

James J. Belanger (011393)  
**JBELANGER LAW PLLC**  
Po Box 447  
Tempe, Arizona 85280  
(602) 253-6682 (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 TO APPLICANT'S  
MOTION FOR REVIEW**

Applicant's Motion for Review should be denied. It is merely a very long and somewhat duplicitous lament that avoids the fact that the Applicant was not prepared to and did not sustain its burden of proof at the hearing. It is also a wishful attempt to recharacterize findings of fact and conclusions of law that were legally sound and well supported by the evidence.

AAC R9-1-103 (A) allows a party aggrieved by a final administrative decision to file a motion for review. The moving party must establish that the decision *materially* affected its rights due to irregularity in the proceedings, abuse of discretion that deprived the party of a fair hearing, misconduct by the ALJ, newly discovered evidence, etc. AAC R9-1-103 (C). Other parties to the proceeding *may* file a response

and the Director may require supplemental briefing and may permit oral argument. Here, Applicant has filed a 68-page motion for review. Unless the Director requires further briefing on issues raised by the Applicant, Maricopa Ambulance will only address certain of the points raised by the Applicant. Failure to address others is by no means a concession that any of Applicant's arguments have merit. Maricopa Ambulance would also incorporate by reference its Post-Hearing Brief, filed on January 28, 2019, and its Response to Applicant's Post-Hearing Memo, filed on February 21, 2019.

**1. Applicant's Claim that Intervenors Relied on "Unmet Need" and "Right of First Refusal Standards."**

This argument is a red herring. Arizona's ground ambulance market is a market that is regulated to ensure comprehensive ambulance service statewide. "In general, the Statutes and Rules [governing the CON system] ensure that all the residents of Arizona have access to ambulance service, whether they live in an urban area like Flagstaff or Peoria or a rural area like Fredonia or Gisela. Additionally, the Statutes and Rules seek to ensure that ambulance services have the sufficient financial strength and volume of business to continue operations to provide Arizonans with reliable service." GD-0999-PHS-EMS, at 1 of 5.

Among the factors required to be considered in a CON hearing to maintain the viability of this regulated market are the financial impact on existing CON holders, the need for additional convalescent or interfacility transports, and whether there has been substandard performance. AAC R9-25-903(B). Because the ALJ did not find in

Applicant's favor on these factors, including lack of substandard performance, which Applicant conceded, Applicant recharacterizes these factors as "unmet need" and "right of first refusal" and relies on Dr. David Argue to support its very simplistic and unremarkable argument that competition is good.

In fact, the ALJ found that current CON holders can very adequately meet the needs of this still immature market, there was no ruling premised in any respect on the right of first refusal, and, based on any non-superficial review, Dr. David Argue was, perhaps, Applicant's most damning witness. Dr. Argue acknowledged Maricopa County's ambulance market was still immature, that it was now functioning exactly as he would have expected, that the regulatory overlay was intended to maintain a viable, stable and responsive market and was doing just that, and that Applicant's IF/Convalescent service would not contribute to the maintenance of a countywide 911/emergence response system. Dr. Argue testified that:

- One component of a CON system is to maintain a financially stable and financially viable system. RT. at 1218;
- Even if Applicant is not in the market, competition among the existing CON holders will compel CON holders to improve service and submit improved bids for contracts. *Id.* at 1239;
- There was no evidence that any of the Intervenors did not have the financial or operational capacity to provide the services Applicant was seeking to provide. *Id.* at 1237-1238;

- The 911 system has infrastructure costs that an IF provider will not have to bear, *id.* at 1244, and that Applicant will be able to vet its transports in a financially more beneficial manner than providers that do both 911/emergency response and IF transports. *Id.* at 1243-1245; DHS Ex. 12;
- The CON system, as it is currently arrayed in Maricopa County, already provides financial incentives to the market participants to improve their service to be able to effectively compete for contracts and transports. *Id.* at 1249-1250;
- Even the threat of a new entrant in the market will cause existing CON holders to up their game and improve their services. *Id.* at 1252-1253.

Even at \$725 per hour, virtually nothing that Dr. Argue testified to supported Applicant's application for a CON and does not support its motion for review.

**2. Applicant's Claim that Applicant was Fit and Proper.**

After several days of hearing, and almost two full days of testimony from Applicant's principals, what was apparent was that Applicant's principals were largely uninformed about how Arizona's regulated ground ambulance market even operated.

- Applicant was unacceptably reliant on EMS Advisors who is not a principal of Applicant and did not testify. RT. at 798.
- Applicant's plan for rural ambulance services was to "let" other CON holders do rural IF transports. *Id.* at 837. Applicant did not know the actual number of these transports. RT 10/25/18 at 865-869; 885.

- Applicant had no idea what services other CON holders could provide in its proposed service area. *Id.* at 855.
- Applicant did not understand how the Department mandates or evaluates response times. *Id.* at 887.
- Applicant conceded that it was not alleging that any intervenor had substandard performance. *Id.* at 908-910; 917.
- Applicant conceded that existing CON holders could provide all of the services it proposed to provide. *Id.* at 918.
- Applicant conceded it had “no idea” what rural areas were in its proposed service area. *Id.*

The findings and conclusions on fit and proper were legally sound and supported by the record.

**3. Applicant’s Claim that it was Subject to a Standard not Previously Applied in CON Hearings in Maricopa County.**

This argument takes the form that Maricopa Ambulance was granted a CON even though there was a bankruptcy proceeding involving an ambulance company in Tennessee that Bryan Gibson was hired to try and turn around. In some respects, Applicant has at least made the sound decision not to disparage the ALJ like it has previously done, but its claims are still off base. At Maricopa Ambulance’s CON hearing, there was exhaustive testimony on Maricopa Ambulance being fit and proper to run a full service ground ambulance company in Arizona. The critical difference is that Mr. Gibson was fully, comprehensively and adequately able to answer every question asked of him.

Not so with Applicant's principals. The Applicant was required to prove it was fit and proper. It failed to do so. Maricopa Ambulance did.

**4. Applicant's Claim that the ALJ Adopted Roy Ryals' Opinion that Applicant's Deployment Plan was Defective and That Applicant Is a Creamskimmer.**

Sadly, if the shoe fits, wear it. The fact is that Applicant did not prove that its service model was cost-effective. Among other things, it could not even identify a critical document regarding its service model, ABC Exh. 63 (RT10/26/18, at 1360-1361), and it was testified to without rebuttal that its proposed mapping was defective and that its plan to use part-time firefighters was not practical or feasible. The testimony from Roy Ryals was that Applicant's maps were "useless", RT 11/6/2018, at 1750-1754, that its proposed staffing model was impractical, and it would be impossible for Applicant to attain its projected number of transports with the service model it proposed RT 11/6/2018, at 1735-1742. Reliance on this testimony is not an abuse of discretion.

On the issue of cream skimming, Dignity's management – Dignity is Applicant's majority owner - testified unabashedly throughout the hearing that Dignity expects Applicant to put Dignity's needs first and foremost – essentially we say jump, you say how high. Applicant not only never refuted this expectation, Applicant testified that it expects to be "laser-focused" on serving Dignity and doesn't really have the resources to do anything else. RT 10/25/2018 at 886; RT 10/26/2018,

at 1176. Applicant also conceded that Dignity transports are less risky in terms of remuneration.

Mr. Ryals testified that there generally are two forms of cream-skimming, and that Applicant is guilty of both. The first is to take high-efficiency in terms of revenue producing calls – i.e., pre-scheduled IF and convalescent calls – and not do low-efficiency revenue producing calls – i.e., 911 calls. The second form of cream-skimming is geographical. That is, carve out a profitable critical mass area of calls and leave the rural peripheries to others. Basically, do prescheduled Dignity IF calls in and around Metro-Phoenix and leave the outlying calls in rural Maricopa to be covered by others. RT 11/6/2018, at 1822-23. This, in fact, is Applicant’s proposed model.

**5. Applicant’s Claim that Prior CON Hearings Should be Precedent.**

Applicant’s various references to “*In the Matter of: Maricopa Ambulance, LLC*, 2015-EMS-0190-DHS, and other hearings, 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, Applicant’s expert witness Dr. Argue testified that the market then was *significantly* different than it is today.

**6. Applicant's Claims that Only It Can Serve Dignity's Needs.**

Regarding Applicant's comments that ABC and Maricopa Ambulance alone cannot meet Dignity's needs, 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 its own expert witness, 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 – un rebutted – is that Maricopa Ambulance could absolutely meet that demand.

**CONCLUSION**

If the Director requests briefing on any issues Applicant has raised, Maricopa Ambulance will certainly provide it. The fact is, however, Applicant comprehensively failed to sustain its burden of proof and the evidentiary and legal record on which the decision is based are well within the ALJ's and the Director's legitimate and lawful

discretion. Applicant's threat of an appeal does not change this. Applicant's Motion for Review should be denied.

Respectfully submitted this 2<sup>nd</sup> day of July, 2019.

**J**BELANGER 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 July 2, 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