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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

<p>In the Matter of:</p> <p>RBR Management LLC, dba Community Ambulance</p> <p>Applicant.</p>	<p>Docket No. 2017-EMS-0104-DHS (EMS No. 0283)</p> <p>ABC AMBULANCE'S WRITTEN CLOSING ARGUMENT</p> <p>(Assigned: The Hon. Tammy L. Eigenheer)</p>
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This unique CON application acknowledges that it is *not* seeking a CON because there is public necessity for another provider of convalescent and interfacility transports in Maricopa County. Applicant is simply part of a large health care organization that wants to continue expanding its service delivery by adding ambulance services to its array of services. Applicant has been very clear: its majority owner, Dignity Health, wants a CON to service its **own hospital system**. Dignity’s purported “necessity” is the only need that Applicant has asserted, and the only “need” upon which its Application is based. Unfortunately for Applicant, Arizona’s regulatory model is based on a threshold showing of “public necessity.” Applicant’s failure to satisfy this determinative standard is fatal to its Application. In fact, evidence on the record proves the contrary - there are currently

1 enough providers in Maricopa County to meet the public need for convalescent and
2 interfacility transports; and adding an additional provider that will “self-refer” will not only
3 significantly negatively impact the system, but will also decimate ABC’s ability to continue
4 to provide Arizonans with reliable service.

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6 Applicant also fails to prove the second requirement to qualify for a CON – that it is
7 “fit and proper.” Applicant has been in business for eight years in Nevada and yet
8 astonishingly chose to withhold from this tribunal and the Department its financial
9 statements, collection trends, staffing and billable rate models. This makes it difficult if not
10 impossible to assess whether in fact Applicant has been successful and/or profitable and/or
11 financially competent and/or financially honest in its Nevada operations (as it asserts), nor
12 whether Applicant is financially sound or stable. As Applicant bears the burden of so
13 proving, its Application must fail.¹

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16 **A. REGULATORY REQUIREMENTS: AN APPLICANT MUST SHOW**
17 **THAT PUBLIC NECESSITY REQUIRES THE SERVICE, AND THAT**
18 **IT IS FIT AND PROPER**

19
20 **1. Public necessity must require the proposed service**

21 The very threshold issue that an applicant must establish before qualifying for a
22 certificate of necessity (“CON”) is that “**public necessity requires** the service or any part
23 of the service proposed by the applicant.” A.R.S. § 36-2233(B)(2) (emphasis added). All
24 the other factors are moot if an applicant cannot establish this primary factor.

25 “Public necessity” means “an identified population **needs or requires** all or part of
26 the services of a ground ambulance service.” A.A.C. R9-25-901(33) (emphasis added).

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¹ ABC does not waive any argument it made during the hearing by not reiterating or repeating such argument in this
Written Closing Argument.

1 In “determining public necessity,” the Director of the Department of Health Services
2 (“ADHS” or “the Department”) considers, among other things, whether issuing a certificate
3 of necessity to **more than one** ambulance service within the same service area (as in the
4 present case) is **in the public’s best interest**. A.A.C. R9-25-903(A)(4) (emphasis added).
5

6 “In deciding whether to issue a certificate of necessity to **more than one ground**
7 **ambulance service** for convalescent or interfacility transport for the same service area or
8 overlapping service areas,” the Director considers the following:
9

- 10 1. The factors in subsections (A)(2), (A)(3), (A)(4)(a), (A)(4)(c),
11 (A)(4)(d), (A)(5), and (A)(6);
- 12 2. The **financial impact on certificate holders** whose service area
13 includes all or part of the service area in the requested certificate of
14 necessity;
- 15 3. The **need for additional convalescent or interfacility transport**; and
- 16 4. Whether a certificate holder for the service area has **demonstrated**
17 **substandard performance**. A.A.C. R9-25-903(B) (emphasis added).²

18 **2. An applicant must also show that it is fit and proper**

19 In addition to proving public necessity, the Director must find that “the applicant is
20 **fit and proper** to provide the service.” A.R.S. § 36-2233(B)(3) (emphasis added). “Fit and
21 proper” is defined as “the director determines that an applicant ... has the **expertise,**
22 **integrity, fiscal competence and resources** to provide ambulance service in the service
23 area.” A.R.S. § 36-2201(21) (emphasis added).
24

25 **3. BEMSTS Guidance Document GD-099-PHS-EMS**

26 The Department’s Guidance Document GD-099-PHS-EMS (“Guidance
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² This last factor was waived by Applicant. “I believe there’s no data that we have to show that there’s substandard performance.” Transcript of Proceedings (“Tr.”) Vol. 2, p. 326:22. ‘Community Ambulance is not alleging that the services provided by any Intervenor is “substandard” as that term is defined by statute and regulation.’ Applicant’s Pre-Hearing Memorandum, p. 20:8-9.

1 Document”)³ fleshes out the above statutory and regulatory requirements, as follows
2 (emphasis added):

3 • “In general, the Statutes and Rules ensure that **all residents** of Arizona have
4 access to ambulance service, whether they live in an **urban** area ... or a **rural** area.”

5
6 (Guidance Document, p. 1, Heading 1.)

7 • “The Statutes and Rules seek to ensure that ambulance services have
8 **sufficient financial strength** and **volume** of business to **continue** operations to provide
9 Arizonans with **reliable** service.” (Guidance Document, p. 1, Heading 1.)

10
11 • “A common misconception is that the Statutes and Rules are solely designed
12 to limit the number of ambulance services in Arizona. This is not the case, as portions of
13 the State have multiple providers with overlapping service areas where more than one
14 ambulance company is providing services. However, the Statutes and Rules do establish a
15 requirement that anyone seeking to start an ambulance service ... **must be able to**
16 **demonstrate that there is a public necessity** for the proposed service and ensure that
17 protections are in place for citizens living in **rural areas.**” (Guidance Document, p. 1,
18 Heading 1.)

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21 • “The authority to operate a CON is **based upon a determination of public**
22 **need** for the service. ... This Rule recognizes that the **primary focus** should be on the
23 **interests of the public** and not upon protecting the territory or service interests of current
24 providers in the area, although the **impact on the current provider(s)** of service, and on
25 the public in and near the application area, are factors to be considered.” (Guidance
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³ Exhibit ADHS 15.

1 Document, p. 2, Heading 4.)

2 • “The Department believes that the **primary focus** for the determination of
3 **public necessity** is made with reference to analyzing the **needs of the community**, the
4 **adequacy of current services provided**, maximizing the use of contemporary EMS
5 protocols that have been demonstrated to save lives, and **ensure cost controls.**” (Guidance
6 Document, p. 2, Heading 4.)

7 Document, p. 2, Heading 4.)

8 • “The Director will use the information submitted in the application for a
9 CON, information provided by the current service provider, and other matters that may be
10 relevant to the determination of public necessity ...” (Guidance Document, p. 2, Heading
11 4.)

12 • “Applicants wishing to provide interfacility transports may propose
13 ‘Interfacility Arrival Times’ and have those times measured for compliance purposes.”
14 (Guidance Document, p. 4, Heading 5.)⁴

15 **4. Applicant bears the burden on all factors**

16 Applicant, as “the party asserting a claim, right, or entitlement” to a CON, has the
17 **burden of proof.** A.A.C. R2-19-119(B)(1). Intervenors have no burden on any issue in
18 these proceedings because they are not “asserting an affirmative defense,” which, where
19 appropriate, shifts the burden of establishing such affirmative defense. A.A.C. R2-19-
20 119(B)(2).⁵

21 ⁴ Applicant has not applied for “Interfacility Arrival Times” to be placed on its CON. Tr. Vol. 5, p. 1178:25, p.
22 1179:1-3.

23 ⁵ The ALJ during the hearing correctly stated as follows: “The applicable rules to this hearing would establish
24 whether or not financial impact is an affirmative defense or a factor. Obviously, the rules and the guidance document
25 indicate it's a factor; it's not an affirmative defense. So whether or not they have to --- the intervenors don't have to
26 establish by a preponderance of the evidence their financial impact, it is a factor to be determined.” Tr. Vol. 6, p.
27 1520:1-11.
28

1 **B. APPLICANT HAS NOT ATTEMPTED TO SHOW PUBLIC NECESSITY**
2 **FOR ITS PROPOSED SERVICE**

3 Applicant has applied to the Department for a CON to perform interfacility and
4 convalescent⁶ transports in Maricopa County. Notice of Hearing filed on June 1, 2017;
5 Exhibits ADHS 1 and 12; Tr. Vol. 3, p. 809:10-11. As a threshold matter, Applicant must
6 prove that “**public necessity requires**” its proposed service. Applicant has failed to meet
7 this threshold burden, and its Application must be summarily denied.

8
9 **1. The only “need” that Applicant asserts and has offered is that of its majority**
10 **owner, Dignity Health**

11 Applicant has focused its Application on *Dignity Health’s* desire for an in-house
12 interfacility transport (“IFT”) ambulance service. For this reason, the Department considers
13 this Application “unique,” because “it will specifically focus on one healthcare system,”
14 namely, Dignity Health. Tr. Vol. 6, p. 1157:24-25, 1158:1-8.

15 Applicant devoted the majority of its hearing to six witnesses from Dignity Health,
16 all of whom testified about the **needs of Dignity Health** to have its own in-house IFT
17 service. For example:

18
19 • To deal with Dignity Health’s “capacity issues” (Tr. Vol. 1, p. 26:5), and
20 alleviate “conditions of overcrowding” at Dignity’s **Nevada** facilities (Tr. Vol. 1, p. 23:6,
21 p. 27:11, p. 30:13), and “throughput issues” (Tr. Vol. 1, p. 48:6-12), Dignity Health formed
22 and became the majority owner (50.1%) in RBR Management LLC (Applicant) in 2010
23

24
25 _____
26 ⁶ Applicant asks for, but does not intend to perform, convalescent transports. Applicant’s CEO was initially confused
27 as to whether a convalescent transport “requires an ambulance ... or ... a non-ambulance transport” (Applicant
28 believes a convalescent call “could have a non-ambulance transport”). Tr. Vol. 3, p. 853:8-15. He later corrected this,
stating that a convalescent transport is in fact an “ambulance transfer.” Tr. Vol. 5, p. 1171:2-9. In any event,
Applicant does not propose to do any such transports, but rather plans to call “other entities” to perform convalescent
transports. Tr. Vol. 3, p. 854:8-10.

1 (Tr. Vol. 1, p. 31:18-19). This allowed Dignity to “offload or transfer” patients between
2 Dignity hospitals in Nevada. Tr. Vol. 1, p. 26:12.

3 • As Dignity Health grew in Arizona, patient transfers between Dignity
4 facilities became “more and more of an issue” by the “end of 2014 ... early part of 2015.”
5 Tr. Vol. 1, p. 69:14-18.⁷

6
7 • Dignity’s CEO in Arizona testified that “we have a shortage of beds in this
8 community ... so the sooner we can transfer patients, the more we can get people out of the
9 ER or out of the outlying areas ... into a bed.” Tr. Vol. 1, p. 193:19-24.

10
11 • Dignity’s Arizona CEO acknowledged that Dignity has a **financial incentive**
12 to move patients: Dignity is “held accountable” to a “geometric mean length of stay”
13 “because that’s how we’re paid. So if you go over, it’s on your nickel.” Tr. Vol. 1, p. 185:8-
14 18. “They don’t reimburse you for that time, that extended -- so it was very obvious that we
15 needed to do something.” Tr. Vol. 1, p. 186:21-23.

16
17 • Dignity acknowledged that it did no “assessment into broader public need for
18 interfacility transports in Maricopa County;” that its assessment “**only related to Dignity’s**
19 **needs.**” Tr. Vol. 1, p. 135:5-9 (emphasis added).

20
21 • Dignity acknowledged there has been a “big push to keep Dignity’s patients
22 in-house” (Tr. Vol. 1, p. 163:20-24) and that Dignity’s “practice is to keep our patients in-
23 house” (Tr. Vol. 2, p. 531:19).⁸

24
25 • Dignity’s expectation is that “this ambulance service will **focus on Dignity-**

26
27 ⁷ At that time, Dignity was not contracted with any of the providers intervening in this hearing, and no quantifiable
28 data was provided to demonstrate what “more of an issue” meant.

⁸ As explained below, Dignity’s business plan for growth does not create “public necessity.”

1 **controlled facilities.”** Tr. Vol. 1, p. 180:12-15. If Applicant is granted a CON, Dignity’s
2 expectation is that Applicant “**would serve the needs of those controlled Dignity**
3 **facilities.”** Tr. Vol. 1, p. 182:22-25, p. 183:1 (emphasis added).⁹

4 • Dignity acknowledged that it did not look at any of the ARCRs¹⁰ of the
5 existing providers in Maricopa County on the Department’s website because “I don’t know
6 that the **financial position of another organization** or the total transports that another
7 organization is doing -- how that **could be relevant to the Dignity Hospital transport**
8 **needs.”** Tr. Vol. 2, p. 353:7-10.¹¹

9 • Dignity’s focus is “**solely on Dignity**” and “what Dignity and our – our
10 partners” need. Tr. Vol. 2, p. 353:11-14.

11 • Dignity is “**unaware of any needs outside of Dignity** that [Applicant] may
12 have analyzed.” Tr. Vol. 2, p. 387:21-25. This was testified to by the Dignity representative
13 that sits on Applicant’s Board of Managers. Tr. Vol. 1, p. 199:7-9.

14 • In exploring the meaning of “the needs of Dignity,” Dignity acknowledged
15 that what it wants in an ambulance service is “**ownership by Dignity, oversight by**
16 **Dignity, fiduciary relationship with Dignity.”** Tr. Vol. 2, p. 430:13, p. 431:9-13
17 (emphasis added). It acknowledged that **its needs**, thus defined, could not be met by “**any**
18 **independent, non-owned**” ambulance company in Arizona. Tr. Vol. 2, p. 431:14-19.

19 • When asked what would Dignity expect Applicant to do if called by a non-
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26 ⁹ As explained below, Applicant’s focus on the private needs of Dignity and self-referrals is the antithesis of “public
27 necessity.”

28 ¹⁰ Annual Revenue and Cost Report that every CON holder must submit to the Department annually.

¹¹ Dignity clearly shows that it is not interested in the overall system that is regulated for the benefit of the public and
its only concern is for Dignity.

1 Dignity facility for a transport, Dignity’s witness (after acknowledging that he wears two
2 different hats to respond to this question – RBR and Dignity) responded “**not at the expense**
3 **of a Dignity Health** level of performance that we’ve agreed to.” Tr. Vol. 2, p. 436:19-25,
4 p. 437:1-3 (emphasis added). Then, wearing the RBR hat, he confirmed that “we need to
5 make sure we’re not compromising the commitment we made **to Dignity Health.**” Tr. Vol.
6 2, p. 437:7-8.

8 • Dignity reiterated that neither it nor Applicant did a “needs assessment” prior
9 to filing the Application because “I am the primary customer. I know exactly -- ... I know
10 what **our needs** are. ... **I’m the voice of the customer.** It is **my needs** that I can share very
11 clearly with you.” Tr. Vol. 2, p. 437:22-24, p. 438:3-10.

13 • Applicant’s CEO confirmed that Applicant did not “do a needs assessment
14 for the purposes of analyzing the need for ground ambulance transports in Maricopa
15 County” because [Mr. O’Malley on behalf of Dignity Health] **is the need. He’s the patient**
16 **– he’s the customer that’s providing that need.**” Tr. Vol. 3, p. 847:18-25, p. 848:1-6
17 (emphasis added).

19 • Applicant’s CEO agreed that the testimony shows that “the only identified
20 population **assessed** by [Applicant] or by Dignity, its majority owner, is that the identified
21 population **is Dignity and Dignity’s patients.**” Tr. Vol. 4, p. 16-25 (emphasis added).

23 • Applicant’s CEO acknowledged that he has testified to **nothing on the issue**
24 **of public necessity.** Tr. Vol. 5, p. 1167:20-22 (emphasis added). He also confirmed that
25 Dignity’s witnesses were testifying “to **their** need.” Tr. Vol. 5, p. 1167:18 (emphasis
26 added).
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1 • When pressed for a plan to service non-Dignity-related facilities, Applicant’s
2 CEO again stated that “we would put the emphasis and everything **to take care of [Dignity**
3 **Health]**,” and that, if another facility calls, Applicant “would look at it” and “we would
4 entertain” being a “back up.” Tr. Vol. 5, p. 1175:1-17.

5
6 • When pressed further by the Department for Applicant’s plan to serve the
7 population covered by its proposed service area, Applicant’s CEO continued to re-assert
8 that “**our emphasis would be our client Dignity Hospital**” (Tr. Vol. 5, p. 1176:1), and
9 “**our emphasis and our focus would be on our client** that we have, is Dignity Health” (Tr.
10 Vol. 5, p. 1177:1-2), while broadly stating that “we would help assist anybody in the –
11 Maricopa County for assistance if they needed transport services.” Tr. Vol. 5, p. 1176:2-4.

12
13 • When asked about Applicant’s plan to address **rural communities** and
14 county islands (based on the Guidance Document), Applicant’s CEO stated that Applicant
15 would “**let**” current CON holders continue to serve those communities as long as they
16 performed at Applicant’s expectation for service level. Tr. Vol. 3, p. 838:10, Tr. Vol. 5, p.
17 1180:16-25, p. 1181:1-2. When asked what “your plan is,” the answer was “Anything that’s
18 in a declared rural area, the current CON holder would get all those calls, that they would
19 keep doing what they are doing.” Tr. Vol. 5, p. 1181:13-21. This was the same response for
20 all the bullet points in the Guidance Document. Tr. Vol. 5, p. 1183:23, p. 1184:1, p.
21 1184:3.¹² Applicant provided **no plan** to serve the rural communities in its requested service
22 area.
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27 _____
28 ¹² Applicant’s answer to this line of questioning reveals that Applicant essentially views itself as the new regulator over the providers of services in rural areas – Applicant would like to determine what they would be allowed to perform, and the service level to continue performing.

1 All of the above testimony corroborates the statements made by Dignity’s Mr.
2 O’Malley to ABC’s Mr. Thomas on September 22, 2016 that Dignity would only “be
3 willing to discuss” ambulance transport services with ABC “if they were not able to get
4 their license.” Exhibit ABC 7, Tr. Vol. 6, p. 1412:15, p. 1414:1-2.

5
6 This is the unique issue that confronts the Department: whether to grant a CON to
7 an applicant where such applicant makes no bones about the fact that it is not attempting to
8 meet the public’s need, but rather wishes to service the needs **only** of its majority owner.
9 Effectively, it is an application by a large hospital system to take IFT services in-house.
10 Dignity has made it clear it considers this an **innovation and evolution** of Arizona’s CON
11 system: Mr. O’Malley testified that “I also believe that there is **evolving** models of health
12 care that have not been contemplated by current CON laws ... and I think we need to be
13 prepared to **evolve** our ambulance transportation system to meet those needs (Tr. Vol. 2, p.
14 369:17-21), and “I’m looking for somebody to **innovate** and help us **evolve** the ambulance
15 system.” Tr. Vol. 2, p. 370:20-21. This may explain Applicant’s brazen failure to address
16 the issue of **public need**. Both Applicant and Dignity admit they did no assessment of public
17 need prior to filing the Application. **Applicant failed to put on any testimony of public**
18 **need.**

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22 In the blatant absence of proof of public need, does Applicant’s and Dignity’s
23 *attempt to innovate* meet the current statutory and regulatory scheme governing ambulance
24 transports in Arizona? It cannot, by any stretch of interpretation of the threshold
25 requirement that “public necessity requires” Applicant’s proposed service.
26

27 Indeed, in apparent recognition that its Application is beyond the authority of the
28

1 Director, in January 2019, after the hearing in this proceeding had ended, Dignity Health
2 (through its representative) introduced a Bill to the Arizona State Legislature entitled
3 HB2280, “Certificates of Operation; Interfacility Transports.”¹³ In HB2280, Dignity is
4 attempting, through the Legislature, to **completely remove** proof of “public need” for
5 **interfacility transports** (but not convalescent transports). It proposes calling it a
6 “certificate of operation,” as opposed to a “certificate of necessity.”¹⁴ Revealing how self-
7 serving its intentions are, it wants its new statute to apply **only to Maricopa County**.¹⁵
8
9 What HB2280 highlights (yet again) is that, in the Application and throughout these
10 proceedings before OAH, Dignity is hoping that *this tribunal* will amend the law via the
11 *hearing process*. Dignity, apparently now recognizing that it has chosen the wrong forum,
12 is pursuing the legislative route instead (which is their right).

13
14 Whether or not the Department sympathizes with Dignity’s unquantified woes
15 relating to overcrowding, staffing shortages and throughput issues, the solution to any
16 problem perceived by Dignity is to work within the regulatory system, not bypass it because
17 it just wants to expand its services. Dignity has options to work with existing ambulance
18 service providers - there is no shortage of ambulances or ambulance providers to work with
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22 ¹³ This Bill was submitted to the Arizona legislature after the hearing ended and therefore was unavailable to submit
23 as an exhibit at the hearing. However, HB2280 is a matter of public record, and thus the ALJ may take judicial notice
24 thereof. *State v. Rojers*, 216 Ariz. 555, 560, 169 P.3d 651, 656 (App. 2007) (“Judicial notice is discretionary, and it
25 may be taken at any stage of a proceeding. *Ariz. R. Evid. 201(c),(f)*. ... A court will take judicial notice of
26 administrative procedures whose content is capable of accurate and ready determination by resort to sources whose
27 accuracy cannot reasonably be questioned. *Ariz. R. Evid. 201(b)*). HB2280 is available on the Arizona legislature’s
28 website at <https://www.azleg.gov/legtext/54leg/1R/bills/HB2280P.htm>.

¹⁴ HB2280 is not just an amendment to the statute; it’s an amendment to the very foundation of this law – the
requirement that there is a **public need** for ambulance services. Dignity is not asking that the standard be *lowered*; it
is asking that the Legislature do away with the standard altogether (literally, while the “fit and proper” standard
remains, “public necessity” is omitted). Dignity is hoping to gut the CON laws because they are inconvenient.

¹⁵ The language used in the Bill is that the ability to obtain a “certificate of operation” only applies in counties with
populations of 3 million or more (the only county in Arizona that comes anywhere near this number is Maricopa).

1 Dignity on any service issue that it has raised (as explained below). Permitting Dignity to
2 expand its services in the absence of a showing of public need would significantly
3 undermine and contravene Arizona’s current CON regulatory model (as discussed below),
4 thereby causing irreparable harm to the system itself, not to mention to the current CON
5 holders (as discussed below).¹⁶
6

7 Applicant’s failure to present evidence to satisfy the determinative public need
8 standard is fatal to its Application, and the Application should be denied summarily. No
9 further enquires (including whether Applicant is fit and proper) are needed. However, in the
10 event that the ALJ and/or the Director wish to address other issues in this case, they are
11 dealt with below.
12

13 **2. Allowing a hospital system to operate its own in-house service just because it has**
14 **a base of patients to self-refer is detrimental to the system**

15 Because of Dignity’s ownership in Applicant (and thus its ability and intent to refer
16 its patients to Applicant and share financial payment information with Applicant),¹⁷
17 Applicant would be in a unique and enviable position - that, at the time of the call requesting
18 a transport from a Dignity Health facility, unlike other arms-length providers (including the
19 Intervenors), **Applicant will already have access to a patient’s personal health**
20 **information** (“PHI”), allowing Applicant to choose whether such a transport is desirable
21 or not.
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25 ¹⁶ The statute already exempts certain ambulance transports from having to prove public necessity – including some
26 air ambulance transports, some out-of-state ambulances, and stretcher van transports. A.R.S. § 36-2217. Although
27 Applicant wishes it were otherwise, in-house services for hospital systems are not included in the list of exemptions
28 (A.R.S. § 36-2217(A)), and thus Applicant is required to satisfy the public necessity test, precisely as the current
providers had to do.

¹⁷ Applicant and Dignity are promising a “platform” to integrate their electronic medical records. Tr. Vol. 2, p. 344:8-
13, p. 346:3-5. “The call will be automatically matched to a medical record number to a dispatch number.” Tr. Vol. 3,
p. 819:19.

1 Applicant is fully aware that this unique position gives it an advantage over other
2 CON holders - in the context of convincing the Department that its bad debt “will come in
3 lower” [than other providers], it touts that “**the clients are known to us with better PHI**
4 than a 911 transport.” ADHS 12-0001.

5
6 In other words, at the time of the transport request, **before deciding whether to**
7 **accept a transport**, Applicant will know whether a patient is a high or low risk for payment.
8 This knowledge could dictate whether Applicant accepts the transports or passes it on to
9 another provider.

10
11 What Applicant fails to realize is that **it is this very advantage** that reveals why
12 allowing a hospital system to operate its own in-house service just because it has patients
13 to refer to itself is detrimental to the system. This “bad debt” that Applicant touts it can
14 avoid **must go somewhere** – someone must perform those ambulance transports that come
15 with higher bad debt – and if Applicant does not choose to do them, then it will necessarily
16 fall on the other CON holders, who are not privy to the PHI of Dignity patients at the time
17 of the call. Industry expert of 50 years, Mr. Roy Ryals, confirmed this: “**if they chose to**
18 **use the presence or absence of a guaranteed payer or the presence or absence of an**
19 **insurance** or some other demographic – if they chose to use that as a tool in triaging the
20 less desirable reimbursement patients to other providers, they certainly would have the
21 **capability to do that.**” Tr. Vol. 7, p. 1821:17-22. Dignity’s proposed system shifts greater
22 risk to the other service providers. Not only does this put the other service providers at a
23 competitive disadvantage, but it also undermines their “**financial strength and volume of**
24 business to continue operations to provide Arizonans with **reliable** service” (an important
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1 factor to be considered per the Guidance Document, p. 1, Heading 1).

2 Applicant's expert defined "cream skimming" as "when you have a competing entity
3 that comes in and serves **only the highly profitable patients** or provides only a highly
4 profitable service." Tr. Vol. 5, p. 1226:9-11 (emphasis added). As confirmed by Mr. Ryals,
5 knowing a patient's PHI before a dispatch fits within **at least two common definitions of**
6 **cream skimming**: (1) "you take the high efficiency in terms of revenue-producing calls and
7 run those calls and not accept or respond or take low-efficiency revenue-producing calls,
8 most commonly referred to as a 911 call;" (Tr. Vol. 7, p. 1822:18-22); and (2) "[t]he second
9 form of cream skimming is a geographic cream skimming. And the geographic cream skim
10 is where a provider comes in and staffs an deploys to take – to center of high efficiency, in
11 terms of an operational standpoint, transports out of a much larger area, leaving the
12 peripheral areas that are farther from the high-efficiency center to other providers to do
13 those calls." Tr. Vol. 7, p. 1823:4-11. Mr. Ryals concluded that "At least from the testimony
14 I've heard and the business plan is that what's proposed is sort of a **combination of the two**
15 – is taking high-efficiency revenue-producing calls out of the system without the risk of
16 having to do the low-efficiency revenue-producing calls and at the same time is
17 concentrating on the core of Maricopa County and ... the peripheral areas **they're going to**
18 **leave to the other providers.**" Tr. Vol. 7, p. 1823:11-19 (emphasis added).

19 The primary relevance of this business model ("an ambulance service that is taking
20 the **high-efficiency reimbursement calls out of the system**") is that it "**leaves a**
21 **disproportionate number of the less attractive calls to the existing providers.**" Tr. Vol.
22 7, p. 1822:24-25, p. 1823:1-3 Moreover, where providers "have no background, you have
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1 **no information on those patients, ... there's significantly higher bad debt."** Tr. Vol. 7,
2 p. 1822:22-24.

3 This also applies to transports within the Dignity-owned Arizona Care Network (see
4 below), because every patient within that network is an **insured patient**. Tr. Vol. 7, p.
5 1824:15-17. "They would have a **hundred percent assurance of pay** for those transports."
6 Tr. Vol. 7, p. 1826:1-2 (emphasis added). This reduces the number of insured patients for
7 the other ambulance providers, to the extent they were previously taking those calls. Tr.
8 Vol. 7, p. 1826:3-8. This would almost certainly lead to a higher bad debt to the other
9 providers as a relative percentage of their gross revenue: "as a relative percentage of their
10 gross revenue, they would have a higher bad debt." Tr. Vol. 7, p. 1826:9-12.

13 There is no doubt that the higher the bad debt, the more necessary it becomes to raise
14 a provider's rates. In determining rates, the Department "shall establish rates to provide for
15 a rate of return that is at least 7% of gross revenue." R9-25-1106(C). Rate of return on gross
16 revenue is partially a function of billings and collections.¹⁸ Higher bad debt not only impacts
17 a provider's bottom line, it also has the undesirable consequence of driving rates up.

19 In addition to the competitive advantage (and resulting shift of risk) that instant
20 access to PHI affords, Dignity wishes to offer its in-house service an additional disruptive
21 competitive advantage: Dignity is not motivated by **operational efficiencies**. Dignity has
22 espoused in these proceedings that its priority for Applicant is **not** that it be an efficiently-
23 run enterprise in healthy regulated competition with the other CON holders; it is primarily
24 that Dignity has "**oversight and control and influence** and ability to develop and **direct**

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28 ¹⁸ The Department considers "income statement," "cash flow," and "reimbursable and non reimbursable charges,"
among other things. R9-25-1106(A).

1 **policy**, procedure. And transparency.” Tr. Vol. 2, p. 289:20-23. “It’s that – that
2 **organizational control**” that makes this more attractive to Dignity than working with a
3 company “that Dignity Health doesn’t have an ownership interest in.” Tr. Vol. 2, p. 289:11-
4 14, p. 290:11. Dignity is open about its expectation that Applicant will “commit to
5 providing those services [to Dignity]” and “it’s going to be **independent of the volume of**
6 **services.**” Tr. Vol. 2, p. 308:23-25. Unlike working with AMR, which “is serving multiple
7 masters” (Tr. Vol. 2, p. 384:8), Dignity wants to be assured that Applicant will commit
8 ambulances to its facilities (Tr. Vol. 2, p. 309:1-5) in a manner that disregards the
9 operational efficiencies and viability of doing so from a business perspective. All of these
10 factors are wrapped up in the fact that, in the words of Applicant’s COO (who has been in
11 business with Dignity for at least eight years), “**Dignity is going to do what’s best for**
12 **Dignity.**” Tr. Vol. 5, p. 1376:20-21.

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16 Again, this creates a disruptive competitive advantage for Dignity’s in-house
17 company that undermines the “**financial strength and volume** of business” of the other
18 CON holders, detrimentally impacting their ability to “continue operations to **provide**
19 **Arizonans with reliable service.**”

20
21 Finally, there are clear dangers of having a self-referral system within a hospital
22 system. This danger surfaced with *this Applicant* and with *Dignity*: in 2012, in Nevada,
23 RBR and Dignity were sued by two former Dignity employees, who charged that they were
24 forced to transfer patients from one Dignity hospital to another “so its owners and their boss
25 could profit – at the expense of patient safety.” Exhibit ABC 2, Tr. Vol. 1, p. 64:17.
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1 According to a newspaper article about the lawsuit, a then-co-owner of AMG¹⁹ “pushed
2 hard in emails to ER doctors to promote patient shuttling and authorized bonuses to doctors
3 who transferred the most patients to other” Dignity facilities. *Id*, Exhibit ABC 2-0001.
4 Whether or not the plaintiffs in that case were successful,²⁰ it reveals the misplaced
5 incentives where a hospital is organizationally and financially incentivized to move patients
6 between facilities using its own in-house services.
7

8 **3. There is no public necessity for another IFT CON in Maricopa County**

9 In addition to the *absence* of evidence on the record showing public need for
10 Applicant’s services, there is a plethora of evidence on the record showing that public
11 necessity does *not* require another service in Maricopa County. There are currently enough
12 IFT CON holders in Maricopa County who are meeting the public’s (and Dignity’s) need
13 for convalescent and interfacility transports.
14

15 Dignity asserts that it would like Applicant to perform 11,315 IFT transports in year
16 one. It is notable that Dignity and Applicant extrapolated this number from data provided
17 by the AMR CON Holders, based on one quarter in 2015,²¹ for a subset of facilities that is
18 considerably smaller than the number of facilities that Dignity hopes Applicant will service
19 as part of this Application.²² (Dignity’s inability or unwillingness to use its own systems to
20 track its ambulance transports over the years is surprising given (1) it needs such detail to
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24 ¹⁹ AMG is 49.9% shareholder of Applicant and has management control over Applicant.

25 ²⁰ It appears that some payment was made to settle this lawsuit in January 2016: “Dr. Payoffs” is referenced in
26 Exhibit ABC 82-0014, Tr. Vol. 2, p. 394:9. And Applicant’s CEO stated that “They got their settlement payments in
27 January of ’16.” Tr. Vol. 3, p. 773:11-12.

28 ²¹ Tr. Vol. 2, p. 443:2.

²² In other words, this number is likely a substantial under-estimation of the transports Applicant will actually
perform for Dignity if this CON is granted. As AMR’s executive vice president of revenue management, Rich Bartus,
testified, this number is “stale,” (Tr. Vol. 8, p. 2122:17), and that a more accurate current number would be 18,900.
Tr. Vol. 8, p. 2123:2.

1 reconcile billing, (2) it is a \$2.1 billion a year company (Tr. Vol. 1, p. 118:25-119:1), and
2 (3) its internal policies oblige its employees to track such information (Exhibit ABC 30, Tr.
3 Vol. 2, p. 417:18).) In any event, working on the assumption that Dignity has a need for a
4 CON holder to perform 11,315 IFT transports in year one, the current CON holders have
5 the capacity to service that (and the public's) need.
6

7 As a starting point, Dignity acknowledges that "all of the patients in Dignity facilities
8 or in any Dignity hospital are being transported to and from wherever they're going **by**
9 **existing CON holders.**" Tr. Vol. 2, p. 326:7-12 (emphasis added). (And it should be
10 emphasized that such Dignity transports are currently being performed in a manner that
11 meets **all of the regulatory requirements.**)²³ Dignity acknowledges that there are **no**
12 Dignity-affiliated facilities **outside of** the service areas of intervenors AMR, Maricopa
13 Ambulance, and ABC Ambulance. Tr. Vol. 2, p. 350:16-25, p. 351:1 (emphasis added).
14 Moreover, Dignity acknowledges that (1) "the intervenors present in the room have
15 expressed the ability to **add more ambulances, if needed**" (Tr. Vol. 2, p. 325:18-22), and
16 (2) it does not have information regarding non-intervening CON holders and whether they
17 have additional capacity to serve the public in Maricopa County (Tr. Vol. 2, p. 326:3-6).
18 Moreover, the evidence shows that there are "**at least nine**" other CON holders that offer
19 IFT and convalescent transport services in parts of Maricopa County that overlap the
20 Applicant's service area request. Tr. Vol. 6, p. 1597:2.
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24 Also, it is notable that, in a telephone conversation with Dignity's Mr. O'Malley and
25 ABC's Mr. Thomas on September 22, **2016**, Dignity made no reference whatsoever to any
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28 ²³ Applicant acknowledges that none of Dignity's criticisms about AMR rise to the level of "substandard performance" under 9 A.A.C. 25-903(B). Tr. Vol. 2, p. 326:22.

1 dissatisfaction with the current providers, or to any complaints that the current providers
2 could not meet Dignity’s needs. Exhibit ABC 7, Tr. Vol. 6, p. 1412:15, p. 1414:8-9. He
3 advised Mr. Thomas that Dignity would only “be willing to discuss” ambulance transport
4 services (with ABC) “if they were not able to get their license.” Exhibit ABC 7, Tr. Vol. 6,
5 p. 1412:15, p. 1414:1-2.
6

7 **a. ABC Ambulance has the capacity to service Dignity’s needs**

8 ABC holds CON No. 139, which authorizes it to perform IFT and convalescent
9 transport services in Maricopa County. Tr. Vol. 6, p. 1392:17-22. Applicant’s assertion that
10 ABC cannot meet its needs because of the “limitations on the number of ambulances” (Pre-
11 Hearing Memo, p. 15:2) is disingenuous.
12

13 First, ABC is currently entitled to a maximum of 20 ambulances (with an additional
14 two ambulances per year going forward) but currently operates 14 (Tr. Vol. 6, p. 1417:13-
15 14). Applicant seeks to have 5 ambulances in operation (with one spare) to meet the need
16 of Dignity Health (Tr. Vol. 4, p. 872:17-18), with a proposed 11,315 transports in the first
17 year (Tr. Vol. 3, p. 836:16). In other words, based on Applicant’s own claims that it can
18 meet Dignity’s needs with 6 ambulances, ABC would be able to meet those same needs
19 with the 6 additional ambulances that it is entitled to.²⁴
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22 Second, ABC’s CEO Neal Thomas testified that, if Dignity were to approach ABC
23 to do a similar transport load, ABC has the personnel and equipment to ramp up its
24

25 ²⁴ In any event, ABC has applied to the Department to remove the limitation, which was imposed as part of a
26 settlement agreement with the Department in 2014 “to provide an important service to the public – an additional
27 ambulance provider with expertise in specialty transports, including behavioral health – while also limiting the
28 financial impact on currently certified providers.” Exhibit ABC-89, Tr. Vol. 6, p. 1499:22. Because the rationale
underlying the limitation is now defunct, and because this is the second time an applicant for a CON has used this
limitation to purportedly show that ABC is somehow *de minimus* in the “public necessity” assessment, ABC has
requested that the Department remove the limitation from its CON. Exhibit ABC-89, *id.*

1 operations to fulfill some or all of Dignity’s transports, although his “preference would not
2 be to try to take all of their transports. I would rather work with the existing providers. I
3 think that it’s in the patients’ best interest that the providers are as efficient as possible so
4 they have as many resources in certain areas so they can have the best and most appropriate
5 response times.” Tr. Vol. 6, p. 1417:9-25, p. 1418:1.

7 Third, ABC does not perform only behavioral health transports (even though it has
8 a reputation for specializing in them); about 48 percent of ABC’s transports are currently
9 considered behavioral health transports. Tr. Vol. 6, p. 1396:19-22.

11 Fourth, Dignity has never substantively explored the possibility of ABC’s meeting
12 Dignity’s needs. When Dignity first issued a Request for Information for transport services
13 in Maricopa County on or about April 13, 2015 (Tr. Vol. 6, p. 1407:15-17), ABC had not
14 yet received its CON, but Mr. Thomas did advise Dignity (Mr. O’Malley) that ABC was
15 about to get its CON. Tr. Vol. 6, p. 1409:1-5. On or about January 14, 2016, Mr. Thomas
16 emailed Mr. O’Malley offering ABC’s services to Dignity Health; Mr. O’Malley never
17 responded. Tr. Vol. 6, p. 1410:12-23.²⁵ Then, on September 22, 2016, Mr. Thomas again
18 reached out to Mr. O’Malley, but was advised that they “had a very strong partnership with
19 a company in Las Vegas” and the plan was to “provide services to all Dignity Health
20 facilities and then to Dignity partners ...” Tr. Vol. 6, p. 1413:4-10. Mr. Thomas advised Mr.
21 O’Malley that Dignity’s volume “fit squarely within our wheelhouse and with our
22 capacity,” but Dignity advised that they would only be willing to talk to ABC “if they were
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28 ²⁵ It was about this time – January 2016 – that Dignity and Applicant contracted with EMS Advisors to begin the
process of filing their own application for a CON. Tr. Vol.3, p. 800:10.

1 not able to get their license.” Tr. Vol. 6, p. 1413:20-21, p. 1414:1-2.²⁶ A final meeting was
2 held between ABC’s Mr. Thomas, Mr. O’Malley, Mr. Richardson and a representative of
3 EMS Advisors on March 1, 2017. Tr. Vol. 6, p. 1415:16-24. The substance of the meeting
4 was to request ABC to provide backup services to Applicant if Applicant was granted a
5 CON. Tr. Vol. 6, p. 1416:2-6. However, Dignity’s offer came with a *condition* that Mr.
6 Thomas considered unlawful: in return for Dignity’s transports, ABC would need to
7 withdraw its intervention in these proceedings. Tr. Vol. 6, p. 1416:7-13. Mr. Thomas
8 declined. Tr. Vol. 6, p. 1416:15.

10
11 Finally, ABC presented evidence that its current arrival times are equal or superior
12 to the arrival times demanded by Dignity in its proposed contract with Applicant. Exhibit
13 87, Tr. Vol. 6, p. 1402-1406:10. In other words, based on historical data in Maricopa
14 County, ABC is already performing at a level that is better than the level that would be
15 contractually required by Dignity from its service provider.

17 **b. Maricopa Ambulance has the capacity to service Dignity’s needs**

18 Maricopa Ambulance testified that it has “the financial capacity to service Dignity
19 transports and still meet its other obligations under its CON.” Tr. Vol. 7, p. 1630:24-25, p.
20 1631:1-2. It also testified that it has the “operational capacity to gear up” to do so. Tr. Vol.
21 7, p. 1632:5-8. In fact, Maricopa Ambulance is already performing ambulance transports
22 for Dignity. Tr. Vol. 7, p. 1630:3-4. Applicant offered no testimony that it was unhappy
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26 ²⁶ It is revealing that, at that time, Mr. O’Malley minimized the CON process by referring to it as a “license.” It yet
27 again demonstrates Applicant’s and Dignity’s fundamental misunderstanding of how the statute works. A CON is not
28 a “license,” like a driver’s license or a dog’s license, where an applicant qualifies simply by applying; an applicant
for a license does not have to prove that there are insufficient drivers or dogs. This distinction is not facetious; it is
important because the primary reason that nine days of hearing were conducted was for Applicant to show a “public
need” for what it is applying for.

1 with the service currently being provided by Maricopa Ambulance. On the contrary, all the
2 testimony pertaining to Maricopa Ambulance’s services to date is positive. Moreover,
3 Maricopa Ambulance submitted evidence that, in recorded incidents where Dignity Health
4 had complained about a lack of available ambulances or slow AMR response times,
5 Maricopa Ambulance “was never called, and in every instance had they been called, they
6 had available units to respond.” Tr. Vol. 7, p. 1729:11-13.

8 **c. AMR CON Holders have the capacity to service Dignity’s needs**

9 Applicant put on Dignity witnesses to testify to Dignity’s unhappiness with the
10 services of the AMR CON Holders.²⁷ For many reasons, Dignity’s criticisms do not ring
11 true.
12

13 First, many of them (particularly through the testimony of Dignity’s CEO, Linda
14 Hunt) **pre-date** AMR’s CON. In fact, in the time period that Ms. Hunt testified to
15 (November 2014 to March 2015) as being the impetus for looking into a new system for
16 IFT transports for Dignity, **neither AMR nor ABC nor Maricopa Ambulance** held CONs.
17 Tr. Vol. 2, p. 424:3-12. Thus, the issues she identified were “a **preexisting** issue for another
18 ambulance provider.” Tr. Vol. 2, p. 424:21-22 (emphasis added).
19

20 Second, Applicant acknowledges that none of Dignity’s criticisms rise to the level
21 of “substandard performance” under A.A.C. R9- 25-903(B).²⁸
22

23 Third, when Mr. O’Malley discussed the Application with ABC’s Mr. Thomas in
24 September 2016, he never once mentioned that Dignity was not satisfied with AMR’s
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²⁷ As defined in their Motion for Intervening Party Status filed on June 14, 2017.

28 ²⁸ This last factor was waived by Applicant. “I believe there’s no data that we have to show that there’s substandard performance.” Vol. 2, p. 326:22.

1 performance. Tr. Vol. 6, p. 1414:8-11.

2 Fourth, Dignity and/or Applicant engaged the services of EMS Advisors in Arizona
3 in January 2016 (Tr. Vol.3, p. 800:10) to begin the process of applying for their own CON
4 – just **two months** after Dignity entered into a written agreement with AMR (November
5 2015). Tr. Vol. 2, p. 284:13. Even two months is giving Dignity the benefit of the doubt:
6 they were almost certainly in discussions with EMS Advisors in the month prior to the date
7 on which that agreement was signed – meaning that Applicant did not even wait as long as
8 sixty days before “deciding” that AMR was supposedly not up to the task. This shows a
9 complete **lack of commitment** to its relationship with AMR. Mr. O’Malley half-heartedly
10 testified that, in this two month period, “some of the initial reports were showing ... subpar
11 performance.” Tr. Vol. 2, p. 285:1. But this is unconvincing as a rational explanation
12 justifying Dignity’s apparent desire to move away from AMR.
13

14
15 Fifth, all of Dignity’s criticisms of AMR that post-date Dignity’s lawsuit against
16 AMR (July 25, 2017)²⁹ should be disregarded or given minimal weight, especially the
17 testimony of Dolores Kells, Brandon Hestand and Matthew Karger. For example, Mr.
18 Karger testified that, from his perspective, it was “May of 2018 when we recognized that
19 there was a large issue that we were having with our interfacility ambulance transfers.” Tr.
20 Vol. 3, p. 637:5-7. Almost all, if not all, of his testimony relates to **incidents in 2018**. Tr.
21 Vol. 3, p. 642, 643, 646, 656, 660, 662. Also, Mr. Hestand acknowledged that (1) although
22 Mr. O’Malley was not normally someone he would report to, Mr. O’Malley had specifically
23 asked him to bring *negative* AMR experiences to his attention (Tr. Vol. 3, p. 617:23-25, p.
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28 ²⁹ Tr. Vol. 3, p. 605:23.

1 618:1-2); and (2) he was *not* requested to send *positive* experiences with AMR to Mr.
2 O'Malley (Tr. Vol. 3, p. 621:2-6). This suggests strongly that Dignity was trawling its
3 records for evidence to support its nebulous claim that it wants its own in-house IFT service
4 because the current CON providers are insufficient (and to dilute its real reasons, namely,
5 that Dignity wants control and profitability).
6

7 Sixth, and most tellingly, Applicant **did not mention any criticisms about AMR**
8 **or its service in its Application**. The closest it got to a complaint in its Application, filed
9 in June 2016, was that “the ambulance service being provided lacks much in the way of
10 competition of service.” Exhibit ADHS 1-0004, Tr. Vol. 1, p. 140:19. Applicant made no
11 mention whatsoever of complaints it later came up with as the proceedings advanced.
12

13 Last, Dignity has never filed a formal complaint about AMR’s arrival times, or any
14 other issues, with the Department. Tr. Vol. 3, p. 697:7-10.
15

16 Currently, the AMR CON Holders and Maricopa Ambulance perform IFT services
17 for Dignity Health. ABC Ambulance has the capacity to contribute to Dignity’s transport
18 requirements. There are at least nine IFT CON holders within Maricopa County that also
19 have the capacity to join in addressing Dignity’s transport referrals. There is no need for an
20 additional provider of IFT services in Maricopa County.
21

22 **C. IF APPLICANT IS GRANTED A CON, THE FINANCIAL IMPACT ON**
23 **ABC WILL BE DEVASTATING**

24 As part of the “public necessity” threshold test, the Department must consider the
25 “**financial impact**” on current CON holders. 9 A.A.C. 25-903(B)(2). “Additionally, the
26 Statutes and Rules seek to ensure that **ambulance services** have the **sufficient financial**
27 **strength and volume** of business **to continue operations** to provide Arizonans with
28

1 **reliable** service.” Guidance Document, p. 1, Heading 1 (emphasis added). The regulatory
2 model envisages that the Department will not permit newcomers if doing so puts the current
3 provision of ambulance services under pressure and creates a risk for the public. As
4 explained further below, regulating competition (by requiring a certificate of necessity)
5 would be unconstitutional if it were not in the best interest of the public to do so. Thus, by
6 protecting the *viability* of existing providers that are providing adequate services to the
7 public, and by *regulating* the rates, service area and services provided, the best interest of
8 the public is served.

9
10
11 ABC has been performing IFTs in Maricopa County since 2015. Tr. Vol. 6, p.
12 1392:25. ABC has invested heavily in the capital infrastructure supporting its operations,
13 as well as CON and start-up expenses, in the amount of approximately \$2,061,235 since
14 2013. Tr. Vol. 6, p. 1398:8-17. ABC has been fulfilling all of its duties as a regulated
15 provider of this public service, with no complaints. Tr. Vol. 6, p. 1406:22-24. ABC’s arrival
16 times are exemplary. Exhibit 87, Tr. Vol. 6, p. 1402-1406:10.

17
18 Granting a CON to this Applicant, to satisfy the business desires of its majority-
19 owner, will decimate ABC’s business. Dignity has a deep reach into the health care
20 community in Arizona. Although there was some confusion among Dignity’s and
21 Applicant’s witnesses regarding what constitutes a “Dignity facility,” a “Dignity affiliate,”
22 and a “Dignity patient” (Tr. Vol. 1, p. 179:15-25, Tr. Vol. 3, p. 843:13-19), it is clear that
23 Dignity would like this CON to serve its patients at least at its 74 related facilities (Tr. Vol.
24 1, p. 75:18-23), and patients that have visited its facilities (Tr. Vol. 3, p. 802:3, 843:13-19).

25
26
27 Of greatest threat to ABC ambulance is the fact that Dignity owns 50% of a health
28

1 plan called Mercy Care. Tr. Vol. 1, p. 80:1-6. Dignity’s Arizona CEO, Linda Hunt, sits on
2 the board of Mercy Care. Tr. Vol. 1, p. 80:6. Mercy Care and Mercy Maricopa (now owned
3 by Mercy Care) (Tr. Vol. 1, p. 80:13-14) are ABC customers responsible for **54.8%** of ABC
4 transports in 2017, and **47.9%** of ABC transports in 2018 (to the date of the hearing). Tr.
5 Vol. 6, p. 1418:7-24, p. 1419:10-16. The loss of these transports, should Mercy Care choose
6 to use the CON services of its 50% owner, would decimate ABC.
7

8 ABC is not inventing this fear, or guessing at what Dignity wants to do with Mercy
9 Care transports: in a contemporaneous note made by Mr. Thomas immediately after a phone
10 conversation with Mr. O’Malley on September 22, 2016, Mr. Thomas wrote that Mr.
11 O’Malley had expressly stated that “The plan in Maricopa County is to provide services to
12 all Dignity Health Facilities and then the **Dignity partners such as Mercy Care where**
13 **they own 50% of that company.**” Exhibit ABC 7, Tr. Vol. 6, p. 1420-1421 (emphasis
14 added). Mr. O’Malley **expressly mentioned** Mercy Care to Mr. Thomas on September 22,
15 2016. Tr. Vol. 6, p. 1420:24-25, p. 1421:1.³⁰
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17

18 Dignity’s convenient claim that it “has no authority to require Mercy Care to use an
19 ambulance service,” “because the board doesn’t make those decisions” (Tr. Vol. 1, p. 80:20-
20 25) rings hollow. Dignity is a 50% owner of Mercy Care, and Dignity (through Mr.
21 O’Malley) has openly stated its intent and desire to create an “integrated delivery network”
22 (Tr. Vol. 1, p. 201:24) through “wholly owned enterprises,” “physician groups,” and
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25

26 ³⁰ When shown Exhibit ABC 7 (Mr. Thomas’ contemporaneous notes after his telephone call with Mr. O’Malley),
27 and asked whether he disagrees with this part of his discussion with Mr. Thomas, Mr. O’Malley agreed that “we
28 talked about some of the partners that Dignity Health works with,” but “I do not recall specifically saying Mercy
Care Plan would be served by the partnership.” Tr. Vol. 2, p. 405:5-8. Given that Mercy Care constitutes such a
significant portion of ABC’s business, it is not surprising that Mr. Thomas would clearly recall this statement.

1 “partnerships.” Tr. Vol. 1, p. 202:2-5. The entire point of this CON application is so that
2 Dignity can “integrate” its “delivery network.” It is disingenuous to claim that its “network”
3 will then not make *use* of the CON services that Dignity proposes to bring into the fold.

4 Dignity and Applicant were both free to testify at the hearing that they will *not*
5 *instruct or encourage* Mercy Care to move transports away from ABC. A search of the
6 sworn testimony providing any such assurance yields nothing.

7
8 In addition to Dignity’s 50% ownership in Mercy Care, Dignity is also a 50% owner
9 of an accountable care organization called Arizona Care Network (“ACN”). Tr. Vol. 1, p.
10 78:23, 127:7-8. ACN is a “physician group” – through which Dignity intends to “integrate”
11 its “delivery service.” Tr. Vol. 1, p. 78:17-24. Dignity is deeply involved in ACN. Dignity’s
12 Linda Hunt is chair of the oversight board of ACN. Tr. Vol. 1, p. 79:3-4. A wholly-owned
13 subsidiary of Dignity is the employer of ACN employees. Exhibit ABC 53, Tr. 1, p. 129:2,
14 p. 128:14-21. ACN publicly boasts that it “retains 89 percent of referrals in-network”
15 (Exhibit ABC 25, Tr. Vol. 6, p. 1424:22, p. 1425:12-13). As it turns out, Dignity’s ACN
16 has contracted with none other than Dignity’s Mercy Care and thus Mercy Care is now part
17 of ACN’s referral network. Tr. 1, p. 129:20-23, Exhibits ABC 23 and 24, Tr. Vol. 6, p.
18 1422-1423. Dignity is thoroughly integrating its service networks, as it testified it wants to
19 do with ambulance services. Dignity has **two reasons** to refer ambulance services to Mercy
20 Care – it co-owns Mercy Care, and it co-owns the network to which Mercy Care belongs.
21 It is highly likely that Dignity will do what says it wants to do – “integrate” its “delivery
22 network” - by referring Mercy Care and ACN ambulance transports to its own CON, if it
23 gets one.
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1 This is a proverbial double-whammy for ABC Ambulance. Not only is Mercy Care
2 incentivized to move transports it currently does for ABC over to Dignity's CON (because
3 Dignity is one of its owners), but it is also incentivized to move *other* transports (those
4 within the ACN network) over to Dignity's CON (because Dignity owns 50% of the
5 network). The possibility that Mercy Care will continue to use the services of ABC if
6 Applicant gets a CON is remote at best.

8 If ABC loses Mercy Care transports to Applicant, it will suffer significant financial
9 harm. Based on ABC's 2017 ARCR and rates, ABC's income would go from a positive net
10 income of \$52,622.00, to a negative net income of \$726,346.00, for a total income loss of
11 **\$778,968.00**. Exhibit ABC 81, Tr. Vol. 6, p. 1432:10.³¹ Applicant has provided no evidence
12 whatsoever to cast doubt on, or contradict, ABC's financial impact assessment. In fact,
13 Applicant's financial expert admitted that he did **not perform any analysis** of the financial
14 impact assessment provided by ABC.³² Tr. Vol. 4, p. 1061:22-24, p. 1102:15-24.

17 **D. APPLICANT'S PRO FORMA ARCRS ARE MATERIALLY**
18 **MISLEADING AND DEFECTIVE**

19 Applicant must submit "projected" ARCRs with its Application. R9-25-
20 902(A)(3)(b). In addition, an applicant for a CON, or an applicant that is asking the
21 Department "to establish general public rates," must provide to the Department its "**most**
22 **recent financial statements or an Ambulance Revenue and Cost Report,**" as well as a
23

24
25 ³¹ Given that ABC submitted an application with the Department for a rate increase in February 2018, ABC also
26 submitted evidence of its net income (loss) in both 2017 and 2018, based on its applied-for rate, the Department's
27 suggested rate, and the Phoenix Rate Group. Exhibit ABC 90, Tr. Vol. 6, p. 1434-1436, p. 1440:14-15, p. 1441:15-
28 17. If the Department grants this rate increase application, ABC's losses will increase, as reflected in Exhibit ABC
90.

³² Mr. Evans' given reason for not analyzing ABC's financial impact assessment was based on representations made
by Applicant to him that ABC would not lose Mercy Care transports. Tr. Vol. 4, p. 1062:2-10. As noted above,
Dignity and Applicant were careful to avoid making any such statements under oath at the hearing.

1 **“projected income statement and projected cash-flow statement.”** R9-25-1101(A)(3)
2 and (4), R9-25-902(A)(3)(f).³³

3 The Department relies heavily on the information provided by an applicant in its *pro*
4 *forma* ARCRs, as Applicant’s financial expert stated: “[The ARCRs are] a tool that can be
5 used by the Department to analyze the financial health of any potential ambulance company
6 that’s applying for a certificate of necessity.” Tr. Vol. 4, p. 998:1030:13-15.

8 Not only is Applicant’s inexplicable failure to provide its own financial statements
9 fatal to its Application (as explained below), but the *pro forma* ARCRs that Applicant did
10 provide are materially misleading and in many respects fanciful. Applicant will be unable
11 to achieve its financial projections due to, among other things, over-reported income and
12 under-reported expenses.

14 **1. Applicant’s projections of performing 11,315 transports with 4.5 ambulances is a**
15 **“statistical impossibility”**

16 Applicant’s projection that it will perform 11,315 transports in its first year with six
17 ambulances is unrealistic. In fact, in the opinion of industry expert, Mr. Roy Ryals, it is a
18 “statistical impossibility,” based on an analysis of unit hour utilization, compared to the
19 current CON holders, “with 4.5 ambulances, spread across a very wide geography.” Tr. Vol.
20 7, p. 1741:19-21, p. 1742:2-3.

22 By Applicant’s own testimony, it is not achieving anything near this kind of
23 performance in its current Nevada operations: in 2015, it performed approximately 8,000
24 transports with **14 or 15 ambulances**. Tr. Vol. 4, p. 1122:14-20.

27 _____
28 ³³ As explained fully below, ABC takes the position that this obligation to provide financial statements is obligatory and their omission is fatal to an application.

1 In the opinion of Mr. Ryals, based on his analysis of Applicant’s proposed ARCRs,
2 Applicant will simply be unable to meet its proposed performance standards. Tr. Vol. 7, p.
3 1744:10-16.

4 Even Applicant’s COO conceded that Dignity’s expectations are too high. When
5 asked whether “what some of the staff at urgent cares ... desire isn’t necessarily in line with
6 what the contractual response times that you have agreed to with Dignity,” he conceded
7 “possibly. **They’re going to need to be educated**, because that’s what we’re going to do.”
8 Tr. Vol. 5, p. 1351:18-25 (emphasis added). And “[Ms. Kells] wants 30 minutes or less on
9 every single transport from those two [Dignity] facilities. How are you going to do that?”
10 His response: “**I’m not.**” Tr. Vol. 5, p. 1356:23-25, p. 1357:1 (emphasis added).
11

12 Applicant’s Application represents transports that it knows it cannot perform, and
13 contradicts the testimony presented by Applicant at the hearing.
14

15
16 **2. Applicant materially misrepresented ownership of the vehicles to be used in**
17 **Arizona**

18 Applicant’s ARCRs (both the original and amended versions) represent that
19 Applicant (RBR Management LLC dba Community Ambulance) owns the ambulances to
20 be used by Applicant.³⁴ Exhibits ADHS 1 (ADHS 1-0088) and 12 (ADHS 12-0023).
21 However, this was proven to be untrue (or, at best, upon cross-examination, Applicant was
22 not sure who owns the ambulances). Upon cross-examination, Applicant’s CEO testified
23 that the ambulances are in fact titled in the name of AMG (the company he co-owns with
24 Applicant’s COO): “they [AMG] purchase the ambulances, lease them back through to the
25 ambulance company [RBR].” Tr. Vol. 4, p. 998:11-17. Title passes to RBR only when the
26
27

28 ³⁴ The Application reflects depreciation taken for the assets, which only an owner is entitled to take.

1 ambulances are “paid off.” Tr. Vol. 4, p. 999:14. No lease agreements were provided by
2 Applicant reflecting this arrangement, or were even acknowledged to exist by Applicant’s
3 CEO. Tr. Vol. 4, p. 1000:8-10.

4 Applicant’s financial expert was “not aware of any other ownership of the
5 ambulances” when asked whether it was his “understanding that all six ambulances on the
6 ARCR are owned by RBR.” Tr. Vol. 4, p. 1081:2-5.³⁵ It appears that Applicant failed to
7 advise its own expert as to ownership of the primary assets on its ARCRs.
8

9 Applicant’s expert also testified that he reviewed Applicant’s financial statements
10 from Nevada for 2015 (which were never provided to this tribunal or the Department – see
11 below), and that he does not recall seeing any expenses for ambulances leases. Tr. Vol. 4,
12 p. 1101:18-21.
13

14 Under cross, Applicant’s CEO also conceded that AMG owns “some” of the
15 ambulance *equipment* referenced in the ARCRs. Tr. Vol. 4, p. 1120:12-25.
16

17 Because Applicant did not provide any of its actual financial statements (which it
18 was obliged to do - see below), the pro forma ARCRs are the only document upon which
19 this tribunal and the Department can rely to determine the proposed business model and
20 financial position of the Applicant. There is thus a heightened responsibility to be
21 scrupulously transparent and honest with the Department regarding assets and liabilities,
22 given that the Department (in the absence of actual financial statement) has few means of
23 verifying the projected assets and liabilities against the actual assets and liabilities of an
24
25

26
27 ³⁵ This may not be surprising given that Applicant’s financial expert was not even aware that Dignity Health is a
28 majority owner of Applicant. He believes that Applicant (RBR) “is comprised of two individuals”. Tr. Vol. 4, p.
1080:1-6.

1 applicant.

2 Applicant's material misrepresentation of ownership of the largest assets that an
3 ambulance company is expected to have is not only a violation of GAAP reporting
4 requirements, but also yet again shows that the Application does not represent what
5 Applicant plans to do.
6

7 **3. The discrepancies between Applicant's initial and amended ARCRs are**
8 **unexplained and irrational**

9 *Loaded billable miles* in the initial ARCRs was 90,520. Tr. Vol. 5, p. 1138:19. That
10 number almost doubled to 177,646 in the amended ARCRs. Exhibit ADHS 12-0004.
11 Applicant's CEO testified that the first number was calculated on the location of Dignity
12 facilities, and that the same methodology was used in the amended ARCRs. Tr. Vol. 5, p.
13 1139:6-22. No explanation is given as to how or why that number was inflated to 177,646,
14 given that the Dignity facilities have not moved.
15

16 Applicant massively overstates *cash flow*, which in fact, using Applicant's own
17 numbers, becomes negative. Projected total *operating revenue* from the initial ARCRs to
18 the amended ARCRs goes up from approximately \$5.5 million to \$7.1 million,³⁶ which is
19 about **29%**. Tr. Vol. 5, p. 1140:3-23. However, the correlated *accounts receivable* number
20 goes up from \$7.2 million to \$7.4 million,³⁷ which is only **2%**. Tr. Vol. 5, p. 1141:17. This
21 is not a petty error or misrepresentation. This dramatically impacts Applicant's viability and
22 indicates yet again the unreliability of any of the numbers included in its Application.
23 Applicant's failure to simultaneously increase its accounts receivable to a realistic
24
25

26
27
28 ³⁶ Exhibit ADHS 1-0071, line 10, and ADHS 12-0006, line 10.

³⁷ Exhibit ADHS 1-0091, line 2, and ADHS 12-0026, line 2.

1 percentage and number (2% is a near impossibility) must be a mistake, but it results in a
 2 misrepresentation by overstating collections, which means there is an additional need for
 3 operating capital to make up for the increased AR. Applying the same collection rate that
 4 Applicant used in its initial ARCRs (65%) to its amended ARCRs shows that in reality
 5 Applicant has understated its accounts receivable by **\$1,141,742**.³⁸
 6

	Initial	Revised	Expected
Transports	11,315	11,315	11,315
Sales	11,062,056	13,143,621	13,143,621
AR	7,221,611	7,401,611	8,580,513
	65%	56%	65%
Understated AR 8,580,513-7,221,611 = 1,141,742			

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 10 Once this understatement of AR is established, this necessarily impacts Applicant's
 11 *cash flow*. Applicant's amended ARCR cash flow statement shows a projected ending cash
 12 balance of \$858,697.³⁹ After adjusting the overstatement of collections (see above), the
 13 ending cash balance becomes negative ($\$858,697 - \$1,141,742 = - \$320,205$). Applicant
 14 has not met the requirements of showing that operations cash flow will cover operations
 15 expenses within the first year, as required in the regulations.⁴⁰
 16
 17

18 **4. Applicant has contractually agreed to perform wheelchair and stretcher van**
 19 **services, but does not account for them in its ARCRs (and has never performed**
 20 **any such services in the past)**

21 In Applicant's contract with Dignity, Applicant has agreed to perform "Convalescent
 22 Wheelchair or Gurney" services for Dignity "through qualified subcontractors or
 23 Community-owned vehicles." Exhibit CA 17 (p.1), Tr. Vol. 2, p. 417-419. However,
 24 Applicant airily conceded that it plans on "transferring those calls." Tr. Vol. 5, p. 1173:6.⁴¹
 25

26 ³⁸ "Sales" refers to projected "Operating Revenue" at Exhibit ADHS 1-0071, line 1, and ADHS 12-0006, line 1.

27 ³⁹ ADHS 12-0027, line 29.

28 ⁴⁰ R9-25-902(3)(d): "The source and amount of funding for cash flow from the date the ground ambulance service commences operation until the date cash flow covers monthly expenses."

⁴¹ This is because, as Applicant conceded, it has **never performed** such services in the past (Tr. Vol. 5, p. 1172:20-

1 “Subcontracting” stretcher van services to another company (as required in the agreement
2 with Dignity) is very different to simply “transferring” those services to another company.
3 With subcontracting, Applicant would have to go through the process of credentialing and
4 contracting with other companies that do such work, plus have claims payment and
5 receiving mechanisms in place that are not normal to an ambulance operation. Thus, if
6 Applicant actually plans to comply with this part of its agreement with Dignity, this kind of
7 operation would necessarily impose on the resources of Applicant in the form of allocation
8 of expenses for a dispatch center, for supervisors, for HR and other expenses associated
9 with overseeing the subcontract. None of this was included in Applicant’s ARCRs. If
10 Applicant *had* included such additional expenses in its ARCRs, it would have negatively
11 impacted Applicant’s statement of profitability, reflecting yet again Applicant’s
12 understatement of expenses.

13
14
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16 **5. The ARCRs do not reflect what Applicant intends to do or can do**

17 Applicant’s disclosed a written note that shows that, at least in some regards,
18 Applicant admits that the ARCRs do not reflect its intended plans. Exhibit ABC 63, Tr. Vol.
19 4, p. 1097:10. This was a document in which Mr. Taylor (who prepared the ARCRs for
20 Applicant) was requesting information from Applicant to prepare the ARCRs. Tr. Vol. 4,
21 p. 1073:4-17. When asking questions regarding fleet service, he was advised that “the
22 Sprinters more than likely will not come to Arizona.” He noted “Why are we not loading
23 what we expect to do in the ARCR?” Tr. Vol. 5, p. 1154:17-19.

24 This same evidence shows an intent to mislead on the issue of expenses. In response
25
26

27
28 _____
22). This yet again reveals Applicant’s propensity to promise more than it intends to perform.

1 to an observation that “no wages are shown for Officers/Owners,” the response came: “Like
2 Hellsgate, **they do not want to show**, the owners do not get a wage.” Exhibit ABC 63, Tr.
3 Vol. 5, p. 1153:21-25, p. 1154:1-4 (emphasis added).

4 Under cross, Applicant’s CEO admitted that he and Applicant’s COO received
5 approximately **\$1.3 million** in management fees, paid by Applicant to them, from their
6 Nevada operations in **2017** alone. Tr. Vol. 5, p. 1157:4-8. Applicant indicated that it has
7 “waived the management fee for the first year” in Arizona. Tr. Vol. 4, p. 992:16-17.
8 However, the parties are “in the middle of negotiations” as to whether it will be payable in
9 year two. Tr. Vol. 4, p. 992:23. Applicant’s CEO acknowledged that he is certainly
10 anticipating a management fee in year two. Tr. Vol. 5, p. 1159:2-4. This was not
11 communicated in any correspondence with the Department. This is not surprising based on
12 the Applicant’s pattern of (1) contradicting its Application at the hearing (showing its failure
13 to grasp the importance of the *pro forma* ARCRs),⁴² and/or (2) hiding its true intentions.
14 It is highly misleading for Applicant’s ARCRs to omit such a large expense that will arise
15 in forthcoming years of operation.

16
17 Applicant’s ARCRs show **zero discounts** to Dignity Health. Even though Applicant
18 and Dignity included discounts **in their contract** (Exhibit CA 17, Tr. Vol. 5, p. 1159:22-
19 23), such discounts were reflected as **zero** in its ARCRs.⁴³ Assuming its *pro forma* ARCRs
20 are incorrect, and assuming that Applicant plans to comply with its signed agreement with
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26 ⁴² Question to Applicant’s CEO: “What do you think the relevance is of you using the word ‘pro forma’ there?”
27 Answer: “It’s just that you take your best assumptions and put it in the document, but like anything it’s variable ...”
28 Tr. Vol. 5, p. 1146:10-11.

⁴³ This is in direct contrast to its operations in Nevada, where Applicant conceded its net revenues from Dignity transports (where Dignity was the payor) were around \$3 million in 2015. Tr. Vol. 5, p. 1159:11-25.

1 Dignity (in other words, assuming that Dignity will be given a discounted rate), the **lack of**
2 **discounts in its ARCRRs artificially inflates its projected revenues in its ARCRRs.**

3 Applying Applicant's numbers from Nevada, this could be an inflation of as much as
4 **\$900,000.00** (reasonably assuming a discount rate of 30%⁴⁴ on its Nevada Dignity revenue
5 of \$3 million). During the hearing, the Department agreed that (albeit based on a different
6 hypothetical calculation of lost revenue through discounts - Tr. Vol. 4, p. 1020:15-22) this
7 would be a "**fair amount of lost revenue that's not reflected in the ARCRRs.**" Tr. Vol. 4,
8 p. 1020:24-25, p. 1021:1. Applicant's failure to include discounts in its ARCRRs results in a
9 material inflation of revenue. Given that Applicant's net income is projected to be
10 \$726,539.00 (Exhibit ADHS 12-0006 (line 28)), discounts amounting to anything near
11 \$900,000.00 would have a dramatic effect on the resulting economics of Applicant's
12 proposed operation.
13
14

15 Applicant models its proposed Arizona operations on its Nevada operations.⁴⁵
16 However, Applicant proposes less staff in Arizona than its Nevada operations,⁴⁶ only part-
17 time staff in Arizona (see below),⁴⁷ Nevada employees (fleet, payroll and accounting
18 functions included) will overlap with Arizona operations,⁴⁸ no overtime to be paid in
19 Arizona⁴⁹ (by contrast, Applicant pays overtime in Nevada),⁵⁰ with a much larger service
20
21

22
23 ⁴⁴ According to the Department's Aaron Sams, "Most people that offer a discount, the percentage is 30 percent." Tr.
Vol. 4, p. 1018:18-19.

24 ⁴⁵ Applicant has "successfully provided high-quality interfacility ambulance transports in Southern Nevada for 8
years." Applicant's Pre-Hearing Memorandum, p. 9:7.

25 ⁴⁶ Tr. Vol. 4, p. 997:9 (Mr. Richardson refers to 285 employees, in answer to a question about how many employees
AMG has, presumably referring to Applicant's employees - he corrects his answer regarding AMG to "two" - and
26 later testifies that RBR technically employs everybody (Tr. Vol. 4, p. 998:7-10)). Applicant's amended ARCRRs
provide for 60 F.T.E.s. Exhibit 12-0009, line 22.

27 ⁴⁷ Tr. Vol. 4, p. 1069:8-13.

28 ⁴⁸ Tr. Vol. 5, p. 1142:14-18.

⁴⁹ Tr. Vol. 4, p. 1000:25, p. 1001:1-6.

⁵⁰ Tr. Vol. 4, p. 1001:18-19.

1 area in Arizona. It is unrealistic to assume that, because Applicant may have an apparently
2 successful business model in Nevada (which it has *not* shown – see below), it is likely to be
3 successful in Arizona (based on its own assumptions).

4 Applicant’s initial and amended ARCRs represent that “cost of goods sold” will be
5 **zero**. Exhibit ADHS 12-0007. This means that Applicant is not going to have any supplies
6 purchased ahead of time that are in inventory. Even Applicant’s COO himself believes this
7 is “unrealistic.” Tr. Vol. 5, p. 1349:7-17. Yet again, Applicant contradicts its own
8 Application during testimony, yet again demonstrating the unreliability of the data and
9 promises provided by Applicant.
10
11

12 **6. Applicant’s staffing model is unique, untested and likely unworkable**

13 Applicant’s *pro forma* ARCR proposes to staff its Arizona operations with **part-**
14 **time employees only**. Tr. Vol. 4, p. 1069:8-13. Applicant’s expert conceded that, in his
15 decades of preparing over 200 ARCRs (Tr. Vol. 4, p. 1028:1), he does not recollect ever
16 having prepared an ARCR for an ambulance provider that was going to rely solely on part-
17 time employees. Tr. Vol. 4, p. 1098:19-22. Applicant’s COO testified that it was “a little
18 challenging to me” when he reviewed what was represented in the ARCRs, because what
19 he plans to do in reality “is a little different than it says in the” ARCRs. Tr. Vol. 5, p.
20 1329:18, p. 1329:23-24. He testified that, in spite of what Applicant had put into the
21 ARCRs, Applicant would need employees to work on average a 42-hour work week, and
22 be paid overtime. Tr. Vol 5, p. 1330:8-16. This is in direct contrast with Applicant’s *pro*
23 *forma* ARCRs, which do not include any overtime for ambulance crews. Tr. Vol. 4, p.
24 1000:25, p. 1001:1-6. In reality, Applicant plans to use full-time employees - yet another
25 material inconsistency with its Application.
26
27
28

1 **E. APPLICANT HAS FAILED TO SHOW THAT IT IS FIT AND PROPER**

2 "Fit and proper" means "that the director determines that an applicant ... has the
3 **expertise, integrity, fiscal competence and resources** to provide ambulance service in the
4 service area." A.R.S. § 36-2201(21) (emphasis added). Applicant fails to prove this second
5 requirement to qualify for a CON.

6
7 Applicant bases its claim that it is "fit and proper" on the fact that its CEO and COO
8 have "nearly 70 years combined experience" (Applicant's Pre-Hearing Memorandum, p.
9 7:23-26) and have "successfully provided high-quality interfacility ambulance transports in
10 Southern Nevada for 8 years." Applicant's Pre-Hearing Memorandum, p. 9:7. However,
11 even after nine days of hearing, there is very little evidence of the "success" or otherwise
12 of Applicant's Nevada operations. Applicant's CEO testified that "we were doing well in
13 Nevada and everything was going fine." Tr. Vol. 3, p. 799:11-12. He also testified that
14 Applicant's gross revenues in 2017 were approximately \$38 million. Tr. Vol. 5, p. 1157:4.
15 Dignity testified that, in Nevada, Applicant had a "tremendous impact" on Dignity's
16 overcrowding issues (Tr. Vol. 1, p. 37:19), "saved the hospital system a substantial amount
17 of money" (Tr. Vol. 1, p. 38:12), and that Dignity had "seen an incredible improvement in
18 the level of service" in Nevada (Tr. Vol. 2, p. 281:8-9).⁵¹ That is essentially the extent of
19 Applicant's evidence to support its claims of running a "successful" operation in Nevada.
20 Applicant's evidence is insufficient to prove that its Nevada model could be "successful"
21 in Arizona, or that it is "fit and proper."
22
23
24
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26 _____
27 ⁵¹ Dignity made it clear that its favorite characteristic of Applicant is that Dignity has "members place on the board of
28 managers that are providing that ultimate oversight," and "only in a partnership kind of a situation like this do you
see that level of oversight and control and influence and ability to develop and direct policy, procedure." Tr. Vol. 2,
p. 288:15-16, p. 289:19-22.

1 **1. Applicant has not provided its own financial records**

2 A glaring black hole in RBR’s Application is the complete absence of any of its
3 financial statements on the record. Applicant has been in operation in Nevada for **eight**
4 **years**, bases its Application on the apparent success of its Nevada operation, and yet made
5 the strategic decision to withhold its financial statements, choosing instead to provide only
6 its hopes and dreams in the form of the blatantly deficient (see above) *projected* ARCRs.
7 Without actual financial records, it is difficult if not impossible to assess whether the
8 Applicant is “fit and proper” to run an ambulance company, nor to establish rates for the
9 Applicant.
10 Applicant.

11 ABC takes the position that an applicant for a CON, or an applicant that is asking
12 the Department “to establish general public rates,” is *obliged* to provide to the Department
13 its “**most recent financial statements or an Ambulance Revenue and Cost Report,**”
14 based on the unambiguous wording of A.C.C. R9-25-902(A)(3)(f) and A.C.C. R9-25-
15 1101(A)(3). Applicant has no actual ARCRs to submit (as it has not been in operation in
16 Arizona at all),⁵² therefore Applicant was obliged to submit to the Department its **actual,**
17 **“most recent” financial statements.** Applicant’s failure to submit any of its financial
18 statements in these proceedings should be fatal to the Application.
19
20
21

22 A *pro forma* ARCR is not a substitute for actual financial statements of Applicant.
23 A *pro forma* offers nothing on the current financial position of Applicant nor does it offer
24 insight into Applicant’s past performance. In the absence of Applicant’s financial records,
25

26 _____
27 ⁵² This requirement certainly does not intend to refer to *projected* ARCRs – which are covered by A.C.C. R9-25-
28 902(A)(3)(b) – or to *projected* income statements or cash-flow statements – which are covered by A.C.C. R9-25-
1101(A)(4). It refers simply to the “Annual Cost and Revenue Report.” This provision applies also to rate increase
applications (in other words, existing providers, who are obliged to submit ARCRs annually).

1 there is no evidence on the record to assess whether Applicant's Nevada operations are
2 objectively successful. While there is evidence of *gross* revenue in Nevada, there is no
3 evidence of Applicant's *operating expenses, balance sheet or cash flows* in Nevada, and
4 therefore Applicant's financial status has been hidden by the Applicant (while the
5 Intervenors' financial statements and audited financials are public information and
6 possessed by the Applicant). Applicant's bald statements, upon which this tribunal and the
7 Department is expected to conclude that Applicant has the required "expertise," must be
8 disregarded.
9

10
11 The only financial records Applicant decided to reveal to the Department are
12 **Dignity's** 2014 and 2015 consolidated financial statements.⁵³ These offer no insight into
13 the operations of Applicant in Nevada. While choosing to disclose Dignity's financial
14 statements, Dignity and Applicant chose **not** to reveal the financial statements of **AMG**, the
15 49.9% owner and the managing member of Applicant. Tr. Vol. 3, p. 774:5. Dignity is not
16 the Applicant and it is absurd to believe Dignity's consolidated financial statements are a
17 substitute for the Applicant's.
18

19 Applicant's case around its fiscal competence shows only that it *may* have access to
20 Dignity's (apparently deep) pockets, and that it has access to lines of credit and cash
21 (amount unknown) in Nevada. Dignity testified that there are "mechanisms" in place to
22 make contributions or loans to Applicant "through a loan ... as well as a capital call
23 depending upon what level of commitment would be needed." Tr. Vol. 1, p. 86:1-7.
24
25
26

27 ⁵³ Hidden deep in Exhibit ADHS 1 (the Application) (Exhibit ADHS 1-0094 to 1-0148), but they were never
28 specifically testified to, and Applicant is not mentioned in them at all (even in the list of "Dignity Health,
Subordinate Corporations and Subsidiaries" – ADHS 1-0148).

1 Applicant testified that, as its “source and amount of funding for its start-up operation” in
2 Maricopa County, it has a line of credit for capital, and another line of credit for operational
3 expenses. Tr. Vol. 3, p. 835:9-22. Applicant’s CEO was unsure how much cash is available
4 in Applicant’s bank account, offering a *broad range* of “somewhere between 500- to
5 \$700,000 cash.” Tr. Vol. 3, p. 835:23. This was for the RBR company as a whole and not
6 just for the start-up operations of Arizona. The only written evidence submitted by
7 Applicant to support these contentions was one letter from its Nevada bank, confirming an
8 existing line of credit (with no reference made to any start-up operations in Arizona).
9 Exhibit CA 147, Tr. Vol. 5, p. 1185:5-12.

12 Applicant has been in business in Nevada since 2010, and yet does not wish be
13 transparent about the financial health of its Nevada operations. This makes it difficult to
14 assess, based on real data, whether in fact Applicant has been successful and/or profitable
15 and/or fiscally competent and/or financially honest in its Nevada operations (as it asserts),
16 nor whether Applicant itself is financially sound and stable.

18 It is notable that Applicant was very keen to introduce into evidence (over
19 objections) its Nevada records reflecting its compliance with response time requirements.
20 Tr. Vol. 5, p. 1286:5-25, p. 1287 – 1290. Applicant’s attorney proclaimed that Applicant
21 wanted “transparency and sharing with this Court.” Tr. Vol. 5, p. 1288:16-17. But this
22 transparency and sharing did not extend to Applicant’s financial data.

24 Applicant’s lack of transparency regarding its own financial records necessarily
25 raises red flags about the way Applicant conducts its business. Moreover, its glaring absence
26 makes it difficult to assess Applicant’s fiscal competence, and ultimately whether Applicant
27

1 is fit and proper to hold a CON in Arizona.

2 **2. Applicant's services in Nevada have been the subject of many employee**
3 **complaints**

4 Contrary to Applicant's proclamation that "we were doing well in Nevada and
5 everything was going fine" (Tr. Vol. 3, p. 799:11-12), evidence shows that Applicant's
6 employees may not hold the same views. During about April 2017, Applicant conducted a
7 survey of its employees, asking questions like "do you believe Community has gotten better
8 or worse in the time you've been part of the organization?" Exhibit ABC 5 - 0001, Tr. Vol.
9 5, p. 1160:23. In answer to the question, an employee wrote (emphasis added):

11 There is and has been a **major issues with follow though** and
12 communication, from the management of the company. Very regularly,
13 employees are told things, and there is never any follow though, it's
14 come to a point where pretty much **anything that is said can just be**
15 **disregarded**, because we know it won't actually happen. This goes for
16 statement/promises to individual employees, and company wide as well.
17 It doesn't seem as though its done to with malice, but in the end it has
18 created a **complete lake of faith in those running the company**. One
19 example, ambulances. Mistakes happen, and the Mccoy Miller trucks
20 were a mistake, there has been many statements that have gone
21 unfulfilled. Even with the retrofitting that is going on with them, the
22 trucks still don't hold up, and are **unsafe**. Even if the trucks were great,
23 we still don't have enough, and we have all been told multiple times that
24 more trucks are on the way. There's the rumor that we have to go though
25 the process and wait for the company to sue mccoy miller, and thats fine,
26 but we still need more trucks. And from what the employees see, its not
27 like the company can't buy more trucks, we keep hiring more people,
28 and keep hearing how **we're expanding to Arizona**. There are many
other examples of the **lack of follow though** from management, but this
is one that everyone can agree on. Exhibit ABC 5 - 0002 (#22).

24 While the survey contains some complimentary messages, this complaint appears to
25 sum up the gist of many of the employee complaints (over 25 pages) included in the survey
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1 (“unkept promises, no raises, it feels as if concerns fall upon deaf ears;”⁵⁴ “[a]s Community
2 has grown I’ve seen them take less care for employees and stretch limited supplies to unsafe
3 means;”⁵⁵ “there’s no longer any follow through on promises made by management;”⁵⁶ “I
4 don’t think Community puts patient care first. I think profit is the top priority”⁵⁷). In other
5 words, many employees feel that they cannot trust what Applicant’s “management” says.
6 These are important signals, especially given the dearth of financial substantiation of claims
7 made by Applicant to this tribunal and the Department.
8

9 **F. IRRELEVANT EVIDENCE THAT SHOULD BE DISREGARDED**

10 **1. Applicant’s letters of support are meaningless**

11 ABC re-iterates its objection to the admission of the letters of support that Applicant
12 submitted as part of its Application. Tr. Vol. 4, p. 1011:5-8, p. 1012:1-15, p. 1015:10-13.
13 Not only are they classic hearsay, but they are **unreliable** hearsay. Even though “[i]t is clear
14 in Arizona that hearsay is admissible in administrative proceedings, and that it may, in
15 proper circumstances, be given probative weight,” the hearsay must be “reliable”: it must
16 be of the kind reasonable persons rely upon in serious matters. *Begay v. Arizona Dep’t of*
17 *Economic Sec* 128 Ariz. 407, 626 P.2d 137 (Ariz. App. 1981). The reliability of the opinions
18 offered in the letters of support is materially undermined by the fact that the letters were not
19 written by the signatories thereof -- every letter is almost identical, and the draft was
20 provided to each signatory by Applicant’s representatives. *See Exhibits ADHS 17-24.*
21 Moreover, each letter was based on a misrepresentation regarding the Applicant’s proposed
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27 ⁵⁴ Exhibit ABC 5 - 0002 (#31).

⁵⁵ Exhibit ABC 5 – 0003 (#40).

⁵⁶ Exhibit ABC 5 – 0003 (#45).

⁵⁷ Exhibit ABC 5 – 0005 (#21).

1 service area. One of the signatories, Mark Nichols, Fire Chief of Daisy Mountain Fire
2 District, and signatory of Exhibit 24, testified that Dignity represented that Applicant's
3 proposed service area was only to serve "**Dignity facilities.**" Tr. Vol. 5, p. 1448:9-19. For
4 this reason, he did not perceive that the Application would a threat to Daisy Mountain's
5 CON (Tr. Vol. 5, p. 1449:7-11) because there are no Dignity facilities within Daisy
6 Mountain's CON district (Tr. Vol. 6, p. 1459:19-21). Chief Nichols also testified that the
7 letter he signed was a "form letter" (Tr. Vol. 5, p. 1449:12-13), that was provided by
8 Applicant's agent, EMS Advisors, that he put on Daisy Mountain letterhead, signed and
9 sent back. Tr. Vol. 6, p. 1460:1-9.

12 There is no doubt that the support letters constitute hearsay. The question is whether
13 they are *reliable* hearsay. Given that the signatories did not write them (they were "form
14 letters"), and given that they were based on a misunderstanding of what Applicant was in
15 fact asking for (a CON to service the whole of Maricopa County), the letters are unreliable
16 as evidence that the signatories thereof fully and unreservedly support Applicant's CON
17 request. As such, the letters should be excluded from evidence.

19 However, to the extent that such letters are found to be admissible, they should in
20 any event be given no weight for the all reasons set out above – the signatories did not write
21 them, and they were based on a misunderstanding of what exactly Applicant is seeking.

23 **2. Evidence pertaining to "competition" is irrelevant and has been rejected by**
24 **Arizona's regulatory model**

25 ABC re-iterates its objection to Applicant's witness, Dr. David Argue, to the extent
26 that he testified at all, and to the extent that he testified to the "benefits of competition." Tr.
27 Vol. 5, p. 1191:1-25, p. 1194:22-25, p. 1195:1-5. "Competition" is not relevant to this
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1 Application because Applicant will not be competing for Dignity’s business (Dignity
2 proposes to use only its own in-house IFT service), and, in any event, free market,
3 unregulated “competition” was done away with in 1982, when the current regulatory model
4 was established.

5
6 **a. Dignity does not want competition; it wants its own in-house service**

7 Applicant’s argument is disingenuous because Applicant does not propose to offer
8 any “choice” to Dignity’s patients. Dignity patients will only be offered Dignity’s
9 ambulance services. Dignity has made it very clear that this is an in-house service it is
10 looking for. Dignity wants “ownership by Dignity, oversight by Dignity, fiduciary
11 relationship with Dignity.” Tr. Vol. 2, p. 430:13, p. 431:9-13. It acknowledged that its needs
12 could not be met by “any independent, non-owned” ambulance company in Arizona. Tr.
13 Vol. 2, p. 431:14-19. This is the very antithesis of competition. For this reason alone,
14 Applicant’s evidence attempting to show benefit to the system by increasing competition
15 should be disregarded.
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18 **b. Open, free market competition was done away with in 1982**

19 Dr. Argue testified that “competition is generally helpful in healthcare markets”
20 because “it’s been shown to result in better quality and lower prices of services.” Tr. Vol.
21 5, p. 1208:7-9.⁵⁸ He opined that “it really comes down to the purchaser” (Tr. Vol. 5, p.
22 1209:1-2), but immediately conceded that it had nothing to do with the “actual purchaser,”
23 but was rather “the hospital” that “arrange[s] these services and make[s] contractual
24 agreements with providers.” Tr. Vol. 5, p. 1209:2-6. He believes that “it’s really the ability
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28 ⁵⁸ He conceded that, in the context of CON applications, “the price piece” is not relevant (Tr. Vol. 5, p. 1208:10)
(presumably because rates are set by the Department).

1 of the hospitals to have alternative ambulance service providers to which they can turn for
2 the services.” Tr. Vol. 5, p. 1209:7-9.

3 Dr. Argue’s opinion can be disregarded for two reasons. First, his opinion is based
4 on the false premise that “the hospital” (i.e. Dignity Health) is looking for “alternative
5 ambulance service providers.” As explained above, Dignity is not interested in having
6 Applicant compete with other providers – it simply wants its own in-house service. Second,
7 as explained below, Dr. Argue’s exact argument -- namely, that open competition would
8 benefit quality and price -- was decisively *rejected* by Arizona’s voters in 1982, when the
9 current regulatory model (requiring proof of “public necessity”) was introduced by
10 constitutional amendment. His opinion is thus irrelevant to any application for a CON.

13 Prior to 1980, Arizona ambulance companies were regulated by the Arizona
14 Corporation Commission as public service corporations. *Southwest Ambulance, Inc. v.*
15 *Arizona Dep’t of Health Servs.*, 183 Ariz. 258, 259–60, 902 P.2d 1362, 1363–64 (Ct. App.
16 1995), citing Ariz. Const. art. XV, § 2 historical note; *Emergency Medical Transport, Inc.*
17 *v. City of Tempe*, 157 Ariz. 260, 261, 756 P.2d 929, 930 (App.1988).

19 As a result of a 1980 general election referendum, for a brief period (1980 to 1982),
20 ambulance companies were deregulated. *Id.*

22 However, within two years, in November 1982, after another general election
23 referendum, ambulance companies were again made subject to regulation. This time, rather
24 than making them subject to the jurisdiction of the Arizona Corporation Commission, the
25 constitution made them subject to regulation directly by the legislature. *Id.* at 260, citing
26 Ariz. Const. art. XXVII, § 1.

1 In the 1982 referendum, the arguments both for and against the re-regulation of the
2 ambulance industry were set out in literature published at the time. Opponents of the 1982
3 referendum (who were unsuccessful) made the same arguments that Applicant makes here.
4 They warned against the new constitutional amendment (which is the current constitutional
5 provision) because “The present system of **free competition** results in *better service and*
6 *lower charges* for persons needing ambulance services. Proposition 100 would bring back
7 a system of regulated monopoly for ambulance services, and the **public would suffer**
8 **because of poor service, delays and additional costs.**” Exhibit ABC 8 - 0005, Tr. Vol. 5,
9 p. 1442:22 (emphasis added). Opponents to regulation warned that “Proposition 100
10 attempts to turn back the clock by **returning government regulation** to the ambulance
11 industry. Arizonans should vote to **keep competition in the ambulance industry** by saying
12 no to Proposition 100.”⁵⁹ *Id.* These arguments were soundly rejected by the electorate and
13 “government regulation” was re-introduced to govern the provision of ambulance services
14 (in the form of having to prove various stringent requirements, including “public
15 necessity”). Applicant’s arguments are approximately 37 years too late.

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19 In implementing the statutory scheme in this light, and determining whether to issue
20 a CON to Applicant, the ALJ and the Department should be guided by the following
21 principles relating to competition in a regulated industry:
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23 “Competition is the general rule. **However, when an entity dedicates private**
24 **property to a use in which the public has an interest**, it grants the public an interest in
25 that use and must submit to regulation for the public good. **The right to public protection**
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28 ⁵⁹ Arguments in favor 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.” *Id.*

1 **then outweighs the right of competition."** *Sw. Transmission Co-op., Inc. v. Arizona Corp.*
2 *Comm'n*, 213 Ariz. 427, 432, 142 P.3d 1240, 1245 (Ct. App. 2006) (internal citations
3 omitted) (emphasis added).

4 The rationale underlying why the public interest is not served by handing out
5 certificates to anyone who applies in the context of public services is apparent from the
6 following ruling:⁶⁰ "A system which did not provide certificate holders with an opportunity
7 to provide adequate service at reasonable rates [before deletion of a certificated area could
8 be made] would be antithetical to the public interest for several reasons. First, it would
9 encourage price competition between public service corporations,⁶¹ **the very mode of**
10 **operation which the Legislature has rejected.** Second, it encourages **over-extensive**
11 **development.** ... The **consuming public will ultimately pay for this needless**
12 **construction** ... Third, it fails to reward a public service corporation for **taking on the risks**
13 **and obligations** concomittant to certification. ... Finally, it discourages service by
14 companies that would supply service **to sparsely populated** areas today, at a marginal
15 profit, ..." *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 426, 429–30, 671
16 P.2d 404, 407–08 (1983) (emphasis added).

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21 "Public convenience and necessity are not furthered in most cases by the
22 maintenance and operation of a number of competing plants or systems of the same
23 character to supply a locality, but that they are generally far better served in the long run by
24 the **maintenance only of the smallest number of such instrumentalities which will**
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27 ⁶⁰ This case dealt with a certificate of need and necessity, which is comparable to a CON in the sense that both
require a showing of public interest. *See, for example, Arizona Water Co. v. Arizona Corp. Comm'n, supra*, at 656.

28 ⁶¹ Public service corporations generally must be regulated in rates, service and service area, which ambulances
services are also subject to.

1 **adequately serve the public needs.”** *Corporation Commission v. People's Freight Line,*
2 *Inc.*, 41 Ariz. 158, 16 P.2d 420 (1932).

3 To the extent that this tribunal and the Department take the so-called “benefits of
4 competition” into account in this CON application, it is relevant that the Intervenors have
5 each “dedicated private property” (ABC has invested a total \$2,061,236 since 2013)⁶² to a
6 use in which the public has an interest – ambulance services. In return, each Intervenor has
7 submitted to regulation for the public good, and taken on the risks and obligations
8 concomittant to certification. “Over-extensive development” of overlapping
9 infrastructure ultimately falls on the “consuming public.” Here, Applicant’s financial expert
10 conceded that there would be “redundancy, certainly” if the Applicant is granted a CON,
11 and that it is “less efficient in terms of total expenses” when you add expense to the system.
12 Tr. Vol. 4, p. 1070:4-18. Likewise, Applicant’s “competition” expert conceded that one of
13 the purposes of CON regulation is to avoid “splintering of the market,” “where you have
14 too many providers coming in so that they’re not able to be financially stable, financially
15 viable if you spread that demand over too many ... suppliers.” Tr. Vol. 5, p. 1218:7-11. In
16 the present case, as shown above, the current CON holders are performing their obligations
17 in such a way that the system is fully able to meet the public need. Granting a CON to
18 Applicant in these circumstances would be a subversion of the regulatory scheme as it exists
19 in Arizona today.

24 **G. CONCLUSION**

25 In presenting its evidence during this nine-day proceeding, Applicant has either
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28 ⁶² Tr. Vol. 6, p. 1398:16-18.

1 utterly misapprehended the regulatory requirements predicate to obtaining a CON, or
2 chosen to turn a blind eye to those requirements. In either event, we respectfully submit
3 that, on this record, Applicant has fallen woefully short of marshalling the factual record it
4 was incumbent upon Applicant to establish in order to avoid denial of its
5 Application. Indeed, if anything, what this record *does* establish is that to award Applicant
6 the CON it here seeks—which, at bottom, mandates that an applicant establish that public
7 necessity *requires* its service—would be to stand Arizona’s nearly four-decade regulatory
8 model on its head.

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11 Most particularly, what Applicant established, if it established anything at all, is that
12 it is not what *the public interest requires*, but instead what *its financial stakeholders*
13 *privately desire*, that constituted the impetus for this Application. That explains why, over
14 and over again, with regularity, Applicant’s presentation focused exclusively upon what
15 was best for its system, and why it had no compunction in adopting a devil-may-care attitude
16 about the broader interests of the patient population that falls outside its own network,
17 unceremoniously telling us that it planned to simply wash its hands of those needing
18 medical assistance who are not in its exclusive club. This cavalier attitude is reflected as
19 well in Applicant’s professed utter lack of interest in how its entry into the system will
20 impact the viability of the existing providers (all of whom, Applicant readily concedes, are
21 fully meeting each and every one of the requirements they pledged to abide by as a condition
22 of receiving their CONs -- including the obligation to respond to the medical needs of
23 EVERY person in their service areas who require medical assistance, and not just some
24 favored segment of that patient population). Given the thousands of interfacility transports
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1 undertaken by the presently-certificated providers, one would think that, were there a
2 legitimate public need for yet another certificated service, there would be some evidence,
3 somewhere, that the existing providers were falling down in the discharge of their
4 regulatory responsibilities -- complaints lodged with the Department, for example, or a
5 serious pattern of dangerously long response times, or medical negligence -- but as to all of
6 these matters the record is resoundingly silent. And it is silent for one reason: the
7 interfacility transportation network in this service area, and the CON-holders who provide
8 those interfacility transports, are completely, capably, and cooperatively meeting the
9 medical needs of this community. To succinctly state the case, Applicant has not
10 established otherwise. There is no public necessity for its service, and its private desires do
11 not, and should not be permitted to, override the public interest.

12 We respectfully submit that, on this record, the Application should, appropriately,
13 be denied.

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17 RESPECTFULLY SUBMITTED this 28th day of January, 2019.

18 HOFMEYR LAW PLLC

19 By /s/ Adriane J. Hofmeyr

20 Adriane J. Hofmeyr

21 *Attorney for ABC Ambulance, LLC*

22
23 **CERTIFICATE OF SERVICE**

24 Original filed using the OAH electronic document filing system
25 <https://portal.azoah.com/oedf> this 28th day of January, 2019 with copies provided to all
26 parties on the approved mailing list by posting through the designated OAH website as
27 <https://portal.azoah.com/oedf/documents/2015A-EMS-0190-DHS/index.html> in
28 accordance with Case Management Order No. 1.