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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

<p>In the Matter of:</p>  <p><b>RBR Management LLC, dba Community Ambulance</b></p> <p>Applicant.</p>	<p>Docket No. 2017-EMS-0104-DHS (EMS No. 0283)</p> <p><b>ABC AMBULANCE'S STATEMENT OF LAW, RULES, AND POLICY RELIED ON IN SUPPORT OF ITS POSITION</b></p> <p>(Assigned: The Hon. Tammy Eigenheer)</p>
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On June 10, 2016, RBR Management LLC dba Community Ambulance ("Applicant" or "RBR") applied for a Certificate of Necessity ("CON") to operate an interfacility (non-911) ambulance transport service ("IFTs") in Maricopa County (as supplemented and amended, "Application"). Intervenor ABC Ambulance, LLC, current holder of CON No. 139 ("ABC"), respectfully requests that the Administrative Law Judge ("ALJ") recommend to the Director of the Arizona Department of Health Services ("ADHS") that the Application be DENIED.

Applicant originally stated (or strongly implied) in its Application that it was seeking a CON only to service the hospitals in Phoenix owned by its majority-owner, Dignity Health. Now, Applicant confirms that it seeks a CON for the whole of Maricopa County.

There are currently at least nine CON holders who can and do provide IFT coverage throughout the entirety of Maricopa County (not all overlapping each other's territories, but all within Maricopa County). The AMR CON Holders, Maricopa Ambulance and ABC Ambulance

1 have intervened in these proceedings.

2 Applicant, as “the party asserting a claim, right, or entitlement” to a CON, has the burden  
3 of proof (AAC R2-19-119(B)(1)<sup>1</sup> to establish the following factors:

4 **a. CON Statute and Regulations**

5 The very threshold issue that an applicant must establish before qualifying for a CON is that  
6 *public necessity requires the service*. All the other factors are moot if an applicant cannot establish  
7 this primary factor. The director of the ADHS shall issue a CON to any person “wishing to operate  
8 an ambulance service in this state” if certain listed criteria apply, including that the director finds  
9 that **public necessity** requires the service or any part of the service proposed by the applicant; and  
10 that the applicant is **fit and proper** to provide the service. A.R.S. § 36-2233(B)(2) and (3).

11  
12 The Statute does not define “public necessity.” However, the Director of ADHS was  
13 empowered to draft regulations,<sup>2</sup> in which he defined “public necessity” as follows:

14 “Public necessity” means an identified population **needs or**  
15 **requires** all or part of the services of a ground ambulance  
16 service.<sup>3</sup>

17 In “determining public necessity,” the Regulations prescribe that, in considering an  
18 application for a CON, the Director shall consider the following:

- 19 1. The response times, response codes, and response-time tolerances proposed by  
20 the applicant for the service area;<sup>4</sup>  
21 2. The **population demographics** within the proposed service area;  
22 3. The **geographic distribution of health care institutions** within and  
23 surrounding the service area;  
24 4. **Whether issuing a certificate of necessity to more than one ambulance**  
25 **service within the same service area is in the public's best interest, based on:**  
26 a. The **existence of ground ambulance service** to all or part of the service  
27 area;

28 <sup>1</sup> "A party asserting an affirmative defense has the burden of establishing the affirmative defense." AAC R2-19-119(B)(2). No party in these proceedings is asserting any defense, and thus this sub-section is not relevant to these proceedings.

<sup>2</sup> Which he did, at A.A.C. R9-25-901 *et seq.* (the “Regulations”).

<sup>3</sup> A.A.C. R9-25-901(45) (emphasis added).

<sup>4</sup> Applies only to *emergency* CONs.

- 1           b. The response times of and response-time tolerances for ground ambulance  
service to all or part of the service area;<sup>5</sup>
- 2           c. The **availability of certificate holders** in all or part of the service area; and
- 3           d. The availability of emergency medical services in all or part of the service  
area;
- 4           5. The information in *R9-25-902(A)(1)* and (A)(2); and
- 5           6. Other matters determined by the Director or the applicant to be relevant to the  
determination of public necessity.<sup>6</sup>

6           As in the present case, “[i]n deciding whether to issue a certificate of necessity to **more**  
7 **than one ground ambulance service** for convalescent or **interfacility transport** for the same  
8 service area or overlapping service areas, the Director shall consider the following:”

- 9
- 10           1. The factors in subsections (A)(2), (A)(3), (A)(4)(a), (A)(4)(c), (A)(4)(d),  
11 (A)(5), and (A)(6);
- 12           2. The **financial impact on certificate holders** whose service area includes all  
or part of the service area in the requested certificate of necessity;
- 13           3. The **need for additional convalescent or interfacility transport**; and
- 14           4. Whether a certificate holder for the service area has **demonstrated substandard**  
**performance**.<sup>7</sup>

15           The concept of public necessity recognizes that the primary focus of the inquiry should be  
16 on the best interests of the public, and not upon protecting the territory or interests of current  
17 providers. BEMSTS Guidance Document GD-099-PHS-EMS, p. 2.

18           However, the Guidance Document also points out the importance of supporting the financial  
19 health and viability of the existing CON holders: “Additionally, the Statutes and Rules seek to  
20 ensure that ambulance services have the sufficient financial strength and volume of business **to**  
21 **continue operations** to provide Arizonans with reliable service.”

22           “Fit and proper” means “that the director determines that an applicant ... has the **expertise,**  
23 **integrity, fiscal competence and resources** to provide ambulance service in the service area.”

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27 <sup>5</sup> Applies only to *emergency* CONs

28 <sup>6</sup> A.A.C. R9-25-903(A) (emphasis added).

<sup>7</sup> A.A.C. R9-25-903(B) (emphasis added).

1 A.R.S. § 36-2201(21) (emphasis added). The Regulations provide no guidance on how to apply this  
2 subsection (in direct contrast to the regulations governing the “fit and proper” standard for other  
3 public service corporations governed by the Arizona Corporation Commission.)

4 **b. The regulation of ambulance services is established by the Arizona Constitution**

5 Applicant appears to be dissatisfied with the regulatory model set out above, proposing to  
6 put on a testimony (including Dr. David Argue and Mr. Will Humble) on the “benefits of  
7 competition,” where patients have a “choice of ambulance providers.” Not only is this a misnomer  
8 (Applicant does not propose to offer any “choice” to Dignity patients in its Application – Dignity  
9 patients will only be offered Dignity’s ambulance services), but it is also irrelevant.

11 The Arizona constitution provides: “The legislature may provide for the regulation of  
12 ambulances and ambulance services in this state in all matters relating to services provided, routes  
13 served, response times and charges.” Ariz. Const. art. XXVII, § 1.

14 Prior to 1982, Arizona ambulance companies were regulated by the Arizona Corporation  
15 Commission as public service corporations. *Southwest Ambulance, Inc. v. Arizona Dep't of Health*  
16 *Servs.*, 183 Ariz. 258, 259–60, 902 P.2d 1362, 1363–64 (Ct. App. 1995), citing Ariz. Const. art.  
17 XV, § 2 historical note; *Emergency Medical Transport, Inc. v. City of Tempe*, 157 Ariz. 260, 261,  
18 756 P.2d 929, 930 (App.1988). For a brief period, from 1980 to 1982, ambulance companies were  
19 deregulated as a result of a 1980 general election referendum. *Id.* However, within two years, in  
20 November 1982, as a result of another general election referendum, ambulance companies were  
21 again made subject to regulation. This time, rather than by including them specifically in the  
22 definition of “public service corporation” subject to the jurisdiction of the Corporation  
23 Commission, the constitution made them subject to regulation directly by the legislature. *Id.* at 260,  
24 citing Ariz. Const. art. XXVII, § 1 (emphasis added). The reasons for and against the re-  
25 establishment of ambulance companies as public service corporations back in 1982 (the current  
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1 scheme) are evident from the literature published at the time of the 1982 referendum, which make  
2 it clear that the public was endorsing ambulance providers as public service enterprises in a  
3 regulatory scheme that was not based on competition. Opponents of the referendum (who were  
4 unsuccessful) made the same arguments that Applicant apparently wants to make here – they  
5 warned against the new constitutional amendment (which is the current constitutional provision)  
6 that “The present system of free competition results in better service and lower charges for persons  
7 needing ambulance services. Proposition 100 would bring back a system of regulated monopoly  
8 for ambulance services, and the public would suffer because of poor service, delays and additional  
9 costs.” And “Proposition 100 attempts to turn back the clock by returning government regulation  
10 to the ambulance industry. Arizonans should vote to keep competition in the ambulance industry  
11 by saying no to Proposition 100.”<sup>8</sup> These arguments were soundly rejected by the electorate and  
12 “government regulation” was re-introduced to govern the provision of ambulance services.  
13 Applicant’s arguments are approximately 35 years too late.

14  
15 In implementing the statutory scheme in this light, and determining whether to issue a CON  
16 to Applicant, the ALJ and ADHS should bear the following principles in mind:

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18 “Competition is the general rule. **However, when an entity dedicates private property to**  
19 **a use in which the public has an interest**, it grants the public an interest in that use and must  
20 submit to regulation for the public good. **The right to public protection then outweighs the right**  
21 **of competition.**” *Sw. Transmission Co-op., Inc. v. Arizona Corp. Comm’n*, 213 Ariz. 427, 432, 142  
22 P.3d 1240, 1245 (Ct. App. 2006) (internal citations omitted) (emphasis added).

23  
24 The rationale underlying why the public interest is not served by handing out certificates to  
25 anyone who applies in the context of public services is apparent from the following ruling:<sup>9</sup> “A

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27 <sup>8</sup> *Id.* Arguments in favour of passing the constitutional amendment included that “Ambulances and ambulance  
services should be regulated to insure that all areas of the state are adequately served.”

28 <sup>9</sup> Comparable to an ambulance company’s need to obtain a CON because both types of companies are required to  
prove public interest. *See, for example, Arizona Water Co. v. Arizona Corp. Comm’n, supra*, at 656.

1 system which did not provide certificate holders with an opportunity to provide adequate service at  
2 reasonable rates [before deletion of a certificated area could be made] would be antithetical to the  
3 public interest for several reasons. First, it would encourage price competition between public  
4 service corporations, **the very mode of operation which the Legislature has rejected**. Second, it  
5 encourages **over-extensive development**. ... The consuming public will ultimately pay for this  
6 needless construction ... Third, it fails to reward a public service corporation for **taking on the risks**  
7 **and obligations** concomittant to certification. ... Finally, it discourages service by companies  
8 that would supply service **to sparsely populated** areas today, at a marginal profit, ..." *James P.*  
9 *Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 426, 429–30, 671 P.2d 404, 407–08 (1983).

11 "Public convenience and necessity are not furthered in most cases by the maintenance and  
12 operation of a number of competing plants or systems of the same character to supply a locality,  
13 but that they are generally far better served in the long run by the **maintenance only of the smallest**  
14 **number of such instrumentalities which will adequately serve the public needs.**" *Corporation*  
15 *Commission v. People's Freight Line, Inc.*, 41 Ariz. 158, 165, 16 P.2d 420 (1932).

17 **c. Public need is the ultimate guiding principle**

18 Applicant has focused its Application on its majority-owner *Dignity's* need for an in-house  
19 service. It is clear from Guidance Document that the underlying rationale for the regulation of the  
20 ambulance industry in Arizona is due in large part to Arizona's geography and the need to ensure  
21 service to the non-urban areas. The Notice of Hearing in this case emphasizes the importance of  
22 ensuring service to rural and wilderness areas is provided for, and not negatively impacted by an  
23 application. Applicant's admission that it plans to service only *Dignity* facilities and associates fails  
24 to address the threshold issue that the public's best interest is at the heart of ambulance regulation  
25 in Arizona.  
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1 **d. ABC's business will be decimated**

2 The Regulations oblige ADHS to consider the financial impact on current CON holders as  
3 part of the public necessity threshold test. Moreover, the Guidance Documents focuses on the  
4 importance of supporting the financial health and viability of the existing CON holders:  
5 “Additionally, the Statutes and Rules seek to ensure that ambulance services have the sufficient  
6 financial strength and volume of business **to continue operations** to provide Arizonans with  
7 reliable service.” It is important that the process does **not** work in a manner that a provider who is  
8 doing a good job is put in a position where they cannot remain in operation by virtue of an additional  
9 CON being granted (especially in circumstances where the desire to get a CON is principally to  
10 serve your own patients in your own network). This principle (the continued viability of current  
11 providers) is not in place simply to “protect the territory or service interest of current providers”<sup>10</sup>  
12 – it is to prevent harm to the public by **degrading** existing ambulance service. Taking transports  
13 away from existing CON holders may result in compliant providers not being able to continue to  
14 optimally staff, train and/or fund their services. This is what the statutory scheme seeks to avoid.

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17 ABC has been found to be “fit and proper,” and has been performing IFTs in Maricopa  
18 County since 2015. ABC has invested heavily in its operations, and has been fulfilling all of its  
19 duties as a regulated provider of this public service, with no complaints. Granting a CON to this  
20 Applicant, to satisfy the business desires of its majority-owner, will decimate ABC's business.  
21 Dignity has a deep reach into the health care community in Arizona – in particular, Dignity owns  
22 50% of an Accountable Care Organization called Arizona Care Network (“ACN”). ABC's biggest  
23 customers – Mercy Care and Mercy Maricopa – have contracted with ACN to be part of that Dignity  
24 network. There is little doubt that Mercy Care and Mercy Maricopa will be incentivized to keep  
25 ambulance transports in-network (as soon as Dignity is granted control of a CON through RBR),  
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<sup>10</sup> Guidance Document, p. 2.

1 thereby taking a devastating number of transports away from ABC. To date in 2018, this was 47%  
2 of ABC business. ABC likely will not survive this type of business diversion.

3 To grant a CON to an applicant to satisfy *its own* (or its affiliate's) business preferences,  
4 without the requisite showing that *the public needs* an additional ambulance company, and without  
5 taking fully into account the potential financial devastation of a currently fully compliant CON  
6 holder were that additional company to be certificated, would be to subvert the very essence of  
7 Arizona's regulatory model.  
8

9 RESPECTFULLY SUBMITTED this 15th day of October, 2018.

10 HOFMEYR LAW PLLC  
11 By /s/ Adriane J. Hofmeyr  
12 Adriane J. Hofmeyr  
13 *Attorney for ABC Ambulance, LLC*

14 **CERTIFICATE OF SERVICE**

15 Original filed using the OAH electronic document filing system <https://portal.azoah.com/oedf>  
16 this 15th day of October, 2018 with copies provided to all parties on the approved mailing list this  
17 15th day of October, 2018 by posting through the designated OAH website as  
18 <https://portal.azoah.com/oedf/documents/2015A-EMS-0190-DHS/index.html> in accordance with  
19 Case Management Order No. 1.  
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