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**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**

<p>In the Matter of:</p>        <p><b>RBR Management LLC, dba Community Ambulance</b></p> <p>Applicant.</p>	<p>Docket No. 2017-EMS-0104-DHS (EMS No. 0283)</p> <p><b>ABC AMBULANCE'S RESPONSE TO APPLICANT'S WRITTEN CLOSING ARGUMENT</b></p> <p>(Assigned: The Hon. Tammy L. Eigenheer)</p>
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The most striking feature of Applicant’s Written Closing Argument (“Closing”) and Proposed Findings of Fact and Conclusions of Law (“FOFCOLs”) are their almost complete disregard for the 2,394 pages of record. Applicant argues “facts” but fails to cite where those “facts” are in the record; it relies heavily on documents that it forgot to admit to the record or deliberately withheld from the record; it alters its own record, admitting errors that became apparent during the hearing; and it repeatedly misstates the record. It seems that the nine days of fact-gathering revealed facts that the Applicant simply does not like, and is thus ignoring them. Applicant fails to meet its burden.

**A. Dignity’s “wants” do not constitute “public necessity”**

To its credit, Applicant has remained consistent in its stance that Dignity’s desire for its own in-house ambulance service should be sufficient to establish public need – it made

1 no attempt in its Closing to re-thread that needle. Applicant’s irritation with this process  
2 (not to mention its hubris) is summed up in its huffy outburst (halfway through its Closing)  
3 that “Dignity Health should not be required to cobble together interfacility responses from  
4 an unintegrated mix of three (3) different providers before Community Ambulance is  
5 granted a CON.”<sup>1</sup> The bad news for Applicant (and its owner, Dignity Health) is that, in  
6 fact, it does have to “cobble together”<sup>2</sup> services provided by fully licensed and compliant  
7 providers, *unless it can prove public necessity*. Its own “interests and needs”<sup>3</sup> are not what  
8 entitles it to operate a public service ambulance company in Arizona. But Applicant is  
9 staking its Application on a finding that Dignity’s desire to own and control its own  
10 ambulance transport services fulfils a “public necessity.”  
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13 Applicant’s FOFCOLs reflect Applicant’s fundamental misunderstanding  
14 (deliberate or inadvertent) of the concept of “public necessity.” Nowhere does Applicant  
15 propose either a finding of fact or conclusion of law that “public necessity requires” the  
16 services it proposes to perform for Dignity Health. Applicant proposes only that “**there is**  
17 **a need**” for its proposed service. FOFCOLs, p. 40, ¶ 56, p. 41, ¶ 63. Having to prove “a  
18 need” is a substantively lower burden (arguably no burden at all) than having to prove that  
19 “public necessity requires” a service (an unusually high burden). This is tantamount to a  
20 concession by Applicant that it has *not* shown that “public necessity requires” its service.<sup>4</sup>  
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24 <sup>1</sup> Closing, p. 43:16-18.

25 <sup>2</sup> It is remarkable that Applicant complains of “cobbling together” services, while simultaneously (albeit  
26 disingenuously) attempting to promote the benefits of *competition*. Applicant seems to be saying here that choosing  
27 from different provides is somehow *undesirable*, while later saying generically that competition is good. Applicant  
28 cannot have it both ways.

<sup>3</sup> Closing, p. 3:19.

<sup>4</sup> Dignity’s nicely gerrymandered legislative effort to eliminate public necessity from an application such as theirs is  
confirmatory of the fact that they know that they cannot meet (and in fact did not meet) the existing public necessity  
standard in this Application.

1 In a half-hearted and one-lined attempt to tie *Dignity's desire* to the *public need*,  
2 Applicant airily states that, if it is granted a CON, "**Dignity Health will be positioned to**  
3 **further enhance the services provided to the residents of Maricopa County and its**  
4 **surrounding areas.**" Closing, p. 4:16-17. This attempt to tie Dignity's needs with the  
5 public's needs fails. First, this statement concedes that it is not the *Applicant* that hopes to  
6 meet the needs of the "residents of Maricopa County;" it is *Dignity* that wishes to do so.  
7 But Dignity, not being the applicant, has no burden to prove that any of its services will  
8 benefit the public. Second, this statement does not allege that Dignity's "enhanced services"  
9 will *meet a public need*. It simply implies that Dignity hopes to "enhance" *its* services  
10 provided to residents, whether or not those services are *already available* to such residents  
11 from other providers (which they are). This statement is of no assistance to Applicant *at*  
12 *all* to show that public necessity requires *Applicant's* proposed service.

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16 To the extent that there is any implication anywhere in Applicant's Closing that  
17 *Dignity's patients'* needs are the same as the *public's* needs, this is (1) unsupported by the  
18 record;<sup>5</sup> and (2) not enough. Even if "Dignity patients" are arguably "the public,"<sup>6</sup> then  
19 Applicant still has to go one step further – Applicant must show that *Dignity's patients* have  
20 the same needs as *Dignity* (given that the only evidence on the record relates to *Dignity's*  
21 needs). This would have been insurmountable.<sup>7</sup>

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24 <sup>5</sup> It is in fact contradicted by the record. Dignity acknowledged that it did no "assessment into broader public need for  
25 interfacility transports in Maricopa County;" that its assessment "only related to Dignity's needs." Tr. Vol. 1, p.  
135:5-9.

26 <sup>6</sup> There is no evidence whatsoever relating to *how many patients* Dignity in fact has (it is unknown), and what that is  
as a percentage of the general population (also unknown).

27 <sup>7</sup> First, the Nevada lawsuit against Applicant and Dignity (Exhibit ABC 2) shows the inherent conflict when a  
hospital system *owns* in an IFT ambulance company, with the consequent financial benefit from self-referring  
28 transports. Second, Dignity does not propose to offer its patients a choice of providers - some of whom charge lower  
rates (ABC, in particular) than Applicant's proposed rates (the hospital is not concerned with the rates because the

1           **B. Applicant’s references to population growth are false**

2           Yet again, Applicant begins an argument referring to facts that it did not address or  
3 attempt to introduce at the hearing. It refers to a census “as of July 1, 2017” showing  
4 Maricopa County’s population is the “fastest growing county and the 4<sup>th</sup> most populous  
5 county in the United States.”<sup>8</sup> It attempts to rely on a finding in a prior administrative  
6 hearing to support these new facts.<sup>9</sup> Whether or not a party can avoid the obligation to put  
7 on its own case in this way, the findings that Applicant relies on *appear nowhere in the*  
8 *prior administrative findings*. It is disappointing that Applicant would misrepresent a prior  
9 administrative record to this degree. Applicant refers to Judge Mihalsky’s findings, dated  
10 April 18, 2016, “at 2:26 ¶.”<sup>10</sup> Judge Mihalsky found nothing more than “Maricopa County  
11 is the largest county in Arizona in terms of population, with more than 4 million residents.”  
12 She makes no reference whatsoever to how fast the county is growing or how it compares  
13 to the rest of the country.<sup>11</sup> Maricopa County’s population growth is not on the record in  
14 these proceedings and cannot be relied upon by Applicant.  
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18           Applicant also misquotes Daisy Mountain’s Fire Chief, Mark Nichols – he did not  
19 testify to “continued growth;”<sup>12</sup> he testified to “some growth.” Tr. Vol. 6, p. 1451:16.

20           **C. Applicant misrepresents ABC’s testimony on whether ABC can meet**  
21 **Dignity’s needs**

22           Applicant falsely claims that “ABC admittedly cannot provide Dignity Health with  
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25 hospital is not paying for the transport).

26 <sup>8</sup> Closing, p. 6:3-8.

27 <sup>9</sup> It also relies on CA150 to establish the population of Maricopa County, but this exhibit was not admitted into  
evidence. Closing, p. 6, fn 2.

28 <sup>10</sup> Closing, p. 6:6.

<sup>11</sup> Nor does purported exhibit CA 150, also mentioned by Applicant here.

<sup>12</sup> Closing, p. 7:22.

1 the systemwide preferred interfacility provider solution it will have with Community  
2 Ambulance.”<sup>13</sup> On the contrary, Mr. Thomas testified that ABC has the personnel and  
3 equipment to ramp up its operations to fulfill some or all of Dignity’s transports - he did  
4 add that his “preference would not be to try to take all of their transports. I would rather  
5 work with the existing providers.” Tr. Vol. 6, p. 1417:9-25, p. 1418:1. This is exactly what  
6 Applicant proposes to do in the rural areas – work with other providers<sup>14</sup> – so it is  
7 disingenuous to criticize Mr. Thomas for offering the same thing. Likewise, Applicant  
8 criticizes Mr. Thomas for not including voluntary arrival times in ABC’s CON.<sup>15</sup> Applicant  
9 also did not include voluntary arrival times in its Application.  
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12 **D. Applicant has not credibly disputed the financial impact on ABC**

13 First, Applicant relies on an *unadmitted* exhibit to show that ABC performed four  
14 transports for Dignity in 2017 and 2018.<sup>16</sup> ABC has never claimed that the loss of these  
15 transports would cause it harm. Second, Applicant again remarkably relies on, and quotes  
16 heavily from, an exhibit it *forgot to admit into evidence*. This exhibit (ABC 55) *is not on*  
17 *the record* and may not be relied upon by Applicant. In any event, this unadmitted exhibit  
18 does not support Applicant’s theory - which is that, because ABC applied for a rate increase  
19 in early 2018 based on ABC’s growth projections, somehow ABC will not suffer any harm  
20 if Applicant absorbs 11,315 existing transports. This makes no sense. If ABC grows its  
21 business from its current revenue, its revenue will increase. If ABC grows its business from  
22 its current revenue, but loses transports to Applicant (from Mercy Care), ABC’s revenue  
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27 <sup>13</sup> Closing, p. 41:2-4.

<sup>14</sup> Closing, p. 65.

<sup>15</sup> Closing, p. 42. Voluntary arrival times are a relatively new concept that did not exist at the time of ABC’s hearing.

<sup>16</sup> Closing, p. 16:22-23.

1 will not increase (and will likely decrease, in spite of the projected growth). Third,  
2 Applicant claims ABC will not be harmed because ABC “had not actively marketed its  
3 transportation capabilities directly to Dignity Health facilities or the AGH system.” Closing,  
4 p. 17:17-18. Beyond the fact that these two propositions are unrelated, it is simply untrue.  
5 Dignity’s Brian Hestand, upon whose testimony Applicant relies here,<sup>17</sup> said only that ABC  
6 did not contact *him personally* (Tr. Vol 3, p. 625:25, p. 626:1-2); he readily conceded that  
7 he does not make the decision as to which ambulance company to call – that someone  
8 “higher up” makes that decision. Tr. Vol. 3, p. 626:12-23. Mr. Hestand had no idea whether  
9 ABC had reached out to “someone higher up.” Tr. Vol. 3, p. 626:24-25, p. 627:1. The record  
10 shows that ABC’s Mr. Thomas reached out to Dignity’s “higher up,” Mr. Jeff O’Malley, at  
11 least *four times* - in April 2015 (Tr. Vol. 6, p. 1409:1-5), in January 2016 (Tr. Vol. 6, p.  
12 1410:12-23), in September 2016 (Tr. Vol. 6, p. 1413:4-10), and in March 2017 (Tr. Vol. 6,  
13 p. 1415:16-24). Applicant’s fourth argument again relies on evidence not submitted at the  
14 hearing.<sup>18</sup> Applicant’s new proposed exhibit, a letter from ACN to ABC,<sup>19</sup> is a red-herring.  
15 First, Applicant, either deliberately or mistakenly, misstates the record by claiming that  
16 ABC contends that “approximately 47% of its total transports are derived from the Arizona  
17 Care Network ... and Mercy Care Plan.” Closing, p 17:20-22. ABC has never claimed any  
18 of its current transports come through **ACN**.<sup>20</sup> Second, ABC’s real fear (as it made

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19 <sup>17</sup> Closing, p. 17:19.

20 <sup>18</sup> This is the third time *under one heading* that Applicant references exhibits not admitted into evidence. It shows a  
21 remarkable level of disregard for the nine-day evidentiary hearing that was conducted for the sole purpose of  
22 gathering facts upon which the ALJ and the Department could make a decision.

23 <sup>19</sup> That Applicant was in possession of a letter sent to ABC by ACN and copied to Dignity’s attorneys reveals the  
24 close ties between ACN, Dignity and Applicant.

25 <sup>20</sup> ABC contends (and it is undisputed) that 54.8% of ABC transports in 2017, and 47.9% of ABC transports in 2018  
26 (to the date of the hearing) came from **Mercy Care**. Tr. Vol. 6, p. 1418:7-24, p. 1419:10-16.

1 abundantly clear) is *independent* of this network, and lies with the potential loss of its  
2 *current customer*, **Mercy Care**, which does in fact contract with ambulance companies –  
3 ABC, in particular. Applicant’s final argument is the first to address the likelihood of Mercy  
4 Care’s defecting to Dignity.<sup>21</sup> On this point, Applicant claims only that Dignity has “no  
5 authority to require” Mercy Care to use any one ambulance service (Closing, p. 19:16-17),  
6 and that ABC has put forward “no competent evidence” to support its “theory.” Closing, p.  
7 19:22-23. Whether or not the first claim is true (that Dignity cannot “require” Mercy Care  
8 to do anything), the record shows that Dignity’s Jeff O’Malley certainly *believes* that he can  
9 influence Mercy Care to move transports to Dignity’s CON - he *expressly advised* ABC’s  
10 Mr. Thomas that he intended for Mercy Care transports to be moved over to Applicant’s  
11 CON (“The plan in Maricopa County is to provide services to all Dignity Health Facilities  
12 and then the Dignity partners such as Mercy Care where they own 50% of that company”).<sup>22</sup>  
13 This is not “pure speculation” (Closing, p. 19:21); these are Dignity’s own words.  
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17 Applicant fails to challenge the calculation of ABC’s damages (either during the  
18 hearing or in its Closing). Applicant’s analysis thus stands uncontradicted.<sup>23</sup>

19 **E. Applicant’s attempt to re-cast the financial impact standard is disingenuous**

20 Applicant disingenuously attempts to equate the “adverse financial impact” criterion  
21 with the concept of “putting a provider out of business.”<sup>24</sup> If the Regulations required a  
22 showing that an incumbent CON-holder would be “put out of business” by a new provider,  
23 that is what the Regulations would have said. They do not, and thus Applicant’s argument  
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26 <sup>21</sup> Closing, p. 19:13-24. ABC does not dispute that Mercy Care has the right to change providers. But that is not  
27 relevant to an analysis of what the financial impact would be on ABC if Mercy Care were to do so.

<sup>22</sup> Exhibit ABC 7, Tr. Vol. 6, p. 1420-1421.

<sup>23</sup> See ABC’s Written Closing Argument, p. 29.

<sup>24</sup> Closing, p.12:6-7.

1 based on this non-existent criterion is utterly irrelevant to the overall analysis.<sup>25</sup>

2 **F. Applicant’s pro forma ARCRRs remain materially defective**

3 Applicant now admits to a few of the many errors in its ARCRRs, including that: (1)  
4 “it should have reported 40 full time equivalents and separately calculated training,  
5 overtime and benefits;<sup>26</sup> (2) it adopted “an incorrect re-allocation of settlement allowances  
6 in its revised ARCRR, which resulted in a Medicaid settlement allowance that was too high  
7 and a Medicare settlement allowance that was too low;”<sup>27</sup> and (3) “Applicant inadvertently  
8 forgot to update that section of its revised ARCRR to include some level of discounting under  
9 the proposed contract.”<sup>28</sup> These purported corrections are not only too late, they are not part  
10 of the record, and moreover, do not remedy its defective ARCRRs.

13 First, these purported amendments, replete with new spreadsheets,<sup>29</sup> appear **only in**  
14 **Applicant’s closing argument.** “Argument is not evidence.” *Murray v. Murray*, 239 Ariz.  
15 174, 367 P.3d 78, ¶ 18 (App. 2019). Applicant failed to amend its Application during the  
16 hearing when such errors became apparent, and chose not to put on a rebuttal case.<sup>30</sup> An  
17 applicant does not simply fix errors in the record in its closing argument. The new data  
18 submitted in the Closing is not “evidence” on the record in any sense of the word.

21 Applicant’s revised numbers in any event are insufficient. First, as a result of its

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23 <sup>25</sup> Likewise, Applicant’s entire discussion of Dignity’s alleged problems with the existing providers is beside the  
24 point. The Regulations do not require that existing providers be perfect in order to defeat a new application. This is  
25 precisely why the standard set in the Regulations is “substandard performance”—that is, systemic, pervasive  
26 problems, and not isolated instances out of tens of thousands of patient encounters. Applicant has conceded that no  
27 current provider is failing to meet this standard.

26 <sup>26</sup> Closing, p. 59:24-25.

26 <sup>27</sup> Closing p. 61:11-13.

27 <sup>28</sup> Closing, p. 62:2-4.

27 <sup>29</sup> Closing, p. 60:12-21.

28 <sup>30</sup> It remarkably refers to Maricopa Ambulance’s CON hearing to justify that its mistakes should be glossed over,  
ignoring the obvious difference that *Maricopa Ambulance amended its ARCRRs during its hearing.*



1 admission that it erred in calculating staffing costs, Applicant’s expenses increase by  
2 \$409,217.<sup>31</sup> First, ABC disagrees that this is an accurate calculation of the actual cost. In  
3 any event, deduct this new number from its projected income of \$726,539,<sup>32</sup> and Applicant’s  
4 projected income *more than halves*. Second, with regard to its “inadvertent inversion”<sup>33</sup> of  
5 settlement allowances, Applicant still has not submitted revised ARCRs to reflect any  
6 corrections. Third, regarding its failure to include contract discounts, Applicant’s claim that  
7 including such discounts will only deduct \$8,300<sup>34</sup> from its ARCRs is yet another example  
8 of wishful (if not misleading) thinking – in Nevada, Dignity paid Applicant around  
9 \$3,000,000 for transports in 2015 alone,<sup>35</sup> which would result in a deduction of \$900,000  
10 from Applicant’s ARCRs.  
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13 Perhaps the most remarkable statement by Applicant is the bald claim that  
14 “Community Ambulance continues to generate strong margins from its Nevada  
15 operations.”<sup>36</sup> Apparently of primary importance (it is its opening factual allegation), it  
16 supports the assertion that Applicant has “the financial wherewithal and resources to serve”  
17 Maricopa County. Closing, p. 56:5-6. Absolutely nowhere in the record did Applicant  
18 produce any evidence to show its *margins in Nevada*. On the contrary, Applicant  
19 deliberately withheld its financial data related to it Nevada operations. Untested and  
20 unsupported claims of “strong margins” are nothing more than fables.  
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23 **G. Applicant’s reliance on past hearings to establish that “competition serves a**  
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25 <sup>31</sup> Closing p. 61:4-5.

26 <sup>32</sup> Exhibit ADHS 12-0006, line 28.

27 <sup>33</sup> Closing, p. 61:22.

28 <sup>34</sup> Closing, p. 62:12.

<sup>35</sup> 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

<sup>36</sup> Closing, p. 56:7-8.

**public necessity” is disingenuous**

Applicant’s argument on the relevance of competition relies heavily on administrative hearings held four and seven years ago.<sup>37</sup> Such reliance is disingenuous. First, when Mr. Thomas applied for ABC’s CON in 2012, there was a true monopoly in Maricopa County for IFT services (all CONs were then held by Rural/Metro). Mr. Thomas was attempting to show that the addition of at least one other company would benefit the system.<sup>38</sup> Second, the ruling in Maricopa Ambulance’s hearing makes it clear that Judge Mihalsky based her findings on competition on “Maricopa Ambulance’s *evidence that was submitted in this matter.*”<sup>39</sup> Her ruling was expressly based on *evidence submitted at that hearing*. Applicant is hoping this tribunal will make a similar finding, but not based on its own evidence. Applicant’s disingenuous reliance on hearings from 2012, 2014 and 2015 is a reflection of how weak their argument is.

**H. Conclusion**

Applicant’s Closing shows nothing but a disregard for the record, and a hope that the threshold requirement for a CON will be disregarded in order to satisfy its majority stakeholder’s private desires. We respectfully submit that the Application should be denied.

RESPECTFULLY SUBMITTED this 21st day of February, 2019.

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

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<sup>37</sup> Closing, p. 21-22.

<sup>38</sup> Moreover, the testimony of Mr. Thomas is not in the record and is not a matter of public record. The exhibit named by Applicant that purports to be Mr. Thomas’ testimony (CA98) is only one page (the title page).The publicly accessible OAH website record of the hearing also only contains one page (the title page) of his testimony. Moreover, there is no evidence that the Director or the ALJ found this purported testimony compelling or determinative.

<sup>39</sup> Closing, p. 21:15-16 (emphasis added).

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**CERTIFICATE OF SERVICE**

Original filed using the OAH electronic document filing system <https://portal.azoah.com/oedf> this 21st day of February, 2019 with copies provided to all parties on the approved mailing list by posting through the designated OAH website as <https://portal.azoah.com/oedf/documents/2015A-EMS-0190-DHS/index.html> in accordance with Case Management Order No. 1.