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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

10 In the Matter of:
11 RBR Management LLC, dba Community
12 Ambulance,
13
14 Applicant

Case No.: 2017-EMS-0104-DHS

**BUREAU'S LEGAL MEMORANDUM
ON CERTAIN SUBPOENA ISSUES**

(Assigned to the Hon. Tammy Eigenheer)

15 The Arizona Department of Health Services ("Department"), Bureau of
16 Emergency Medical Services and Trauma System ("Bureau"), through undersigned
17 counsel, hereby submits its Legal Memorandum pursuant to Case Management Order
18 No. 5. The Legal Memorandum provides the parties and the administrative law judge
19 with the Bureau's position on certain issues related to subpoena requests made by the
20 parties.

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22 **The Applicant, the Application and the Intervenors.**

23 The Applicant, RBR Management LLC dba Community Ambulance, requests
24 the issuance of a Certificate of Necessity ("C.O.N.") to operate a limited, non-911
25 ambulance service in Maricopa County. The Applicant has entered into a Joint Venture
26 Agreement with Dignity Health; the Applicant's proposed service model is for
27 Community Ambulance to operate an ambulance service and provide inter-facility and
28 convalescent ambulance transports to and from Dignity Health-affiliated medical

1 facilities in Maricopa County. See, Applicant’s Initial Application at 9.¹ Because the
2 proposed ambulance service is limited in its scope, the Bureau believes that the parties’
3 related subpoena requests should be viewed and evaluated in a similar light. Documents
4 sought by administrative subpoenas may be ordered to be produced “if the party
5 seeking the discovery demonstrates that the party has reasonable need of the materials
6 being sought.” A.R.S. 41-1092.07(F)(4). Therefore, the need for documents or
7 information from all parties should be framed by the Applicant’s application and its
8 proposed service.

9 The Intervenors, ABC Ambulance (CON 139), Maricopa Ambulance (CON
10 147), and the AMR CON Holders², all have C.O.N.’s that authorize them to provide
11 non-911 ambulance services in the Applicant’s proposed service area of Maricopa
12 County, and they oppose the Community Ambulance Application. Maricopa
13 Ambulance and the AMR CON Holders are also authorized to provide 911 ambulance
14 services in the proposed service area.

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16 **Subpoenas and Motions to Quash.**

17 The Applicant and the Intervenors each requested subpoenas for documents; the
18 Applicant and the Intervenors filed Motions to Quash against various subpoena requests
19 as well. The Bureau did not request a subpoena for documents from any party and did
20 not receive a subpoena for documents from any party. This Memo addresses the
21 Bureau’s position on some of the general issues raised in the various subpoenas and
22 Motions to Quash.

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27 ¹ This page number refers to the PDF page number.

28 ² The current AMR CON Holders are AMR-Maricopa (CON 136); Canyon State Ambulance (CON 58); Life Line Ambulance (CON 62); Rural/Metro-Maricopa (CON 109) ; and Profession Medical Transport (PMT) (CON 71). CMO 4; AMR-6A; 6B.

1 1. Requests for 911 Data.

2 Because the Applicant’s proposed service is for non-911 transports to and from
3 Dignity facilities, requests for information related to 911-data do not appear relevant for
4 purposes of this hearing.

5 2. Requests for Information Required for Inspection or Review by the
6 Director/ADHS.

7 A.R.S. § 36-2241 requires C.O.N. Holders to maintain certain documentation for
8 inspection and review by the Director and/or the Department to facilitate the
9 Department’s regulatory oversight responsibilities. A.R.S. § 36-2241(A). The
10 documents are required to be maintained for a period of three years and are available to
11 the Department during investigations, rate hearings, and as otherwise required by the
12 Department or by Decisions and Orders of the Director. A.R.S. § 36-2241. A.A.C. R9-
13 25-910(B) includes a list of financial and business documents to be retained by C.O.N.
14 Holders for possible inspection and review by the Director and/or the Department to
15 facilitate the Department’s regulatory oversight responsibilities. The documents
16 required by A.R.S. § 36-2241 and R9-25-910B are for the Department’s regulatory
17 purposes only, and the Bureau does not believe it supports the right of a competitor or a
18 C.O.N. applicant to subpoena those records directly from a C.O.N. Holder as well.

19 For this reason, the Bureau doesn’t view those records as discoverable by
20 subpoena for purposes of a C.O.N. hearing. As a regulator, the Department must have
21 access to that information to ensure the C.O.N. holders are in compliance, but those
22 documents are not considered public records as they are not required to be filed with
23 the Department. From the Bureau’s perspective, they should not be available to an
24 applicant or other competitors absent a compelling need for that information.

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1 3. Requests for Information That Date Back Beyond the Department's Three Year
2 Statutory Retention Requirement Are Unnecessary and No Party Should Produce
3 Older Records.

4 Pursuant to A.R.S. § 36-2241, the Department requires C.O.N. Holders to keep
5 business records for three years. This statute implicitly recognizes the relevance
6 limitation of older business records from the Department's standpoint. The Bureau
7 believes that this same three year period should establish the outer time boundaries for
8 information sought by any party via subpoena. Absent a compelling explanation as to
9 why older business records are needed, the requested information should be denied as
10 likely not relevant.

11 4. The Department is Concerned About Subpoenas Seeking Proprietary
12 Business Information from the Intervenors.

13 The C.O.N. application process is not designed to allow competitors or C.O.N.
14 applicants to use the application and hearing process to obtain proprietary business
15 information from current CON Holders who intervene in the proceeding. The
16 application process is designed to allow an applicant to 1) present evidence of its ability
17 to operate an ambulance service (the fit and proper requirement); and 2) that public
18 necessity requires all or part of the requested service (the public necessity requirement).
19 A.R.S. § 36-2233B. This process necessarily presumes that an applicant believes it has
20 the ability to provide the proposed service and that the applicant has developed
21 information about the need for additional ambulance services in the proposed service
22 area. An applicant should not be allowed to use the subpoena process to create its case
23 based on proprietary business records of intervenors.

24 The Bureau believes that subpoenas can be used to supplement the publicly
25 available information of any party in the proceeding, provided that the subpoenas are
26 appropriately targeted to the information relevant to the Applicant's proposed case or
27 needed to prove a necessary factor in the hearing; or are appropriately targeted to
28 evidence in the Intervenors' possession that is tied specifically to its public filings and

1 that are needed to prove a necessary factor in the hearing. From the Bureau's
2 perspective, whether the requested information falls within these parameters is a
3 decision the administrative law judge must make.

4 5. The Bureau is Concerned About the Hearing Going Beyond the 10 Days
5 Limit set by A.R.S. § 36-2234B(5).

6 A.R.S. § 36-2234(B)(5) requires that C.O.N. hearings may not last more than ten
7 days unless the administrative law judge determines, in writing, on the final day of the
8 hearing, that there is an extraordinary need for additional hearing days. Based on the
9 number of exhibits already identified by the parties in their final list of exhibits filed on
10 September 18, 2018, the Bureau is already concerned that it will not be feasible to
11 complete the hearing in 10 days. If the parties are successful in obtaining all of the
12 subpoenaed information that remains currently outstanding, the Bureau believes the
13 hearing will not be concluded in 10 days.

14 6. The Bureau Does Not Agree that a C.O.N. Renewal Shields the
15 Intervenors From Producing Appropriate Information.

16 The Department's renewal of a C.O.N. means that on the date that the CON
17 Holder's C.O.N. was renewed, it was in compliance with its C.O.N. and the statutes and
18 rules of the Department. That renewal does not act as a shield against a properly issued
19 subpoena for information that is appropriately limited to evidence in the Intervenors'
20 possession that is tied specifically to its public filings and that are needed to prove a
21 necessary factor in the hearing.

22 Intervenors that participate in a C.O.N. hearing may be opening themselves up to
23 subpoenas for appropriate and targeted requests for information not available in public
24 records at the Department. This is not to say the Bureau thinks that some or all of an
25 Intervenor's business records become available to an applicant or a competitor via a
26 subpoena. This simply recognizes that a C.O.N. renewal cannot be used as a shield
27 against the production of any documents. There may be documents in the possession of
28 Intervenors that should be produced, provided that the documents are not proprietary

1 and the Applicant shows a reasonable need for them based on the standards articulated
2 herein. From the Bureau's perspective, whether the requested information falls within
3 these parameters is a decision the administrative law judge must make.

4 Conclusion

5 The Bureau has submitted this Memo to provide the ALJ and the parties with the
6 Bureau's perspective on several pending document subpoena issues. It is not intended to
7 be a substitute for the ALJ's decision-making authority on these issues.

8 DATED this 20th day of September, 2018.

9 MARK BRNOVICH
10 Attorney General

11 /s/ Kevin D. Ray
12 Kevin D. Ray
13 Assistant Attorney General
14 *Attorney for BEMSTS*

14 **CERTIFICATE OF SERVICE**

15 **ORIGINAL** filed using the OAH electronic document filing system
16 <https://portal.azoah.com/oedf> this 20th day of September, 2018, with copies provided to
17 all parties on the approved mailing list this 20th day of September, 2018, by posting
18 through the designated OAH website at [https://portal.azoah.com/oedf/documents/2017-
19 EMS-0104-DHS/index.html](https://portal.azoah.com/oedf/documents/2017-EMS-0104-DHS/index.html).

19 By: /s/ Koren Lyons

20 PHX #7306692