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13 *Attorneys for Intervenors – AMR CON Holders*

14 **BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

15 In the Matter of: )  
16 )  
17 **RBR Management LLC, dba Community** )  
18 **Ambulance** )  
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Docket 2017-EMS-0104-DHS  
(EMS No. 0283)

**AMR CON HOLDERS' RESPONSE TO  
RBR/COMMUNITY AMBULANCE'S  
WRITTEN CLOSING ARGUMENT**

(Assigned: The Hon. Tammy Eigenheer)

Intervenors, American Medical Response of Maricopa, LLC dba . . . (CON 136); R/M Arizona Holding, Inc. dba Canyon State Ambulance dba . . . (CON 58); Life Line Ambulance Service, Inc. (CON 62); Rural/Metro Corp.-Maricopa dba . . . (CON 109); and Professional Medical Transport, Inc. dba PMT Ambulance dba . . . (CON 71) ("AMR CON Holders"), pursuant to Case Management Order No. 7, hereby submit their response to RBR/Community Ambulance's Written Closing Argument ("Closing"). The facts discussed herein are supported by the abundant record citations given in the AMR CON Holder's Proposed FOF and Closing.

1 **AMR CON HOLDERS' RESPONSE**

2  
3 **Introduction.** As expected, RBR's closing relies heavily on the testimonies of Matt  
4 Karger and David Argue, on unproven contentions that RBR is concerned about and will have  
5 resources available for service to rural and/or wilderness areas, on complaints that  
6 Intervenor should have given RBR their "data" rather than requiring RBR to look to ADHS'  
7 public records or its majority owner Dignity for the "data" it wanted, on isolated incidents of  
8 delayed IFT arrivals and customer service type complaints (most of which are dated after the  
9 AMR CON Holders moved to intervene and were sued by Dignity) and on overstated  
10 generalities made by witnesses having no firsthand information or associated detail. Because  
11 these issues have been addressed in the AMR CON Holders' Closing, as supported by its  
12 detailed Proposed FOF (and the citations given there), the limited space allowed here will not  
13 be devoted to repeating what is stated there. Instead, RBR's "substandard service"  
14 argument, certain aspects of its "public necessity" discussion, and RBR's failure to provide  
15 record citations, inappropriate reliance on evidence not admitted, and misstatements /  
16 overstatements / mischaracterizations of the record will be addressed.<sup>1</sup>

17 **RBR's reliance upon areas of Maricopa County not covered, for IFT authority, by**  
18 **Maricopa Ambulance's or ABC's CONs (for example, the Buckeye area) is a red herring.**  
19 RBR offered no evidence of any current or intended Dignity facility located in these areas and  
20 no evidence of any Dignity patient being transported out of any such area to a Dignity facility  
21 anytime in the past five years. It made no attempt to quantify for this Office what public  
22 providers are present in these areas that also have IFT authority and provide – or could  
23 provide if needed – transports, or what "necessity" for additional ambulance transport  
24 providers, if any, might exist. It made no real showing that RBR would be able (much less  
25 motivated) to help supplement IFT work in these remote and limited areas other than offering  
26 general statements of undefined intent, which were contrary to all specific evidence RBR

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<sup>1</sup> Statements made in the AMR CON Holders' Proposed FOF and Closing regarding "fit and proper" not being an issue Intervenor intend to address / challenge (without conceding RBR's burden of proof) were only intended to apply to the intervening AMR CON Holders, not the other Intervenor herein.

1 provided about its expected operations. Absolutely no competent evidence demonstrated a  
2 public necessity for RBR to provide another level of IFT coverage in these areas, and making  
3 that showing was RBR's burden.

4 **Another non-issue raised by RBR's closing is its "substandard performance"**  
5 **discussion.** RBR withdrew this issue prior to commencement of the hearing. See,  
6 Applicant's Final Witness and Exhibit list, p. 3, line 11; see also, Applicant's Prehearing  
7 Memo, p. 20, lines 8-9 and testimony of Jeff O'Malley at RT 326:13-327:2. Had RBR raised  
8 the issue, by submitting competent evidence calling into question the AMR CON Holders'  
9 compliance with their CON arrival time standards (which are plainly separate and distinct from  
10 compliance with the Dignity – AMR service contract arrival standards), the AMR CON Holders  
11 would have addressed the same in their case-in-chief. RBR should not be allowed to try to  
12 "back door" the issue after the fact in this manner.<sup>2</sup> The complaint it apparently has with how  
13 the Bureau calculates IFT arrival compliance is not an issue before this Office; it is something  
14 RBR should raise directly with ADHS/BEMSTS if it really believes they have been doing their  
15 jobs incorrectly. Notably, when Aaron Sams testified, RBR did not question him about RBR's  
16 unique interpretation of "within 30 minutes." Holding the issue until after all evidence has been  
17 submitted is inappropriate.

18 **RBR's Proposed Findings of Fact ("FOF") cannot be relied upon as they are not**  
19 **accompanied by any citations to the underlying record.** RBR has the burden of proof.  
20 This Office (and the Intervenors) should not have to search the record for RBR. Given space  
21 and time limitations, it is impossible to point out how many of RBR's unsupported (by any  
22 record citation) Proposed FOFs are flat out wrong, gross mischaracterizations of the record,  
23 only partially true or unsupported by any competent evidentiary submission.

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24 <sup>2</sup> RBR attempts to justify this by arguing it is somehow the AMR CON Holders' fault that it  
25 did not have the "data" needed to prove substandard performance. This "Intervenors must  
26 give us the data" notion has already been addressed in the AMR CON Holders' Closing. In  
addition to what was briefed there, it should be noted that in its September 2018 Legal  
Memorandum, BEMSTS agreed that attempts to obtain Intervenors' 911 records, any  
records older than three years, or proprietary business information were inappropriate. The  
Bureau also stated that an applicant cannot use the subpoena process to try to create its  
case-in-chief by utilizing proprietary business records of the intervenors. See, BEMSTS'  
Legal Memo, p. 4. Further, Jeff O'Malley testified that Dignity did not even bother asking  
ADHS for CON compliance information. RT, 336:25-337:10.

1           **To the extent RBR’s Proposed FOF are based upon RBR’s Closing, the Closing**  
2 **also contains many “fact” statements unsupported by any appropriate record citation**  
3 (starting on p. 1, where RBR proposes it will improve services to Maricopa County, as a  
4 whole, and to Dignity patients - as opposed to focusing solely upon Dignity Health’s desires).  
5 Given the lack of any record citations in RBR’s Proposed FOFs, anywhere its Closing  
6 Argument suggests facts relating to disputed issues, without offering a corresponding record  
7 citation, those suggestions or statements of “fact” should be disregarded because RBR holds  
8 the burden of proof and cannot simply rely upon its unsupported FOF. Some compelling  
9 examples of plainly disputed “facts” offered with no accompanying record citation (this is not a  
10 complete list) are as follows:

- 11 - RBR Closing Argument p. 4: O’Malley tried to work with each Intervenor.
- 12 - *Id.*, pp. 14 and 25: AMR lost service contracts, such as the Scottsdale 911 contract,  
13 due to customer dissatisfaction and/or failure to perform.
- 14 - *Id.*, p. 20: RBR will improve service to rural residents.
- 15 - *Id.*, pp. 21-22: AMR advocated the benefit of competition when it received its CON.
- 16 - *Id.*, p. 22: AMR’s ambulance service is inadequate.
- 17 - *Id.*, p. 29: AMR’s performance under the Dignity contract left Dignity and its patients  
18 wanting more from the outset of their relationship.
- 19 - *Id.*, p. 34: Dignity experienced “sometimes daily” IFT arrival delays.
- 20 - *Id.*, p. 36: Utilizing 911 for IFT “takes th[e] 911 crew away from responding to an actual  
21 emergency 911 call.”
- 22 - *Id.*, p. 43: RBR proved “a systemic inattention to the particular needs and demands of  
23 the [IFT] system . . . that are not being addressed and that require a different solution.”
- 24 - *Id.*, p. 47: Since termination of AMR’s contract with Dignity, AMR is required to report  
25 CON compliance to Dignity, not compliance with the former contract terms (note this is a  
26 concept RBR did not even raise during the hearing, much less offer any evidence in support  
of, such that it might have then been addressed by AMR).
- *Id.*, p. 65: RBR applied for all Maricopa County authority in order to service patients in  
more remote / rural areas and it intends to do this in collaboration with existing CON holders.
- *Id.*, p. 66: Under RBR’s rural service plan, it will be available to help service rural and  
wilderness areas.

1           **RBR regularly misstates or overstates what is in the record citation provided.** For  
example (this is not an exhaustive list):

2           - *Id.*, p. 14: Dignity has no influence on what ambulance providers its minority owned  
3 affiliates choose to use (Hunt only stated that these entities are not Dignity controlled - RT,  
4 182:22-183:13).

5           - *Id.*, p. 22: AMR believes ADHS should shut the door to more CONs in Maricopa County  
6 (the citation is to Glenn Kasprzyk's simple statement that there are three private providers –  
7 RT, 2064:21-25; from the AMR CON Holders' overall evidentiary presentation, it should have  
8 been obvious to RBR that AMR's main concerns about RBR's Application relate to RBR's  
9 "Dignity-silo" business model, including the cream-skimming and denigration of the overall  
Maricopa County ambulance transport system that will result from that model).

10           - *Id.*, p. 27: AMR is responsible for the concerns that led Linda Hunt to initially reach out  
11 to Jeff O'Malley (which is contrary to the time line involved – see, RT, 206:12–212:22; see  
12 also, O'Malley's admission that these were not AMR caused problems – RT, 228:14-16).

13           - *Id.*, p. 28: AMR did something wrong by not providing five dedicated ambulances under  
its contract with Dignity (O'Malley was told this would be illegal – RT, 234:23-235:19).

14           - *Id.*, p. 28: O'Malley's request for "turned call" information was a "data failure" that  
15 supported the Application (time line shows this request was after RBR filed its Application and  
16 Dignity sued AMR – see RT, 241:2-7; further, RBR presented no evidence to prove that  
17 Dignity ever approved any alternative provider in advance, to whom calls might be "turned,"  
18 as required by the contract – CA-24, p. 10, ¶128b; had RBR questioned Glenn Kasprzyk about  
this, it would have learned Dignity never completed that contractual prerequisite).

19           - *Id.*, p. 28: O'Malley was told by AMR representatives that if AMR cannot handle a call,  
20 it just calls 911 (note the three lines after the citation given show this was not the real answer,  
21 O'Malley was told "no, not really." RT, 241:16-18).

22           - *Id.*, p. 28: Implication that all "data" O'Malley wanted was required under the AMR –  
23 Dignity contract (citation does not establish this, and it is contrary to the contract terms – CA-  
24, p. 11).

24           - *Id.*, p. 29: Inaccurate reporting allegations – O'Malley was simply wrong about some of  
25 his report interpretations, such as construing model patient surveys as actual reporting (RT,  
26 2255:9-2257:21), and offered no proof the urgent transport response information was wrong.

1 The overall evidence indicated O'Malley was simply mistaken about some of these issues (for  
2 example, RT, 397:10-24, 425:20-427:20).

3 - *Id.*, p. 29-30: Employee complaints about AMR service to O'Malley led to the RBR  
4 Application. Note the exhibits and transcript citations given all involve limited / sporadic  
5 customer service issues dated *after* the Application was submitted and *after* the AMR CON  
6 Holders moved to intervene.<sup>3</sup>

7 - *Id.*, p. 30-31: Even Hestand's testimony was mischaracterized, he only testified to rare  
8 and isolated concerns, offered no evidence AMR was not meeting its contractual 90%  
9 compliance mark, and gave no testimony regarding any long existing and substantial issues  
10 with the AMR CON Holders, despite his résumé showing he had been in his position since  
11 2015 (CA-128). His cited testimony regarding the single "impella pump" incident failed to  
12 include evidence that air transport was not appropriate for that patient or that RBR will have  
13 impella pumps on all of its ambulances, and he admitted that patients who require this unique  
14 equipment are rare and very sick, and air transport is often the most appropriate method (RT,  
15 603:9-605:11).

16 - *Id.*, p. 32: Hestand testified regarding a "significant delay" due to an IFT unit pulled into  
17 911. The citation given reveals his comment was that he was unaware this could happen. He  
18 did not testify to a "significant delay" and did not give actual arrive time (RT, 588:20-590:5).

19 - *Id.*, p. 33: "Transport delay" and "dispatch issues" were actually related to an incident  
20 involving Dignity employees simply not wanting to follow dispatch protocols (CA-233R).

21 - *Id.*, p. 43: Argue's testimony implied that Dignity was falling behind Banner and Honor  
22 Health with regard to services offered patients. Argue did not say this and RBR offered no  
23 such evidence.

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24 <sup>3</sup> The items offered in support include the basically meaningless Ahwatukee EMS log (CA-  
25 232B) which even Nurse Kells acknowledged is inaccurate (RT, 492:25-502:8), a November  
26 2017 incident that appears to be more about Dignity wanting to keep patients in the Dignity  
system than about the 911 system being activated for what might have been seen by AMR  
dispatch as a stroke patient (CA-233E), a March 2018 extended arrival not shown to violate  
AMR's 90% compliance requirement (CA-233H), an IFT unit being pulled into 911 use in  
August 2017 where no information was provided regarding actual IFT arrival time - which  
could have been earlier than the original ETA given (CA-233J), and gross generalities  
testified to by O'Malley without any appropriate foundation being established (Closing, p.  
30).

1 - *Id.*, p. 43-44: Dignity is being forced to take risks with delivery of care to its patients [the  
2 cited testimony does not say this and RBR's own witnesses agreed they had no evidence of  
3 patient care or safety being compromised, for example, see RT, 526:23-527:8 (Kells); 600:8-  
16 and 611:3-612:6 (Hestand); and 685:17-20 (Karger)].

4 - *Id.*, p.48: DHS's interpretation of the AMR CON Holders' IFT arrival requirements (i.e.,  
5 "within 30 minutes") is incorrect. Not only is this unsupported by the few citations offered,  
6 RBR did not question the Bureau's representative about this when RBR had the chance.

7 - *Id.*, p. 65: RBR understands the challenges of operating and maintaining full  
8 ambulance service in sparsely populated rural and wilderness areas. No such testimony was  
9 given, including within the record citation offered.

10 - *Id.*, p. 65-66: Glenn Kasprzyk agrees adding another provider to the Wickenburg area  
11 would be beneficial to the public. This ignores the entire discussion, where Kasprzyk clearly  
12 did not agree with this (RT, 2068:13-2070:12); it also ignores John Valentine's testimony to  
13 the contrary (RT, 2360:21-2361:9), which testimony RBR chose to not attempt to rebut.

14 **RBR relies upon exhibits not admitted** (CA-150, twice on Closing, p. 6; CA-28,  
15 Closing, p. 7; AMR-46, Closing, pp. 28 and 37)<sup>4</sup> **and/or inappropriately relies upon prior**  
16 **CON hearings that involved significantly different Maricopa County ambulance**  
17 **transport systems and facts than those currently in existence** (the AMR Maricopa CON  
18 hearing occurring in late 2014, *id.*, pp. 3, 5 and 12; the Maricopa Ambulance hearing  
19 occurring late 2015 and early 2016, three times at *id.*, p. 6, two times at *id.*, p. 9, and *id.*, pp.  
20 12 and 21; and ABC's hearing, *id.*, p. 22). With regard to the latter, the AMR CON hearing  
21 was done under circumstances where the Rural/Metro organization had filed bankruptcy, was  
22 struggling to recover, and was the only private provider of ambulance transport services in  
23 Maricopa County. When Maricopa Ambulance had its hearing, there was only one existing  
24 private provider (the AMR organization) and DHS made a policy decision that Maricopa

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25 <sup>4</sup> Even more incredible than the reference to non-admitted exhibits is RBR's suggestion  
26 (Closing, p. 6, fn 2) that this Office can take judicial notice of unadmitted exhibits, when no  
authority states this and the Rules of Evidence are not applicable herein. The request to  
admit Exhibit 46 (fn 8, p. 37) is untimely. If it had been introduced, it would have required the  
AMR CON Holders to call a witness to testify regarding the limitations on data retrieval  
associated with the exhibit, etc. It is simply too late for that kind of a request.

1 County was too large to have that single private provider circumstance. As was detailed  
2 throughout the instant hearing, those facts have significantly changed. Further, this Office is  
3 not bound by prior fact determinations and RBR is required to prove its case based upon facts  
4 unique to its proposed operation and the current system.

5 **RBR's use of legal propositions unaccompanied by legal authority citations**  
6 **should also be rejected** in favor of the properly cited statements of legal standards  
7 submitted by BEMSTS and the Intervenors (many of RBR's propositions are inaccurate or  
8 incomplete).

9 **RBR's public necessity argument is replete with these sorts of errors.** In addition  
10 to those matters specified above, and those discussed in AMR's Closing / Proposed FOF,  
11 examples can be seen throughout its argument. For example, its reliance upon Dignity's  
12 desire to continue expanding its presence into less densely populated areas (Closing,  
13 beginning at p. 7) has nothing to do with public necessity justifying another ambulance  
14 transport provider. No facts are cited for the proposition that awarding RBR a CON would  
15 help meet the healthcare needs of rural and less densely populated areas, or that the existing  
16 providers are unable to make timely responses to those areas. For example, see, *id.*, p. 8:16-  
17 24. Surprisingly, RBR contends that AMR's own data confirms continued growth in Maricopa  
18 County ambulance transports since 2013. *Id.*, p. 8:25-9:1. The cited exhibit, AMR-84, does  
19 show growth from 2013 through 2015, but then growth is flat. The numbers show only the  
20 slightest change and John Valentine's testimony that in the ambulance transport world this  
21 trend is basically flat (see, RT, 2352:8-2353:5) was consciously un rebutted by RBR. These  
22 are just examples of how RBR has desperately tried to stretch the record.

23 The Closing's public necessity argument is also "supported" by flat out wrong  
24 propositions, for example Closing at p. 3:21-22, where RBR proposes that Dignity  
25 representatives called as witnesses interact with the IFT providers on "a near daily basis." No  
26 evidence established that frequency and the Dignity self-interest involved was obvious.  
Another example is the statement that the Dignity representatives "have clear insight into how  
the system is performing." *Id.* at p. 3 (lines 21-25). No cite is given, and the overall hearing  
evidence demonstrated a lack of such insight. The other problematic record citations for this  
argument are too numerous to catalogue in ten pages. They include the suggestion that an



1 RBR CON will allow Dignity to be positioned to further enhance services to Maricopa County  
2 residents and the surrounding areas (which was accompanied by no citation). *Id.*, p. 4:15-17.

3 Additional problems include the fact that while offering evidence of hospital and skilled  
4 nursing facilities (and Dignity facilities) in Maricopa County, RBR failed to even try to address  
5 the overall healthcare institution aspect of R9-25-903(A). RBR also wants to rely upon  
6 evidence Linda Hunt said she could not discuss (future growth). See, Closing, p. 7:8-9. RBR  
7 should not be able to have that both ways. Likewise, RBR made no real attempt to quantify  
8 the contributions that CON holders who did not intervene in these proceedings provide to  
9 Maricopa County, in other words, how the overall Maricopa County ambulance transport  
10 system works together, from both a 911 and IFT perspective. The Closing seems to be based  
11 upon the presumption that the non-intervening CON holders make no meaningful  
12 contributions, but that is not anything RBR proved. It instead offered no evidence in this  
13 regard.

14 RBR's repeated reliance upon the letters of support EMS Advisors obtained for them is  
15 also unconvincing. As the Daisy Mountain Fire Chief's testimony demonstrated, EMS  
16 Advisors obtained a letter from him under false pretenses. That, and the public records  
17 requests utilized by the AMR CON Holders to determine the circumstances leading to the  
18 letters and what facts, if any, the letter writers had about what EMS Advisors' form letter  
19 states, demonstrate that these letters of support were not based upon any known facts held  
20 by any of the signators (RT, 1843:8-1849:2, 1915:9-1941:24, and AMR-19A-F). Even less  
21 compelling than those letters is RBR's incredible contention that public providers who did not  
22 intervene undisputedly and overwhelmingly support their Application (Closing, p. 10:20-26).<sup>5</sup>

23 Finally, RBR's Closing fails to identify any evidence establishing a systemic problem  
24 with IFT arrival delays, customer service, or other such concerns. Identifying a handful of  
25 complaints, most made after RBR's Application was filed and the AMR CON Holders moved  
26 to intervene, and relying upon Dignity employees' misunderstanding of both contract and

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<sup>5</sup> Fiscal concerns associated with an intervention are obviously real, and it is RBR's burden to prove the support for its Application – it cannot imply it. Its suggestion that none of these public entities requested a carve-out of their service areas is entirely unproven, and contrary to RBR's representative's testimony that Buckeye and North County did request carve-outs, but RBR "was not interested" in that. RT, 801:9-806:21.

1 CON arrival requirements, as well as IFT issues existing before any of the Intervenor had  
2 even received a CON and commenced service to Dignity, is patently insufficient.  
3 Nevertheless, in response, the AMR CON Holders offered evidence of a healthy Maricopa  
4 County ambulance transport system where IFT services and 911/emergency services co-exist  
5 as part of the whole, and evidence that IFT backing up 911 service and mutual aid backing up  
6 the more remote service areas is how a healthy system is supposed to work. RBR did not  
7 even try to rebut any of this.

8 All in all, RBR's inappropriate characterizations of the underlying record, lack of record  
9 citation, and flat out wrong statements do not establish the "public necessity" it is required to  
10 prove. This issue has been addressed in more detail in the AMR CON Holders' Closing  
11 Argument and Proposed Findings of Fact. RBR did not prove public necessity supports its  
12 Application.

13 DATED this 21<sup>st</sup> day of February, 2019.

14 **SHORALL MCGOLDRICK BRINKMANN**

**FLETCHER STRUSE FICKBOHM &  
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17  
18 Pursuant to Case Management  
19 Order No. 1, electronic filing and  
20 service of the foregoing through  
21 <https://portal.azoah.com/oedf/>,  
has been done this 21<sup>st</sup> day of  
22 February, 2019.

23 By: /S/ Linda Clark