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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:

RBR Management LLC, dba Community
Ambulance

Applicant.

Docket No. 2017--EMS-0104-DHS
(EMS No. 0283)

**MARICOPA AMBULANCE
MEMORANDUM OF
APPLICABLE LAW**

(The Honorable Tammy Eigenheer)

a. Introduction.

In this hearing, and in a regulated market in which there are existing CON holders with the demonstrated capacity to perform the very same services at issue here, RBR, the Applicant, intentionally seeks a limited scope CON that would essentially grant it a sweetheart arrangement within which to provide lucrative, pre-scheduled, non-emergency ambulance transports to a self-interested stakeholder in the market, and simultaneously would protect it from assuming its share of the burden of providing the emergency and 911 transports and infrastructure critical and necessary to the system as a whole.

Under the regulatory scheme in which this CON is being sought, this Application should be denied.

There is no *need*¹ for this limited scope service. Given the existing CON holders operating in the proposed service area, there is much more than ample existing operational and financial capacity to provide all of the transports Applicant projects.

Granting the CON requested by RBR also will not further competition, or at least not fair competition. Rather, because Applicant will not be a full participant in the system, it will effectively undermine the objectives set forth in the Guidance Document for Certificates of Necessity for Ambulance Service, GD-099-PHS-EMS (the “Guidance Document”).

The accompanying memorandum sets forth the applicable law and states why, under that law, this application should be denied.

MEMORANDUM

b. Applicant Does Not Seek a Full Service CON.

Applicant has applied for a CON to provide *non-emergency, pre-scheduled, interfacility (“IF”) and convalescent transports* “to and from Dignity Health-affiliated medical facilities in Maricopa County.”² *Application of RBR Management LLC, dba Community Ambulance*, dated June 6, 2016 (the “Application”).

¹ “Need” must be proven to obtain a CON in Arizona and it is also a term of art under the statutes and rules regulating ground ambulance service in the state.

² “*Interfacility transport*” means a *scheduled transport* between two health care institutions.

“*Convalescent transport*” means a *scheduled transport* other than an interfacility transport.

“*Scheduled transport*” means to convey a patient at a prearranged time by a ground ambulance vehicle for which an immediate dispatch and response is not necessary. 9-25-901.

The Application not only limits what Applicant will be allowed to do as an ambulance operator in Arizona, it limits the kinds of information that is relevant in this hearing. See, e.g., *Bureau's Legal Memorandum on Certain Subpoena Issues*, 2017-EMS-0104-DHS, filed September 20, 2018.

c. The Law Applicable Requires a Showing of Need.

The following law and guidance should apply in this hearing and generally have applied in prior CON hearings:

The Director and ADHS have jurisdiction over ground ambulance services in Arizona and the ALJ is authorized to hold this hearing.

The Legislature, through enactment of the CON statutes, *mandated a fully regulated ambulance industry....*

An entity that wants to operate an ambulance in the State of Arizona may do so only after being granted a CON. A.R.S. § 36-2233.

The Applicant has the burden to prove, by a preponderance of the evidence, that the proposed CON should be granted. A.A.C. R2-19-119. ...³

A.R.S. § 36-2233 requires, and a *CON may only be granted*, if there is:
(1) *proof that public necessity requires the proposed service* or any part of it; A.R.S. § 36-2233(B)(2); and
(2) proof that the CON applicant is fit and proper to provide the service; A.R.S. § 36-2233(B)(3).⁴

³ A preponderance of the evidence is “[t]he greater weight of the evidence not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW DICTIONARY 1301 (9th ed. 2009).

⁴ Whether the Applicant is Fit and Proper is not conceded, but is not a focus of this memorandum.

Public necessity includes, but is not limited to, a review of

- the *need for additional transports*;
- the *financial impact of granting a new CON on the current providers, whether there is evidence of substandard performance* by the existing providers:
- a *review of current providers* and
- the *Applicant's proposed response times*. A.A.C. R9-25-903 (emphasis added).

Further guidance on public necessity can be found in Guidance Document GD-099-PHS-EMS.

d. There Are Existing CON Holders with Demonstrable Capacity.

“In deciding whether to issue a certificate of necessity *to more than one ground ambulance service for convalescent or interfacility transport for the same service area* ..., the Director shall consider the following” (R9-25-903(A) and (B))(emphasis added):

- population demographics;
- the distribution of health care institutions; ...
- the *existence of certificate holders* in all or part of the proposed service area; ...
- the *financial impact* on certificate holders whose service area includes all or part of the proposed service area;
- the *need for additional convalescent or interfacility transport*; and
- whether a certificate holder for the service area has demonstrated substandard performance

Critical items are (1) the *need* for the service proposed, (2) the availability and the capacity of existing CON holders to meet the service proposed, and (3) the financial impact on existing CON holders as well as on the on the system if this CON is awarded.

Taking into consideration the nature of the regulatory scheme that governs ground ambulance service in Arizona, and what “need” means in the context of this system, the Guidance Document, *inter alia*, states the following:

- that *all the residents of Arizona have access to ambulance service*, whether they live in an urban area like Flagstaff or Peoria or a rural area like Fredonia or Gisela;
- that *ambulance services have the sufficient financial strength and volume of business to continue operations to provide Arizonans with reliable service*; and
- that anyone seeking to start an ambulance service, or to expand their current service, must be able to *demonstrate that there is a public necessity* for the proposed service and *ensure that protections are in place for citizens living in rural areas* (emphasis added)

CONCLUSION

Given the foregoing, Maricopa Ambulance does not believe that Applicant can sustain its burden of proof that its service is needed, that “public necessity” requires it, that granting this CON will not have a deleterious financial impact on existing providers and the system as a whole, that there is substandard performance, and that this is anything other than an unfair arrangement that would give Applicant a leg up and an unfair advantage. The Application should be denied.

Respectfully submitted this 15th day of October, 2018.

JBELANGER LAW PLLC

By /s/ James J. Belanger
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CERTIFICATE OF SERVICE

ORIGINAL filed using the OAH electronic document filing system
<https://portal.azoah.com/oedf> on October 15, 2018, with copies provided to all parties on
the approved mailing list by posting through the designated OAH website at
<https://portal.azoah.com/oedf/documents/2016A-EMS-0381-DHS/2016A-EMS-0381-DHS-0018.pdf>.

/s/ James J. Belanger
