

James J. Belanger (011393)
JBELANGER LAW PLLC
Po Box 447
Tempe, Arizona 85280
(602) 888-6072 (Phone)
jjb@jbelangerlaw.com

Attorneys for Maricopa Ambulance, LLC

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:

RBR Management LLC, dba Community
Ambulance

Applicant.

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

**MARICOPA AMBULANCE
RESPONSE**

(The Honorable Tammy Eigenheer)

Based on Applicant's papers, it's as if there were two different hearings. There weren't. At the hearing that did happen, Applicant did not sustain its burden of proving that it should be granted a CON.

Maricopa Ambulance's responses to various of Applicant's claims in its *Written Closing Argument* are set forth below, and Maricopa Ambulance's *Post-Hearing Memo* and *Proposed Findings of Fact and Conclusions of Law*, filed on January 28, 2019, are incorporated by this reference:

1. Applicant's *Written Closing Argument* at 3.¹ Asserting that there is public necessity for its service, Applicant suggests that somehow the needs of the

¹ Page references unless otherwise indicated are to Applicant's *Written Closing Argument*.

Maricopa County patient population are “uniquely” represented by Dignity Health. This is a fallacy. Applicant never assessed any needs other than perhaps Dignity’s and Applicant remains solely and inappropriately focused on “meeting the needs of *Dignity Health’s patient population* in Maricopa County” rather than the need of Arizona’s residents as a whole. *Id.* at 1. Applicant performed *no* public needs assessment. RT 10/23/18 at 318-319. The only needs of concern to Dignity were *its* needs. *Id.* The only “needs” evaluated by Applicant, if any, were Dignity’s. RT 10/25/2018 at 906. There is, moreover, nothing “unique” about an application under the rules and what must be proved to be awarded a CON. See AAC R9-25-902 and 903. Applicant’s desire to have its application viewed as some kind of unicorn because its majority owner is Dignity Health should be rejected out of hand.

2. At p. 4, Applicant hypothesizes that Dignity’s needs cannot “be achieved with existing CON holders” and that only through Applicant’s “enhanced ambulance offering” would Dignity “be positioned to further enhance” its services. Although there were complaints regarding AMR’s service, Applicant conceded in the hearing that there was no substandard performance by AMR or any Intervenor. Applicant quibbles that it did not receive information it sought pursuant to subpoena, but, frankly, arrival/response time information is maintained by the Department, which Applicant did not seek (and did not seem to know it could seek). Based on how the Department evaluates arrival/response times – again something Applicant (and Dignity) did not appear to understand -

AMR would almost certainly have been compliant with its CON. In any event, when Dignity did turn to Maricopa Ambulance, Dignity's employees testified that now that it is doing transports, Maricopa Ambulance is "fast and friendly" and that there have never been any issues with Maricopa Ambulance transports. RT 10/24/2018 at 689, 694.

3. At p. 8, engaging in some sleight of hand, Applicant suggests that the "performance of existing ambulance providers gets worse the farther away from the city center you travel." Overlooking that its own drive time plan established that Applicant could not reach most of rural of Maricopa County in much less than an hour, Applicant trots out an out of context quote by Jeff O'Malley that discusses ambulance service in Maricopa County at the "end of 2015 into 2016," when Rural Metro was dying and Maricopa Ambulance was almost a year away from getting its CON. At the time of Applicant's hearing – October/November 2018 - Maricopa Ambulance was providing numerous transports to Dignity without any complaints. RT 10/25/2018 at 361-365.
4. Applicant's various references to "*In the Matter of: Maricopa Ambulance, LLC*, 2015-EMS-0190-DHS, are simultaneously superficial, disingenuous, and invariably out of context. Maricopa Ambulance sought its full service CON at a time when Rural Metro was on its last legs and it was apparent that, but for Maricopa Ambulance's application, there would be only one, full service, private CON holder in Maricopa County (AMR). Even at \$725 an hour, Dr. Argue conceded that the market then was *significantly* different than it is today.

Maricopa Ambulance applied for a CON to serve *all* of the ground ambulance needs of the residents of Maricopa County. Applicant has done nothing to refute that it is seeking a limited scope IF CON that would grant it a protected arrangement within which to provide lucrative, pre-scheduled, non-emergency ambulance transports to a self-interested majority owner, and that simultaneously would protect it from assuming its share of the burden of providing the emergency and 911 transports and infrastructure critical and necessary to the system as a whole.

5. At p. 10, regarding the “numerous letters of support” that purportedly show “undisputed and overwhelming support,” it was fairly well-established at the hearing that these form letters were actively solicited solely to be used as hearing exhibits and should be given virtually no weight.
6. At p. 12, Applicant notes that Community Ambulances taking 11,315 transports will have a *de minimis* impact on existing CON holders. Three points. First, this belies that the number of transports is likely greater than 11,315. Second, it ignores the many times representatives for Dignity testified during the hearing that Dignity was looking to and intending to grow in Maricopa County and in Arizona. Third, assuming the number of transports is or even close to accurate (and even if it is a much greater number), Applicant made no showing that existing CON holders were not financially and operationally able to fully and competently absorb this number of transports. The point is not that existing CON holders will not be driven out of business, it is (1) that the 911 system will

be impaired and there will be upward pressure on rates,² and (2) that without carrying any of its burden of proof, Applicant will get a license to do lucrative, pre-vetted, IF transports in and closely around metro-Phoenix, without having to bother with 911 and anything other than the odd, one-off rural IF transport.

7. Applicant has at least a bit of gall to observe, at p. 15, that Glenn Leland said in one small portion of an extended negotiation, that Maricopa Ambulance would direct some transports to other providers in order to cover Dignity transports. First, Jeff O'Malley quickly conceded this was one comment in a lengthy negotiation. RT 10/23/2018 at 363-364. Second, since Dignity has used Maricopa Ambulance, there is no evidence this has ever happened. And third, people in glass houses should at least think before they throw stones. Dignity's testimony regarding its captive and subservient joint venturer showed zero regard for any member of the public other than Dignity, i.e., - Dignity testified that it expects Applicant to put Dignity's needs first and foremost. RT *Passim*.

²Bryan Gibson and Roy Ryals both testified without rebuttal that Applicant's IF-Only model would undermine the operational capacity of the 911 system and would necessarily put upward pressure on rates. RT 11/6/2018 at 1633; 1742-1748. Per Mr. Ryals: “[I]n the proposed application of Community Ambulance, they're not proposing to do any 911. And they take 11,000 and change transports - interfacility transports out of the system, both Maricopa Ambulance, to some degree, AMR, to a greater degree, will have to reduce the number of interfacility units because they no longer have demand for them. And when they reduce that number of interfacility units, they have fewer units available to back up the 911 system.” RT 11/6/2018 at 1747-1748 (emphasis added). To meet the shortfall necessitated by Applicants taking IF calls, but making no contribution to the 911 system, existing CON holders will have to charge higher rates to maintain the same level of coverage they would have if they had the IF transports and, therefore, IF units on the road.

Applicant never even attempted to refute this expectation. RT *Passim*. Rather, Applicant expects to be “laser-focused” on Serving Dignity. RT 10/25/2018 at 886. In sum, and as testified to at the hearing, it is Dignity’s expectation that Applicant will perform no other transports that would come at the expense of a Dignity transport. Id. at 436-437. Lastly, and somewhat incredibly, Applicant testified that it did not have the resources to do anything other than Dignity’s 11,315 transports, unless, of course, there was a mythical patient somewhere that had been “waiting for six hours.” Then Applicant “would go and take that transport and help the community.” RT 10/26/2018, at 1176.

8. Regarding competition, at p. 21, Applicant’s view is myopic. Maricopa Ambulance’s CON hearing was held in a completely different context. See ¶4, *supra*. Far from advancing Applicant’s cause, moreover, Dr. Argue’s testimony materially and repeatedly undermined it. See *Maricopa Ambulance Post-Hearing Memo*, at 11-13; *Maricopa Ambulance Proposed Findings of Fact and Conclusions of Law*, at 3-5. Dr. Argue conceded that the current market, which is still an immature market, is working exactly as he would have expected when he testified three years ago, that the competitive mechanisms that already exist in this market will cause CON holders to continuously “up their game,” and that even the threat of a new entrant will have a positive competitive effect. RT 10/26/2018 at 1230-1252. Frankly, Dr. Argue’s testimony was dispositive in favor of denying this application rather than granting it.

9. In its discussion about problems with AMR, *Written Closing Argument* at 27-40, Applicant noted that there were occasions that AMR did not have an ambulance available. This is no reflection on Maricopa Ambulance or any other Intervenor – the hearing established that Maricopa Ambulance is currently doing hundreds of transports for Dignity without any complaints. For every call identified by Dignity for which it claimed a problem getting an AMR ambulance, moreover, Maricopa Ambulance had an ambulance available that it could have deployed had it been called. RT 11/6/2018 at 1725; MA Exhs. 27b, c, d, and e, 28a, 29, 30-35, 36 a-e.
10. Regarding Applicant’s comments that “ABC and Maricopa Ambulance alone cannot meet [Dignity’s] need” and that “Maricopa Ambulance is ... not strong in the East Valley,” Applicant’s *Written Closing Argument*, at 41 and 43, as to Maricopa Ambulance, this is wishful prose. Bryan Gibson testified and submitted un rebutted proof that Maricopa Ambulance alone has the financial and operational capacity to gear up to handle all of Dignity’s transports. RT 11/6/2018 at 1625-1632; MA Exhs. 20 and 21. Moreover, Applicant ignores the repeated and un rebutted testimony from Dr. Argue and others that if a provider is given a preferred provider agreement, or a contract that provides for some certainty in the number of transports, that allows the provider to gear up and deploy resources to meet the needs of that contract because of the relative certainty of volume of transports. RT 10/26/2018 at 1213- 1214. There is no evidence that if Maricopa Ambulance was given a preferred provider agreement

by Dignity, that it could not commit the operational and financial resources to meet the demand of that agreement. Indeed, the only evidence on this point – unrebutted – is that Maricopa Ambulance could absolutely meet that demand.

11. Regarding Applicant’s “plan” to serve rural consumers of ambulance services, Applicant has no plan (other than that Lifeline can have the 2 or 3 IF transports per year that might be generated out west of Wickenburg...) Applicant’s *post hoc* attempt to piece a plan together is inappropriate, untimely, and inadequate. See *Maricopa Ambulance Post-Hearing Memo*, at 6-8; *Maricopa Ambulance Proposed Findings of Fact and Conclusions of Law*, at 3-5. The mantra that “we will focus on the urban IF cream and we will let you have the few rural transports we can’t timely get to anyway” is not a plan to ensure that ambulance service will be maintained and improved for rural communities and it does nothing to enhance an integrated IF/911 system.

12. At p. 44 *et seq*, Applicant tries to backdoor its substandard performance lament. It should not be allowed to do so. In its pleadings and in testimony from its principals, Applicant conceded there was no substandard performance. “Community Ambulance is not alleging that the services provided by any Intervenor is “substandard”. *Community Ambulance Pre-Hearing Memorandum*, 10/15/2018, at 20; see also RT 10/25/2018 at 917 (“Richardson: “We’re not declaring they’re substandard in performance. Q: You conceded that? A: Yes.”) This issue was conceded before the hearing even began and again, pointedly,

during the hearing. Substandard performance is *not* an issue in this hearing and *never* has been an issue in this hearing.

13. At p. 49, Applicant suggests that it is fit and proper. We disagree. See *Maricopa Ambulance Post-Hearing Memo*, at 13-14; *Maricopa Ambulance Proposed Findings of Fact and Conclusions of Law*, at 3-4.

As we said in our Post-Hearing Memo, “[i]f there were a mechanism for a directed verdict in OAH hearings, one could and should have been granted in this matter at the close of Applicant's case.” Applicant has comprehensively failed to sustain its burden of proving that it should be granted a CON. This Application should be denied.

Respectfully submitted this 21st day of February, 2019.

JBELANGER LAW PLLC

By /s/ James J. Belanger
James J. Belanger
Attorneys for Maricopa Ambulance, LLC

CERTIFICATE OF SERVICE

ORIGINAL filed using the OAH electronic document filing system <https://portal.azoah.com/oedf> on February 21, 2019, with copies provided to all parties on the approved mailing list by posting through the designated OAH website at <https://portal.azoah.com/oedf/documents/2016A-EMS-0381-DHS/2016A-EMS-0381-DHS-0018.pdf>.

/s/ James J. Belanger