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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

<p>In the Matter of:</p> <p>ABC Ambulance LLC</p> <p>Applicant.</p>	<p>Docket No. 2019-EMS-0151-DHS</p> <p>ABC'S OBJECTIONS TO MOTIONS TO INTERVENE (Oral Argument Requested)</p> <p>(Assigned: The Hon. Thomas Shedden)</p>
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Applicant, ABC Ambulance, LLC (holder of CON No. 139), hereby objects to the Motion to Intervene and Notice of Appearance emailed to ABC by Maricopa Ambulance LLC ("Maricopa") on June 4, 2019, and the Motion for Intervening Party Status (Multiple AMR CON Holders) and For Prehearing Conference/ Prehearing Order/ Permission to Appear Telephonically at Prehearing Conference, emailed to ABC on June 6, 2019 by American Medical Response of Maricopa, Rural/Metro Corp – Maricopa, and Professional Medical Transport (collectively, the "AMR entities") (both motions collectively the "Motions"). ABC's application is simply to allow ABC **to increase its fleet size**, a common, administrative matter that conveys no rights to, nor seeks information from, overlapping CON holders, and thus, as a matter law, has no impact on any protectable interest of other CON holders. Moreover, the limitation on ABC's fleet size was included on ABC's CON as a result of a settlement agreement to which neither would-be intervenor was a party, and

1 neither of whom was the intended beneficiary of the limitation. The Motions should
2 therefore be denied as a matter of law for failure to show a protectable interest in this
3 hearing. This objection is supported by the attached Memorandum of Points and
4 Authorities.

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6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **A. ABC'S APPLICATION IS SIMPLY TO BE PERMITTED TO ADD**
8 **AMBULANCES**

9 In sum, this amendment application does not request any change to or expansion of
10 ABC's services (level of service or type of service) nor to its service area. The issues raised
11 in this application are a matter to be resolved between the Department and ABC, as
12 governed by 9 A.A.C. 25, Article 10.

13
14 On October 17, 2018, ABC submitted an application ("the Application") to the
15 Department of Health Services, Bureau of Emergency Medical Services & Trauma System
16 ("the Department") requesting the removal of a very unusual (and possibly unique)
17 condition in its CON that serves to control (or phase in) the number of ambulance vehicles
18 that ABC may have in its fleet at any given time (the "Fleet Limitation").

19
20 ABC's Application does not request a change in level of service, or type of service,
21 or service area, the usual CON amendments considered by this forum, and which are
22 covered by R9-25-905. The laws for adding ambulances are not vague and clearly do not
23 convey a protectable right to other CON holders. Simply put, an addition of ambulances is
24 not an expansion of services.

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26 **B. HISTORY OF ABC'S CON AND THE FLEET LIMITATION**

27 CON No. 139 was granted to ABC as part of a settlement agreement between the
28

1 Department and ABC after litigating the Department’s initial denial of a CON. A
2 Stipulation and Settlement Agreement was filed by the parties in superior court on or about
3 April 7, 2015 (“Settlement Agreement”),¹ and the litigation was dismissed on April 30,
4 2015.

5
6 In granting ABC a CON, the Department expressly concluded that (1) ABC was fit
7 and proper,² and that “there is public necessity for the service of the Appellant [ABC].”³
8 The granting of ABC’s CON was made conditional upon a number of licensing
9 requirements, including:

- 10 • ABC was to obtain accreditation from CASS within 36 months;⁴
- 11 • ABC was to provide interfacility arrival time reports to the Department annually;⁵
- 12 • ABC was to provide audited financial statements to ADHS;⁶
- 13 • ABC’s fleet size would be limited - a maximum of 10 ambulances in year one, up
14 to 5 additional ambulances in year two, and up to 5 additional ambulances within
15 the next three years, for a maximum of 20 ambulances registered through year 5.
16 For each year thereafter, ABC shall have a maximum of 2 additional ambulances
17 per year.⁷

18
19 This last condition (the Fleet Limitation that is the subject of ABC’s Application)
20 was imposed by the Department for one reason only: to protect the interest of the sole
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24 ¹ A copy of the Settlement Agreement is attached hereto for ease of reference, marked **Exhibit A**.

25 ² Settlement Agreement, § 5, pp. 2-3.

26 ³ *Id.*, § 6, p. 4.

27 ⁴ *Id.*, p. 7.

28 ⁵ *Id.*

⁶ *Id.*, p. 7.

⁷ *Id.*, pp. 1-2.

1 intervenor, Rural Metro:⁸ “[b]y granting a CON to ABC that is limited by number of
2 ambulances, the financial impact on the Intervenor [Rural/Metro] will be minimal and is
3 outweighed by the public good that will come from granting this CON to the Appellant
4 [ABC].”⁹ The rationale underpinning the Fleet Limitation was repeated: “This limitation
5 was created to provide an important service to the public—an additional ambulance
6 provider with expertise in specialty transports, including behavioral health—while also
7 limiting the financial impact on currently certified providers.”¹⁰

8
9 The Settlement Agreement also noted that granting a CON to ABC would help fill
10 the current uncertainty and potential additional need created by Rural/Metro’s bankruptcy
11 ...”¹¹

12
13 When the Department issued CON No. 139 to ABC (in May 2015), the Department
14 included one of the conditions from the Settlement Agreement on the face of the CON – the
15 Fleet Limitation.

16
17 Since the signature of the Settlement Agreement and issuance of CON 139, ABC has
18 requested an amendment to the terms of the Settlement Agreement, in particular, the
19 condition relating to CASS certification. An amendment to that condition was re-negotiated
20 in late 2017 and granted by the Department (without the need for a hearing or input from
21 other CON Holders).

22
23 When ABC requested that the Department remove the Fleet Limitation from its CON
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26 ⁸ Technically, three groups/entities representing multiple CONs intervened at ABC’s CON hearing, but they were all
owned by Rural Metro.

27 ⁹ *Id.*, p. 2:12-15.

28 ¹⁰ *Id.*, p. 2:3-6.

¹¹ *Id.*, p. 6:19-20.

1 (for reasons including that the Fleet Limitation has consistently been used against ABC by
2 newcomer-applicants for CONs to show that ABC is *de minimus*, and because the rationale
3 underpinning the Fleet Limitation disappeared within a year when the Department granted
4 an unfettered CON to the next applicant for a CON), the Department advised ABC that it
5 was expected to follow the procedures that apply to amendments to CONs. ABC thus filed
6 its Application on the form required by the Department, but maintained the position that no
7 public hearing was required and that the standard does not include “public necessity,”
8 because this was simply a matter of changing the terms of a settlement agreement between
9 the parties, and because fleet size is an everyday, administrative matter governed expressly
10 by R9-25-1001 to R9-25-1006.¹²

13 If the Motions are granted, ABC will have to present evidence at a hearing, facing
14 adverse intervenors, in order to be able to do what every other CON holder is able to do
15 (and which these would-be intervenors do frequently): buy ambulances as their business
16 needs require. This is grossly unfair and not contemplated by the statute or Regulations.

18 **C. REGULATIONS GOVERNING FLEET SIZE**

19 Increasing fleet size is expressly envisaged by the statute and Regulations and is
20 treated as simply an administrative matter. All that is required of a CON holder (regardless
21 of whether the CON overlaps other CON holders) when it purchases additional ambulances
22 is that it must (1) apply for a certificate of registration, (2) pay a fee, and (3) permit the
23 Department to inspect the vehicle (“to ensure that the vehicle is operational and safe and
24 that all required medical equipment is operational”). A.R.S. § 36-2232(A)(11); A.R.S. § 36-
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28 ¹² These issues will likely be presented to this forum in a separate motion, but are included here for background.

1 2212; R9-25-1001 to R9-25-1006. No hearing is required. Other CON holders do not get to
2 weigh in on the desirability of adding ambulances to a fleet, even if their service areas
3 overlap. “Public necessity” is not at issue.

4 It is disingenuous for any CON holder, or would-be intervenor herein, to take the
5 position that adding ambulances to a fleet should be subject to objections (or even input)
6 from other CON holders.

8 It is no different here. Despite the fact that this proceeding is couched as a CON
9 amendment, the effect of the requested action is simply to enable ABC to perform the same
10 administrative functions that every other CON holder is able to perform, namely, to apply
11 to register ground ambulance vehicles under R9-25-1001 to R9-25-1006.

13 **D. REGULATIONS GOVERNING AMENDMENTS TO CONS**

14 R9-25-905(A) governs amendments to CONs:

15 **R9-25-905. Application for Amendment of a Certificate of Necessity**

16 **A.** A certificate holder that wants to amend its certificate of necessity
17 shall submit to the Department the application form in R9-25-902(A)(1)
and an application filing fee of \$50 for changes in:

- 18 1. The legal name of the ground ambulance service;
- 19 2. The legal address of the ground ambulance service;
- 20 3. The level of ground ambulance service;
4. The type of ground ambulance service;
5. The service area; or
6. The response times, response codes, or response-time tolerances.

21 Increasing fleet size is noticeably absent from this list (for good reason: increasing
22 fleet size is an administrative process covered by R9-25-1001 to R9-25-1006, elaborated on
23 above).

24 Not all of the contemplated amendments listed in R9-25-905(A) require a hearing.¹³
25 The first two items (changes to legal name and address) do not undergo a hearing and public
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27
28 ¹³ ABC has taken the position with the Department that in fact no hearing is required herein. See footnote 12 above.

1 necessity test. The Department historically has required a hearing for the remaining types
2 of amendments. The distinction between R9-25-905(A)(1)-(2) and R9-25-905(A)(3)-(6) is
3 that the former (name and address changes) are **administrative** amendments, while the
4 latter (level of service, type of service, service area and response times) amount to a **new**
5 **service** (and thus are regulated by A.R.S. § 36-2233(B)(2)). Increasing fleet size is
6 indisputably considered an **administrative** function by the statute and Regulations (with
7 the emphasis on inspections “to ensure that the vehicle is operational and safe and that all
8 required medical equipment is operational”).¹⁴ It is therefore akin to name and address
9 changes. Other CON holders play no role in these kinds of changes to CONs. They should
10 not be permitted to do so here.
11

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13 **E. THE MOTIONS**

14 **a. Overlapping service area is insufficient to show a protectable interest**

15 Maricopa Ambulance and the AMR entities argue simply that, because they hold
16 CONs that overlap with ABC’s service area, they should be entitled to intervene (and in all
17 likelihood oppose) ABC’s request to remove the Fleet Limitation. The Department also
18 takes the position that a “protectable right” here is based simply on the overlapping service
19 area.¹⁵ But the mere fact that the service areas of ABC, AMR and Maricopa Ambulance
20 overlap cannot **alone** give rise to a right to intervene; an intervening CON holder must also
21 show that it has a **protectable interest** at stake and that no other party can represent their
22 interest. The circumstances in the present case make this distinction abundantly clear. Here,
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27 ¹⁴ A.R.S. § 36-2232(A)(11).

28 ¹⁵ See the Department’s Response to Maricopa Ambulance’s Motion to Intervene and Request for Prehearing Conference [*sic*] filed on June 5, 2019.

1 the action sought to be done is the ability to increase fleet size. Generally, and indisputably,
2 no CON holder has a protectable interest to prevent any other CON holder from increasing
3 its fleet size (it is simply an administrative function to ensure oversight of the safety of the
4 vehicles). It makes no difference if a limitation on fleet size resulted from a settlement
5 agreement (doubly so, where would-be intervenors were not parties to, nor beneficiaries of,
6 that settlement agreement).
7

8 Other CON holders (including the would-be intervenors) would have a protectable
9 interest based on their overlapping service areas if ABC were seeking to:

- 11 • Change its *level* of service (ALS or BLS).¹⁶ It is not.
- 12 • Change its *type* of service (IFT, convalescent or immediate response).¹⁷ It is
13 not.
- 14 • Change its service *area* (as was considered in the Matter of Arizona
15 Ambulance of Douglas, Inc. dba Arizona Ambulance Transport Case No.
16 2016A-EMS-0137-DHS, where a limitation on service area was being
17 adjudicated).¹⁸ It is not.

19 In each of the three categories above, the Department has laid out specific rules to
20 be followed that are appropriate given that such amendments are akin to a *new* CON
21 application.
22

23 Here, ABC is seeking the ability to increase its fleet size. The Department *also* has
24 laid out specific rules to be followed when a CON holder wants to add new ambulances
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27 ¹⁶ R9-25-901(26).

28 ¹⁷ R9-25-901(51).

¹⁸ See Notice of Hearing filed in that case on November 9, 2015, p.1:21.

1 (R9-25-1001 to R9-25-1006). These are the rules that should be followed here because all
2 the same considerations apply.

3 **b. ABC does not seek to expand its services**

4 The AMR entities' statement (upon which their claim to intervene as of right rests)
5 that ABC proposes to provide "expanded services"¹⁹ is inaccurate and contradicted by the
6 Regulations and the Arizona Constitution. "Ambulances" (in other words, the vehicles
7 themselves, including changes to fleet size)²⁰ are expressly distinguished from "ambulance
8 services." The first line of the constitutional provision itself differentiates between
9 "ambulances" (the vehicles) and "ambulance services" (the types and levels of services
10 provided). A.R.S. Const. Art. 27, §1.²¹ The Regulations define "services:" "level of service"
11 refers to ALS or BLS service (which is unrelated to vehicles) and "type of ground
12 ambulance service" refers to whether its IFT, convalescent or immediate response (also
13 unrelated vehicles). R9-25-901(26) and (51). In no way is ABC attempting to expand its
14 "services," and the AMR entities' reliance on this assertion must fail.

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18 **c. The would-be intervenors have no standing under the Settlement Agreement**

19 Neither would-be intervenor was a party to the Settlement Agreement,²² nor were
20 they beneficiaries under the Settlement Agreement. The Fleet Limitation was clearly
21 imposed to limit "the financial impact on the Intervenor [Rural Metro]."²³ It is clear that the
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24 _____
25 ¹⁹ AMR entities' Motion, p. 3:6.

26 ²⁰ "Ground ambulance vehicle" is defined to mean "a motor vehicle, defined in A.R.S. § 28-101 specifically designed
27 to transport ambulance attendants and patients on land." R9-25-901(23). This definition clearly does not include a
28 "service."

²¹ "The legislature may provide for the regulation of ambulances and ambulance services in this state in all matters
relating to services provided, routes served, response times and charges."

²² Only the Department and ABC were parties to the Settlement Agreement.

²³ *Id.*, p. 2:12-15, p. 2:3-6.

1 Department was concerned about Rural Metro’s then-pending bankruptcy.²⁴ That
2 protecting Rural Metro was the purpose for the Fleet Limitation is further demonstrated by
3 the fact that, as soon as Rural Metro was no longer in bankruptcy, no later provider was
4 subject to any such limitations (in fact, the very next CON applicant to be granted a CON
5 – Maricopa Ambulance – was unfettered by fleet limitations).²⁵
6

7 Maricopa Ambulance attempts to get around its lack of standing by attempting to
8 draw a parallel between itself and Rural Metro – it argues that the Settlement Agreement
9 “emphasized” that “a limitation on the number of ambulances would not materially impair
10 those providers that also did 911 and emergency response in addition to scheduled
11 interfacility and convalescent transports.”²⁶ This is disingenuous. The Settlement
12 Agreement made no reference at all to the distinction between 911 and IFT/convalescent
13 transports. The face of the Settlement Agreement makes it clear that the Fleet Limitation
14 was imposed to limit financial impact on Rural Metro, not because it held a 911 CON but
15 because the Department was concerned with Rural Metro’s bankruptcy.
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18 **F. CONCLUSION**

19 This process is strictly a matter between the Department and ABC. It is an
20 amendment to an agreement solely between the Department and ABC, that would permit
21 ABC to perform an everyday, administrative action that conveys no rights to, nor seeks
22 information from, overlapping CON holders, all of which in any event lack standing to
23 challenge ABC’s request. The would-be intervenors have no protectable interest that grants
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27 ²⁴ *Id.*, p. 6:19-20.

28 ²⁵ This fact also demonstrates the absence of any continuing purpose for the Fleet Limitation.

²⁶ Motion to Intervene, p. 2.

1 them the right to intervene and oppose ABC's request.

2 RESPECTFULLY SUBMITTED this 10th day of June, 2019.

3 HOFMEYR LAW PLLC

4 By /s/ Adriane J. Hofmeyr _____

5 Adriane J. Hofmeyr

6 *Attorney for ABC Ambulance, LLC*

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8 **CERTIFICATE OF SERVICE**

9 ORIGINAL filed using the OAH electronic document filing system
10 <https://portal.azoah.com/oedf> this 10th day of June, 2019, with copies provided to all
11 parties on the approved mailing list this 10th day of June, 2019, by posting through the
12 designated OAH website at [https://portal.azoah.com/oedf/documents/2019-EMS-0151-
13 DHS/index.html](https://portal.azoah.com/oedf/documents/2019-EMS-0151-DHS/index.html).

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By: /s/ Adriane Hofmeyr