hospital, regarding circumstances under which 911 should be called in Tempe, was somehow problematic because he believed

3. Applicant failed to show that the Rural/Metro Intervenors were "noncompliant" under A.A.C. R9-25-901(46)(c).

A.A.C. R9-25-901(46)(c) references A.A.C. R9-25-1001 *et seq.* These sections pertain to the ambulances themselves, including their registration, the standards they are required to meet, the equipment and supplies they are required to carry, and the requirement that they pass periodic inspections by DHS. Despite the fact that Applicant subpoenaed and received from DHS literally thousands of pages of ambulance inspection reports pertaining to all of the Rural/Metro Intervenors' vehicles, and identified these pages as trial exhibits (listed on Applicant's exhibit list as MA39H (Rural/Metro Maricopa); MA 40H (PMT); MA41H (ComTrans); MA42H (Southwest); MA43H (American); MA44H (SWARA)), it offered not a single document into evidence (nor, for that matter, any witness testimony) attempting to establish that these Intervenors' ambulances were in any respect non-compliant with applicable regulations. The record is thus devoid of any evidence to support such assertion.

In sum, Applicant failed to establish substandard performance by the incumbent Rural/Metro CON-holders, and thus this factor, too, tips decidedly against a finding of public necessity.

D. Applicant's Scattershot Attempts To Demonstrate "Problems" In The EMS System Fell Flat.

Finding itself unable to muster the requisite evidentiary showing of "substandard performance", Applicant engaged in a misguided – and ultimately unproductive – effort to suggest that its service was nonetheless "needed." At the end of the day, these efforts came to naught.

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this suggested that "appropriate resources were not available," (Vol. 2, p. 369, l. 17 – p. 370, l. 14). As Mr. Stock explained, this was a protocol established not by Rural/Metro, but rather by Tempe Fire Chief Darrell Duty, which Ms. Marr accurately communicated to Ms. Bryant. (Vol. 13, p. 2642, l. 23 – p. 2645, l. 6).

In large part, the "evidence" presented by Applicant here consisted of years' old newspaper articles (rife with hearsay and double hearsay), letters written some time ago having nothing whatsoever to do with this particular proceeding, and the like. While Applicant could have called as witnesses the people who authorized these letters or who were quoted in these articles, who would have then been subject to cross examination, it never did so.[14] Indeed, considering the fact that, as Mr. Blackburn recognized, the Rural/Metro Intervenors likely provide ambulance services to over a thousand facilities in this service area (Vol. 2, p. 236, l. 21 – p. 237, l. 10), and, according to Applicant's exhibit MA203, completed approximately a quarter million ambulance transports in 2014, the "showing" Applicant sought to make here was, charitably put, a paltry one.

For purposes of this discussion, we focus on the exhibits submitted, and the testimony offered by recipients of Rural/Metro's services (there was precisely one such witness). We begin with the latter.

Plaza Healthcare: Mr. Dave Starrett, Executive Director of Plaza Healthcare, testified telephonically.[15] Mr. Starrett's testimony focused in substantial measure on a particular instance involving a patient's missing dentures, and what he perceived as a delay in Rural/Metro getting back to him regarding this inquiry. As it turned out, Plaza Healthcare waited until three weeks after it learned of the missing dentures to contact Rural/Metro to find out if it had any information pertaining thereto, and Mr. Starrett could not explain this delay. (Vol. 2, p. 812, l. 20 – p. 813. l. 21) He did admit, however, that these sorts of things can and do happen, even with excellent medical providers. Moreover, Mr. Starrett admitted

[14] Applicant did convince the ALJ to issue a dozen subpoenas – including, for example, to a half-dozen fire chiefs. Not a single one of those witnesses was called to testify.

[15] Mr. Starrett is a personal friend of Applicant's attorney Scott Bennett, dating back eight years. (Vol. 4, p. 805, l. 7 - p. 806 l. 1). Among other things, Mr. Starrett testified that Mr. Bennett told him that he was contacting Mr. Starrett in connection with an ambulance service in which Mr. John Ford was a partner (Vol. 4, p. 806 l. 9 – p. 807, l. 4), and that ambulance services in Arizona are required to meet certain non-911 arrival times, (Vol. 4, p. 816, l. 6 – 24). While we do not know if Mr. Bennett in fact said these things to Mr. Starrett (and are not suggesting that he did), they are untrue.

that Plaza Healthcare's ambulance service needs are presently being "satisfactorily fulfilled." (Vol. 2, p. 811, l. 18-21)

HonorHealth: Applicant introduced into evidence MA37A, an undated letter from Mr. Tony Benedict at HonorHealth. In part, this letter consists of the reasons why he supports the Maricopa Ambulance application, although as Mr. Benedict did not appear, testify, and subject himself to cross-examination, the source of his purported knowledge of Maricopa Ambulance's capabilities (it having not yet run a single ambulance transport) is unknown.[16]

Mr. Stock a witness with first-hand information, who was subject to cross-examination - did testify. Mr. Stock explained that, he is in regular contact with HonorHealth regarding its interfacility ambulance service needs, and that, per the instructions of HonorHealth, the individual at that institution with whom he was directed to communicate was not Mr. Benedict, but Mr. Bill Remus, Director of Procurement and Supply. (Vol. 13, p. 2637, l. 16 – p. 2638, l. 7). And, in fact, Mr. Stock further testified, Mr. Remus has never raised with him any issues regarding the interfacility ambulance services Rural/Metro provides to HonorHealth. (Vol. 13, p. 2641, l. 9-25). Rather, the issue that Mr. Remus discussed with Mr. Stock related solely and specifically to taxi and wheelchair services, which are not CON-regulated services, and thus a CON is not required in order to provide this service. (Vol. 13, p. 2642, l. 1-22).

Dignity Health: Applicant introduced into evidence MA180, a letter from Jeff O'Malley, Vice President of Partnership Integration at Dignity Health. (Mr. O'Malley was subpoenaed, but was not called as a witness by Applicant.) In his letter, Mr. O'Malley identified two concerns he had regarding interfacility transport (timeliness of patient pick-up; availability of performance data). Mr. Stock

[16] Applicant's request for the issuance of a subpoena to Mr. Benedict was granted, but Applicant did not call him.

testified that he has had discussions with Mr. O'Malley regarding pick-up times, and that he made specific suggestions to Mr. O'Malley in that regard:

> Q. What was the substance of those discussions?
>
> A. Sure. So, you know, one of the things that Dignity wanted to do is they wanted to get an RFP together to look at transport provider, obviously, with having another provider in the market with AMR. And, you know, we talked about several things. So obviously some ideas around, you know, how can we improve on response time compliance; are there other things that we can do, you know, to help to innovate the Dignity system as well too. And, I mean, we had multiple discussions in person and via telephone.
>
> Q. And were there specific proposals made by you and your team as to how to provide even better interfacility ambulance services to Dignity Health?
>
> A. Yes.
>
> Q. What did those proposals consist of?
>
> A. There's a few different things, but in particular, you know, one of the things that we talked about and Mr. Valentine talked about a little bit earlier, in terms of priority dispatching on the 911 side. But what we talked about is something that we do with Kaiser. I think everyone knows Kaiser Permanente. That we do on a national level in other markets, is we actually have levels of calls. So, again, instead of just having Dignity, what they were doing at the time, just calling and saying "I need an ambulance ASAP," and this could be a patient that, you know, truly was something that was urgent that we need to respond within, you know, let's say, 30, 45 minutes, or it could be something as simple as, you know, there's a patient that just had knee surgery that needs to get transported to another facility that, you know, maybe it wasn't as urgent. It could be four or five hours. So one of the things we talked about specific to that was, you know, what if we looked at it in terms of the patient's acuity and the levels and tried to determine response time compliance based on those levels. So that's an example.

Vol. 13, p. 2646, l. 2 - p. 2647, l. 15.

Mr. Stock's discussions with Mr. O'Malley took place during the May-August 2015 timeframe. (Vol. 13, p. 2645, l. 18-24). Thereafter, in October 2015 (when he wrote

his letter), here is how Mr. O'Malley assessed the present state of affairs regarding the interfacility ambulance services Dignity Health is receiving:

> Currently, we use both AMR and Rural/Metro. Over the past couple of months, the timeliness of inter-facility ambulance services has noticeably improved.

II. APPLICANT'S "CHOICE IS GOOD" ARGUMENT

A. Applicant's Attempt to Override Arizona's Statutory CON Model Should Be Rejected.

Having failed to carry its evidentiary burden on public necessity pursuant to the statutes and regulations that specifically identify the factors that are pertinent to that evaluation, Applicant seeks to shift attention away from those factors, and asks the ALJ to instead grant it a CON because, it argues, "choice is good." As we explained in our Pre-hearing Memorandum, at pp. 4-5, a theoretical debate as to whether there is a "better" regulatory model than that which presently exists in Arizona, is one that it is appropriate to engage in at the State Legislature, not in the midst of an evidentiary CON hearing. There, for example, Dr. Argue might explain to a legislative committee why he believes that a CON regulatory system like Arizona's (which, looking across all states, he considers to be "among the most strictly regulated because of the CON law and the fixed prices, the regulated prices," (Vol. 11, p. 2157, l. 7-15)), is an "impediment[…] to competition and generally tend to be - to make consumers worse off as a result," (Vol. 11, p. 2155, l. 12-15).

Dr. Argue is, of course, entitled to his opinions. But those opinions cannot serve in any respect to nullify what, by their precise terms, the statutes and regulations require an Applicant to prove in order to obtain a CON. Stated otherwise, the "choice is good" argument alone (even had it been supported by reliable non-hearsay evidence presented by consumers of ambulance services – which, as we will discuss, it was not), cannot trump what Arizona law mandates that an applicant prove in order to obtain a CON. Indeed,

were it otherwise, this carefully-crafted regulatory model, and the specific parameters it sets in assessing need, would be rendered largely nugatory.

Even more to the point, if anything, Arizona law makes clear that an increase in the number of providers just for the sake of choice is not the touchstone of our regulatory model. Beyond the fact that there is nary a mention in the statutes or regulations of "competition" or "choice" as a factor to be considered in the public necessity analysis (and thus, not surprisingly, Dr. Argue could point to no such language; Vol. 11, p. 2154, l. 14-23), BEMSTS Guidance Document GD-099-DHS-EMS (MA7) makes patent the fact that whether or not to issue a CON to an applicant is not a matter of toting up the number of existing CONs in a service area. Rather, after specifically recognizing that the CON laws are not "solely designed to limit the number of ambulance services in Arizona", it explains that, nevertheless, "anyone seeking to start an ambulance service… must be able to demonstrate that there is a public necessity for the proposed service" (*emphasis added*). And there we have it: Don't expect to succeed on your application for a CON by arguing that there is only one, or are only a few, ambulance services in the area you are applying for. The number of current providers is not the issue; public necessity for an additional provider must be shown.[17]

B. Dr. Argue's Testimony Was Flawed, and Proved Nothing.

As a self-described proponent of the view that "competition in healthcare is a good thing" (Vol. 11, at p. 2155, l. 20-25; *see also* MA183, at p. 2), Dr. Argue attempted to "prove" this theory in a rather curious – and, ultimately, an unconvincing – way.

[17] Indeed, Applicant itself seems more than a bit uncertain as to how its approach, were it to be applied, would actually work. Thus, after pinning its hopes (both at the hearing and in its post-hearing memorandum) on the argument that it is a bad thing to have only one private CON-holder in the area it is applying for, it then decides that – as Intervenor ABC Ambulance was recently certificated in this service area – two ambulance services are also, purportedly, not enough, observing that "health care facilities in Maricopa County now have just two options for interfacility transports – the AMR entities, and ABC Ambulance" Applicant's Memorandum, at p. 24; *emphasis added*. In other words, according to Applicant not only does public necessity require at least two ambulance services, it requires at least three. Or perhaps four? Or maybe five? And that's why, in Arizona, under our CON laws, this counting exercise is not the way public necessity is determined.

Specifically, Dr. Argue was given a collection of letters, newspaper articles and the like, cherry-picked by Applicant's counsel, years-old in many instances, containing hearsay (and double hearsay) statements. Most of these had nothing in particular to do with the instant proceedings or Applicant's proposed service – and none of which Dr. Argue made any effort to independently investigate or personally corroborate. And, on that "basis", Dr. Argue reached certain "conclusions" about this market's ambulance services. To his credit, Dr. Argue was quite candid in acknowledging the absence of any due diligence or rigorous analysis in his purported assessment of this service area's ambulance services:

> Q. And to confirm, you yourself have not -- in the course of this engagement, you haven't personally spoken with or interviewed any official from any of the political subdivisions mentioned in your testimony, correct?
>
> A. That's correct.
>
> Q. Likewise, in your outline and in your testimony, you reference several health care facilities in connection with your discussion of interfacility services, correct?
>
> A. Yes.
>
> Q. But you haven't spoken to any official at any of those facilities, right?
>
> A. That's correct.
>
> Q. You testified on direct examination that you understand from Mr. Blackburn that there are thousands of health care facilities in Maricopa County, including hospitals, urgent care centers, nursing homes, and skilled nursing facilities. Do you remember that testimony?
>
> A. Yes, I do.
>
> Q. But you interviewed not a single person from any of those thousands of health care facilities, true?
>
> A. That's correct.

Vol. 11, p. 2182, l. 25 - p. 2183, l. 23.

And, more generally:

Q. Going back just generally to your testimony and the outline contained in Maricopa Ambulance 183, have you done anything to independently and personally verify any of the information relied upon in your testimony?

A. I have not independently verified the materials I relied on; either the news clippings, the letters, such as these, or the testimony provided in the AMR hearings or, for that matter, the testimony provided in this hearing.

Vol. 11, p. 2191, l. 4-13.

Moreover, despite testifying that, in his assessment of need, he believed that it was "a good thing" for political subdivisions to have a choice of providers when issuing a Request for Proposal ("RFP") for ambulance services, Dr. Argue was unaware of any needs assessment done by any political subdivision in this service area, much less one that corroborated his testimony that these political subdivisions "needed" a choice:

Q. Let me move on now to another factor. Again, I'll read you -- understanding, Dr. Argue, that you don't have the benefit of the regulations in front of you, but I'll read to you the portion I want to focus on next. And that is Arizona Administrative Code 9-25-903(C)(3), and that provision says that one of the additional factors the Director shall consider if an applicant is proposing to provide 911 service in an area already covered by at least one other provider is a needs assessment adopted by a political subdivision. Were you aware that that's one of the factors?

A. Yes.

Q. Okay. And do you know how the regulations define needs assessment?

A. No.

Q. All right. Well, let me read that to you, and this is R9-25-901, Sub 30, and it read as follows, Dr. Argue:

"Needs assessment means a study or statistical analysis that examines the need for ground ambulance service within a service area or proposed service area that takes into account the current or proposed service area's medical, fire and police services."

MS. FLORES: Larry, I'm sorry, to interrupt. There's just a few words you left off of (C)(3). It says "A needs assessment adopted by a political subdivision, if any."

MR. ROSENFELD: Right. Okay. Thank you.

MS. FLORES: So I just wanted to point out that. Thank you.

BY MR. ROSENFELD:

Q. Did you hear my -- the reading of that definition, Dr. Argue?

A. Yes, I did. Yes, I did.

Q. So you talked in your testimony about, again, that in your opinion it would be a good thing if there were more competition when political subdivisions published RFPs for their 911 services, correct?

A. Yes.

Q. And in your outline you mentioned several political subdivisions in Maricopa County, and you refer, for example, to newspaper articles, press releases, things you've been told by Mr. Gibson and Mr. Blackburn and the like about what those political subdivisions have said, correct?

A. Those sources, among others, yes.

Q. Among others, right. To your knowledge, did any of those political subdivisions, apropos of Ms. Flores completing the language in (C)(3), did any of those political subdivisions actually do a needs assessment reflecting a need for an additional provider to bid for 911 services, to your knowledge?

A. I don't know.

Q. And you wouldn't consider -- given the definition of needs assessment set forth in the regulation, you wouldn't consider the information you gathered to fit within that definition, correct?

A. That's correct.

Q. And to confirm, you yourself have not – in the course of this engagement, you haven't personally spoken with or interviewed any official from any of the political subdivisions mentioned in your testimony, correct?

A. That's correct.

Vol. 11, p. 2180, l. 12 - p. 2183, l. 5.

Indeed, not a single witness representing a political subdivision was called by Applicant to testify at the hearing (despite the ALJ issuing, at Applicant's request, subpoenas for the Fire Chiefs of Gilbert, Daisy Mountain, Tempe, Queen Creek and Glendale), nor did a single official from a political subdivision submit a letter lending credence to Dr. Argue's theoretical assertion that Maricopa Ambulance was "needed" because these political subdivisions would be better served if they had other private providers to choose from. This utter dearth of direct testimony that <u>any</u> political subdivision in this service area expressed a need for another private provider for contract bidding purposes serves only to further undermine Dr. Argue's opinions, given that they were <u>decisively</u> based on the premise that Applicant intended to compete for such contracts:

Q Did it make a difference in the opinions you expressed in your testimony and in your conclusions that it would be good for Maricopa Ambulance to enter this market, did it make a decisive difference that Maricopa Ambulance told you that it planned to compete for contracts; again, yes or no?

A. Yes.

Q. Okay. Thank you.

A. Yes, it did make a difference.

Vol. 11, p. 2179, l. 6-14.

Simply put, Dr. Argue's testimony about what fire district officials "need" is nothing more than a theory in search of competent evidence to support it.

Indeed, what this testimony demonstrates is that the approach Applicant is advocating would stand our regulatory process on its head. Mr. Gibson testified that it was entirely possible that if Applicant were certificated, it might have no takers for its services – *i.e.*, that he would have to "earn" the business. (Vol. 6, p. 1273, l. 23 – p. 1275, l. 8) The essence of this testimony was nicely summed up by Mr. Gibson thusly: "In the event we get a CON, there's nothing to say that we actually do one transport." (Vol. 6, p. 1275, l. 3-4) In other words, Mr. Gibson's position, in effect, is this: "Give me a CON not because the needs of the public are not being adequately met by the incumbent providers, but because I want a shot at trying to develop a customer base. Maybe I can, and maybe I can't, but let's try it and see." And that, in a neat little nutshell, is the Dr. Argue model. And, in fact, Dr. Argue conceded that, under that approach, we are essentially certificating a provider for the sole purpose of determining if public necessity requires its service, not because public necessity for the service has already been established – meaning that, if there in fact are no takers, that would show that there was no public necessity for its service:

> Q If, in its first full year of operation, Maricopa Ambulance were to do zero transports because it got zero contracts, would that suggest to you that there would have been no identified population that needed or required its service?
>
> A. Okay, I'm thinking. I heard the question. That would be consistent with no population needing or requiring, but not necessarily not desiring their service.[18]

Vol. 11, p. 2174, 1.4-12

But here's the problem with this approach: once an applicant gets a CON based on this "certificate me so that I can see if there's a need for my service" argument, if it turns

[18] That someone may "desire" to use Applicant is not a sufficient basis upon which to grant a CON; *see* fn. 23 herein.

out that no one signs up for that service, what is DHS to then do? Ask that provider to give back that imprudently granted CON? This "cart before the horse" approach advocated by Applicant, were it to be adopted, would knock the very underpinnings out from under Arizona's regulatory model.

C. That "Many Others" Purportedly Agree With Dr. Argue's Views On Choice Does Not Establish That The Applicant's Proposed Service Is Needed.

At p. 6 of its Memorandum, Applicant asserts that "many others" agree with Dr. Argue's viewpoint on choice. Even assuming that to be true, it proves nothing. Indeed, as Dr. Argue himself recognized:

> Q. All right. Now, you would agree with me, wouldn't you, Dr. Argue, that there are differences of opinion among health care professionals regarding the efficacy and desirability of CON laws?
>
> A. Differences of opinion among whom? Could you repeat that again?
>
> Q. Sure. Among health care professionals.
>
> A. Oh, among health care procedures [sic]? Yes, I expect there are differences of opinion.

Vol. 11, p. 2154, l. 24 - p. 2155, l. 7.

More specifically, as to the comments made by former DHS Director Will Humble after he no longer served in that capacity (cited at pp. 6-7 of Applicant's Memorandum), Dr. Argue, after testifying that he relied in his testimony upon a radio interview given by the former Director, likewise conceded this point:

> Q. And would you believe it to be a reasonably safe assumption that other health care professionals in Arizona disagree with Mr. Humble's opinions?
>
> A. There could be others who disagree; there could be others who agree. I don't know one way or the other.

Vol. 11, p. 2190, l. 22 - p. 2191, l. 2.

The other non-Applicant sources[19] from which Dr. Argue (and Applicant) seek support, as referenced at pp. 6-15 of Applicant's Memorandum, are insufficient to establish that Applicant's proposed service is necessary:

- MA15 (A letter from state representative Paul Boyer): This letter was written in mid-2014. No more recent letter from Mr. Boyer was produced, stating that he continues to hold this view, nor was Mr. Boyer called as a witness. He was thus not subject to cross-examination, and there is nothing on this record to enable us to determine what, if any, serious study he devoted to this matter, or whether he has the necessary expertise in matters pertaining to the ambulance industry that would provide a sufficient basis to place any evidentiary weight on his personal views. Dr. Argue never communicated with Mr. Boyer (Vol. 11, p. 2188, l. 10-17), nor does he know whether Mr. Boyer's views are the same today (Vol. 11, p. 2189, l. 1-6).[20]
- "DHS started an investigation into Rural/Metro's response times": We know how this ended. DHS determined that all of the Rural/Metro Intervenors whose response times it reviewed are response-time compliant. (*See* discussion at Section I(B)(2) of this Memorandum).
- Plaza Healthcare (Dave Starrett): As discussed elsewhere in this Memorandum, of the more than one thousand healthcare facilities to whom the Rural/Metro Intervenors provide interfacility ambulance service, actual testimony was provided by just this one. (We have discussed elsewhere in this Memorandum Mr. Starrett's testimony about the lost patient dentures.)

[19] That is, other than, say, Mr. Blackburn or Mr. Gibson, or Mr. Ford (via testimony he offered in some other hearing; Applicant declined to call him to testify in this hearing), purporting to report on what others told them.

[20] We also note that Mr. Boyer's letter makes reference to "ambulatory services", which are not the same as "ambulance services" (Vol. 11, p. 2185, l. 10-18). Dr. Argue thought this might be a typo, and perhaps, had Mr. Boyer testified, we would know for certain.

Mr. Starrett claimed that the number of ambulances "arriving more than 30 minutes late" on non-emergency calls had increased. Several points here. First, these are not emergency transports. These are scheduled transports between facilities (or between home and a facility), and thus do not have the time-sensitivity of 911 emergency calls.[21] Second, although Mr. Starrett claims that he found the data in RM118 "shocking", what that data in fact shows is that, for the period August 1, 2014 – July 31, 2015, the Rural/Metro Intervenors were arriving at his facility within 30 minutes of the scheduled arrival time an impressive 94% of the time[22] (and were on time or earlier than the scheduled time 69% of the time). Third, Mr. Starrett's testimony that the fact that there were more 30-plus minutes-after-scheduled-time arrivals in the 8/14-7/15 timeframe than in the 8/13-7/14 timeframe was an "issue" for him defies rational explanation. Mr. Starrett testified that there are approximately 520 interfacility transports at his facility per year (approximately 10 per week), and that the data showed that there were 21 more-than-thirty-minutes-after responses in the 8/14-7/15 timeframe than in the 8/13-7/14 period. This amounts to a difference of less than two such responses in a month. Fourth, related to the previous point, nowhere in his testimony did Mr. Starrett claim that, from a medical standpoint, any patient's health or safety had ever been put at risk by anything Rural/Metro did or did not do. Lastly, as noted earlier in this Memorandum, Mr. Starrett testified that his facility's interfacility

[21] Indeed, for this reason, while CON-holders must meet strict response time requirements on their 911 responses, there is no similar requirement as to non-emergency calls. And, while an ambulance service can agree to be held to non-emergency arrival time parameters (as AMR has done), Applicant here has not proposed to do so, and there is no evidence in this record that it would do better than the current providers are doing with respect to these responses.

[22] This is better than what DHS has approved as acceptable non-emergency arrival time parameters for AMR, per its CON. *See* AMR1.

ambulance service needs are being met, and thus even as to this one (and only) provider as to which Applicant did present live testimony, it was conceded that there is no need.[23]

- Dignity Health (Jeff O'Malley); HonorHealth (Tony Benedict): These are discussed at Section I(D) of this Memorandum. In neither case does any of this hearsay evidence demonstrate that the service proposed by Applicant is needed.
- Applicant points to a comment made by PMT in 2010 – some 6 years ago, when the provider network in this service area was quite different than it is today. Applicant made no attempt whatsoever to connect that remark to current circumstances.[24]

III. CONCLUSION

Given the approach Applicant has taken in presenting its evidence, we respectfully submit that it has simply misapprehended how Arizona's CON model works. That is, rather than focusing on what the statutes and regulations have clearly identified as the material considerations in determining public necessity (defined as demonstrating that "an identified population needs or requires" a proposed ambulance service; A.A.C. R9-25-901(33) (*emphasis added*)), Applicant chose to deviate from this well-marked path, and instead wandered into the theoretical wilderness of "choice".

---

[23] And, a propos of Mr. Starrett's testimony, Mr. Blackburn conceded that the fact that Plaza Healthcare might like to use a particular provider (in this instance, the Applicant), does not establish that there is a public necessity for Applicant's proposed service.

> Q. I want to make sure that you're not saying something that I -- I don't think you've said, but I want to just confirm it. You are not advocating a system where simply because Plaza Healthcare, for one, or HonorHealth says we'd sure like to have Maricopa Ambulance doing some or all of our ambulance transports, that that means that anytime a facility expresses a preference for a provider, that justifies granting that provider a CON, are you?
>
> A. No, I'm not making that assertion.

Vol. 1, p. 246, l. 17 – p. 247, l. 2.

[24] Applicant also cites to an article in which Mr. Kaspyrzk of AMR is quoted. As Mr. Kaspyrzk was called as a witness by AMR, we defer to (and join in) AMR's Memorandum with respect to this, and to all other citations, in Applicant's Memorandum pertaining to him. We likewise defer to (and join) AMR with respect to references made in Applicant's Memorandum to John Valentine of AMR, whom AMR also called as a witness in this proceeding.

This was a curious decision to make indeed, for not only does the law not mention, anywhere, that "choice" is a consideration in the public necessity calculus, but even assuming that Applicant were somehow able to cobble together evidence to substantiate its position, it objectively failed to make any such showing here. No disrespect intended, but the theories of a Ph.D. in economics, while interesting to debate, bear not the slightest relevance to what is up for consideration in these proceedings. Indeed, we respectfully suggest that theory, untethered to cogent evidence, is just theory. If these theoretical musings were, somehow, intended by Applicant to be connected up to what the statutes and regulations actually do require be shown, that intention was, plainly, unfulfilled.

But even the premise upon which the "choice is good" argument rests is wrong. Applicant's underlying assumption appears to be that, in order to assure that ambulance companies are motivated to provide great service, there must be multiple providers to spur them on. Without that motivation, Applicant's argument goes, ambulance service just won't be as good as it could be. We take no issue with the notion that that is one plausible way to regulate ambulance services. But – and this is what Applicant fails to come to grips with here - it is not the only way to do so. Another way – and this is what Arizona has chosen to do – is to provide that if the certificated providers fail to abide by the terms of their CONs, or fail to comply with the applicable statutes or regulations, these are relevant considerations used in the analysis of whether another provider may be permitted by DHS to offer its services in this marketplace. So long as the factors that are to be considered in determining whether public necessity requires another provider do not tip in favor of an applicant, the Arizona regulatory model has worked just as intended.

Truth be told, at the end of it all, Applicant itself recognized that the Arizona model is an effective way to incentivize certificated providers to assure that top-quality service is provided. Indeed, we could not have said this better than did Mr. Gibson:

> Q. So despite having no competition, did Kunkel [an ambulance service with which Mr. Gibson was involved] do the very best job it could to provide the

highest quality ambulance service it could, in the most responsive way it could?

THE WITNESS: I'm sure they did.

BY MR. ROSENFELD:

Q. And did you say that -- I think you said Kunkel -- aside from the fact you take pride in your operations, you said Kunkel was incentivized to do so, and then you explained why. And I think it had to do with the fact that if Kunkel was not doing a satisfactory job, the municipality, as apparently ultimately happened, could come in and take over the service, correct?

A. Okay. So I would need to understand what my testimony was, what you're saying I -- you said I -- you just said I said something. So I want to make sure it was correct.

Q. Well, today you said that the municipality took the 911 away from Kunkel, correct?

A. Yes.

Q. That's what I'm saying.

A. Yes.

Q. Okay. And so, I think, what I thought I heard you say yesterday is one of the reasons that Kunkel was incentivized to provide the top-quality service was because that could happen; somebody could come in and take it away if you weren't doing a good job, right?

A. That is correct.

Q. And in Arizona, do you understand that that's how the CON system works as well; that if providers are failing to meet the public need, that provides the opportunity for another provider to come in and get a CON?

A. That's what we're hoping, yes.

Q. But you understand that's the Arizona regulatory model?

MR. BELANGER: Your Honor, I guess if he can answer it, but object to the form. It calls for a legal conclusion, and I believe it's a far more complex regulatory model than that, but...

ALJ MIHALSKY: Noted.

BY MR. ROSENFELD:

Q. So can you answer?

ALJ MIHALSKY: The witness may answer, if he can.

THE WITNESS: Try again.

BY MR. ROSENFELD:

Q. Okay. So you understand that under the Arizona regulatory model, if the public need is not being met by the existing provider or providers in a given market, that provides an opportunity for another provider to seek a CON?

MR. BELANGER: I'm going to object to the form.

ALJ MIHALSKY: Noted. Overruled. The witness may answer, if he can.

BY MR. ROSENFELD:

Q. Can you answer that yes or no?

A. I believe so, yes.

Vol. 8, p. 1739, l. 24 – p. 1742, l. 11.

And this is not just "theory". As Mr. Blackburn recognized, Arizona's largest municipality – the City of Phoenix – has received superb 911 ambulance service despite the absence of choice or a multiple–bidder RFP process:

Q. You testified about the fact that you think it's an important thing, in order to assure high-quality service, that when an RFP is issued, that that RFP be competitive; that is, that there be multiple participants in that RFP process. That's your testimony, isn't it?

A. Yes, sir.

Q. How do you think Phoenix Fire is doing as the sole provider of 911 service in the city of Phoenix? Are they doing a good job?

A. To the best of my knowledge, yes, sir, they are.

Q. Do you know the last time that the City of Phoenix put out an RFP, a competitive bid process, for 911 service in Maricopa County, in the city of Phoenix specifically?

A. No, sir, I do not.

Q. Would it surprise you the answer is never?

A. It would not surprise me.

Q. But they're doing fine, even though there's no competitive bidding; true?

A. Yes, I assume that they're doing a very good job.

Vol. 1, p. 245, l. 4 – p. 246. l. 1.[25]

And so, there is Dr. Argue's way (more providers is the best way to assure great service), and then there is Arizona's way (the imperative to comply with the statutes and regulations assures great service). In this State, in these proceedings, it is Arizona's way that prevails. And on every relevant measure – that is to say, on each of the factors so nicely spelled out in our regulatory model - we respectfully submit that the evidence on this record admits of only one conclusion, and we therefore respectfully request that Applicant's CON application be denied.

DATED this 29th day of February, 2016.

Squire Patton Boggs (US) LLP

By: /s/ *Lawrence J. Rosenfeld*
Lawrence J. Rosenfeld
Laura Lawless Robertson
Attorneys for Rural/Metro Intervenors

ORIGINAL of the foregoing
e-filed this 29th day of February, 2016, with:

The Honorable Diane Mihalsky
Administrative Law Judge
The Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007

[25] Having ignored these facts as to the largest municipality in Maricopa County, Applicant argues (at pp. 25-26 of its Memorandum) that "many large municipalities within Maricopa County do not have CONs, and have not applied for them, including, Avondale, Cave Creek, Chandler, Glendale (which applied then withdrew its application), Goodyear, Paradise Valley, and Scottsdale." Applicant then asks us to accept its assertion that these jurisdictions would benefit from having a competitive bidding process – but not a single witness representing any of these municipalities was called to so testify.

CERTIFICATE OF SERVICE

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/s/ *Lisa Danczewski*
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