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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of: **ABC Ambulance LLC** Applicant.	Docket No. 2019-EMS-0151-DHS **MOTION FOR RULINGS OF LAW TO LIMIT OR CLARIFY ISSUES AT HEARING** (Assigned: The Hon. Thomas Shedden)

Pursuant to R2-19-106 and A.R.S. § 41-1092.05(F), Applicant, ABC Ambulance, LLC ("ABC") hereby requests that the Administrative Law Judge ("ALJ") issue rulings of law in order to limit or clarify the issues that ABC is required to prove at the hearing set for July 11 and 12, 2019 ("Hearing"). The threshold legal questions upon which rulings are requested are:

a) That requiring a public hearing on the issue of fleet size violates the Regulations;

b) That, if a hearing is held, the appropriate test is not "public necessity;"

c) That, if "public necessity" is held to be the appropriate test, the correct framing of the issue is "whether public necessity requires the retention of the Fleet Limitation on ABC's CON."

The intent of this motion is to promote expedition and efficiency in the

administrative process, and to avoid incurring the burden of a hearing; alternatively, to shorten the hearing and to simplify the issues that will be addressed.

This motion is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

A. SUMMARY OF THE ARGUMENT

The Department has taken a position that it has never, to ABC's knowledge, claimed before: that a duly-certificated ambulance provider, fit and proper in all respects, must go to a hearing that will determine how many additional ambulances it may add to its fleet—and that it must show a public necessity for it—despite the fact that it lacks the regulatory authority to do so.

To begin with, there is an unambiguous regulation - R9-25-905 - that governs CON-related amendments that require a hearing. ABC's request – to add ambulances – does not fall within any of the listed categories. There is also an unambiguous regulation – R9-25-1001 – that governs adding ambulances. No hearing is required; "public necessity" is irrelevant.

The Department compounds its legal error by then insisting that a showing of "public necessity" under R9-25-903 must be made here. R9-25-903 does not require that "public necessity" must be shown at every hearing. On the contrary, it does not even apply to every CON amendment under R9-25-905. It certainly does not apply to requests, like ABC's, that are not listed in R9-25-905.

If the ALJ finds that a hearing—including public necessity-- is required, the question becomes what would a showing of public necessity look like. Based on the Department's explanation as to why the fleet limitation was imposed in the first instance-- that it was to

protect an existing provider that was in dire financial straits - the only issue to be determined here is whether, given the vastly different Maricopa County CON landscape today and the unfair impact on ABC, those conditions still exist sufficient to justify the retention of the limitation. If they do not, there is no public necessity for the retention of the limitation on ABC's CON.

B. PROCEDURAL BACKGROUND

On October 17, 2018, ABC submitted an application ("the Application") to the Department of Health Services, Bureau of Emergency Medical Services & Trauma System ("the Department") requesting the amendment of a term in a settlement agreement between the Department and ABC that serves to control the number of ambulance vehicles that ABC may have in its fleet at any given time (the "Fleet Limitation" or "Limitation").[1]

On May 15, 2019, ABC (having heard from the Department that it planned to conduct a public hearing on the Application) sent a substantive and legally supported letter to the Department requesting that the Department re-consider its position that a public hearing is required in these circumstances, and that, if a hearing is to be held, "public necessity" is not the appropriate test. A copy of ABC's letter is attached hereto marked **Exhibit A**.

On May 17, 2019, the Department sent a one-line email response that "the Bureau considered your latest argument and was not persuaded." A copy of the Department's response to ABC is attached marked **Exhibit B**. The Department offered nothing in the way of an alternative interpretation of the statute and Regulations.

[1] ABC's Application does **not** request a change in **level of service**, **type of service** or **service area** - the CON amendments provided for in R9-25-905 (entitled "Application for Amendment of a Certificate of Necessity").

On the same day, the Department filed a Notice of Hearing and Appointment of Administrative Law Judge, setting the matter for public hearing on July 11 and 12, 2019 ("NOH").

The Notice of Hearing relies on ARS § 36-2234(A) to justify its demand for a public hearing,[2] and dictates that the issue is whether "there is public necessity to issue an amended C.O.N," naming R9-25-903(A)(4)(6) and (B), and R9-25-905.[3]

On May 27, 2019, ABC addressed a second letter to the Department requesting that the NOH be amended to (1) correct inaccuracies;[4] and (2) to provide a more definite and detailed statement of the issue to be determined.[5] A copy of ABC's letter is attached hereto marked **Exhibit C**. The Department did not respond affirmatively or negatively, or at all, to this letter.

C. HISTORY OF ABC'S CON NO. 139

CON No. 139 was granted to ABC in May 2015 as part of a settlement agreement between the Department and ABC after litigating the Department's initial denial of a CON ("Settlement Agreement").[6]

In granting ABC a CON in 2015, the Department has already concluded (**and it need not be re-proved herein**) that:

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[2] NOH, ¶ 8. No deference need be shown to the Department's interpretation of the statute A.R.S § 12-910(E) ("the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, **without deference to any previous determination that may have been made on the question by the agency**") (enacted 2018).

[3] *See* NOH, p. 3, ¶ 9.

[4] For example, the first paragraph in the NOA states that ABC requests the Director to amend its CON "in accordance with ... R9-25-903." On the contrary, ABC's position has consistently been that R9-25-903 does not apply to ABC's request.

[5] For example, does the standard in R9-25-905 (the regulation specifically governing amendments to CONs) apply here? ABC also requested the Department to refine the framing of the issues as requested herein.

[6] A copy of the Settlement Agreement is attached to the NOH.

(1) ABC is fit and proper;[7] and

(2) "There is **public necessity** for the service of the Appellant [ABC]."[8]

The granting of ABC's CON was made conditional upon a number of licensing requirements, including:

- ABC was to obtain accreditation from CASS within 36 months;[9]
- ABC was to provide interfacility arrival time reports to the Department annually;[10]
- ABC was to provide audited financial statements to ADHS;[11]
- ABC's fleet size would be limited - a maximum of 10 ambulances in year one, up to 5 additional ambulances in year two, and up to 5 additional ambulances within the next three years, for a maximum of 20 ambulances registered through year 5. For each year thereafter, ABC shall have a maximum of 2 additional ambulances per year.[12]

This last condition (the Fleet Limitation that is the subject of ABC's Application) was imposed by the Department **to protect the interest of the sole intervenor, Rural Metro**:[13] "[b]y granting a CON to ABC that is limited by number of ambulances, **the financial impact on the Intervenor [Rural/Metro] will be minimal** and is outweighed by the public good that will come from granting this CON to the Appellant [ABC]."[14] And:

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[7] Settlement Agreement, § 5, pp. 2-3.
[8] *Id*, § 6, p. 4.
[9] *Id*, p. 7.
[10] *Id.*
[11] *Id*.
[12] *Id*, pp. 1-2.
[13] Technically, three groups ("Rural/Metro," "PMT Intervenors," and "SW Intervenors") representing seven CONs intervened at ABC's CON hearing, but they were all owned by Rural Metro.
[14] *Id*, p. 2:12-15 (emphasis added). The Department, in quoting the Settlement Agreement in its NOH herein, failed to include this provision.

"This limitation was created to provide an important service to the public—an additional ambulance provider with expertise in specialty transports, including behavioral health—while also **limiting the financial impact on currently certified providers**."[15]

The Department memorialized its underlying rationale for the Limitation: "granting a CON to ABC would help fill the current uncertainty and potential additional need **created by Rural/Metro's bankruptcy**," and that "**the Bureau had concerns over a potential failure of Rural/Metro and how this would impact interfacility transports**."[16]

When the Department issued CON No. 139 to ABC (in May 2015), the Department of its own accord (and absent any provision in the Settlement Agreement so permitting) decided to include one of the conditions from the Settlement Agreement **on the face of the CON** – the Fleet Limitation.

Within a year, on May 18, 2016, the Department issued a CON to the next applicant - Maricopa Ambulance LLC - **unfettered by conditions** to minimize financial impact on existing providers. Also, in February 2015, after ABC's hearing closed, but before the Settlement Agreement was entered into, the Department issued a CON to a later applicant - AMR of Maricopa, LLC - **without any restrictions** to minimize financial impact on Rural Metro (still the sole provider in February 2015).

Since the signature of the Settlement Agreement and issuance of CON 139, ABC has requested an amendment to the terms of the Settlement Agreement. An amendment to the CASS certification condition was re-negotiated in late 2017 and granted by the Department

[15] *Id*, p. 2:3-6 (emphasis added). The "currently certified providers" referenced were the seven CONs that intervened in those proceedings (albeit all owned by Rural Metro).
[16] *Id.*, p. 6:19-20 (emphasis added).

(without the need for a hearing or input from other CON Holders).

When ABC thereafter approached the Department to discuss further amending the Settlement Agreement by removing the Fleet Limitation from its CON (for several reasons, including that the Fleet Limitation has consistently been used against ABC by newcomer-applicants for CONs, purportedly to show that ABC is a *de minimus* provider of services; because the rationale underpinning the Fleet Limitation (i.e. that Rural Metro, the then-predominant Maricopa provider, was in dire financial health) disappeared within a year; and because the Limitation is a concern to potential ABC customers), the Department advised ABC that it was required to follow the procedures that apply to amendments to CONs. ABC thus filed its Application on the form required by the Department, but maintained the position that no public hearing was required, and that (if the Department nonetheless insisted on a hearing) the standard to be proved is not "public necessity" (which has already been proven).[17]

In view of the Department's failure to substantively respond to any of ABC's substantive analysis, ABC requests that the ALJ clarify, limit and make rulings on the legal issues as requested herein.

The Department has made it clear on the record that the **only** reason it expects ABC to go through a public hearing in this case is because the Fleet Limitation appears on the face of the CON: "The Bureau generally agrees with ABC that if no such limitation/restriction existed on the ABC C.O.N., ABC would be free to increase the size of its ambulance fleet in accordance with Department rules and without potential

[17] *See* cover letter to Application dated October 18, 2018 (included in the NOH), and Exhibits A and B hereto.

intervenors involved."[18]

In other words, had the Department treated **this** settlement condition as the other settlement conditions, it **would not** now be maintaining that a hearing is required. That is, it is **solely** for this reason, and not based on any specific statutory or regulatory directive, that the Department believes a hearing is required. In fact, however, as we further discuss below, the unilateral decision of the Department (without the consent of the other party to the settlement agreement) to place one of the four settlement conditions on the face of the CON **cannot override the limited situations** (as set forth in the applicable law) wherein a hearing is required. Put another way, the Department's position appears to be that **whatever** it chooses to place on the face of a CON automatically becomes the subject of a later hearing, irrespective of whether or not that item is specifically identified in the Regulations (R9-25-905 (A)) as something for which a hearing must be conducted.

D. LEGAL AUTHORITY TO DETERMINE ISSUES OF LAW

A.R.S. § 41-1092.05(F) empowers the ALJ, at a prehearing conference, to "**clarify or limit** procedural, **legal** or factual issues," and to issue "**rulings** regarding testimony, exhibits, facts or **law**."[19]

The ALJ is empowered to, and indeed must, issue conclusions of law in his final administrative decision. A.R.S. § 41-1092.07(F)(7). "Conclusions of law shall **specifically address the agency's authority to make the decision consistent with § 41-1030** ['an agency shall not base a licensing decision in whole or in part on a licensing requirement or

[18] *See* the Departments's Response to AMR CON Holders' Motion for Intervening Party Status and To ABC's Objections, p. 3:12-14.
[19] Emphasis added.

condition that is not specifically authorized by statute, rule ...']." *Id* (emphasis added).

The ALJ is empowered to rule on motions. R2-19-106.

"The overriding considerations of the Administrative Law Judge in rendering a ruling are those of fairness to the parties and expedition and efficiency in the process." *Motion Practice at the Office of Administrative Hearings*, by former ALJ Gary B. Strickland, Vol. 23, April 2002, available at https://www.azoah.com/Vol23.html.

E. LEGAL ISSUES UPON WHICH A RULING IS REQUESTED[20]

a. Requiring a public hearing on the issue of fleet size violates the Regulations

The Department relies solely on ARS § 36-2234(A) to justify its demand for a public hearing.[21] However, the Department's reading of the statute **ignores and disregards the Regulations that are exactly on point and which are the starting point of this inquiry,** and is thus in error.

While the statute provides that proposed actions relating to CONs require a hearing, the **implementing regulation** (R9-25-905) defines what those actions are, which is precisely how statutes (passed by the legislature) and regulations (enacted by the agency responsible for compliance and enforcement of the enabling laws) are intended to work in tandem.[22] **R9-25-905** (appropriately entitled "Application for Amendment of a Certificate

[20] ABC incorporates herein all arguments made in its letters to the Department dated May 15, 2019 and May 27, 2019 (Exhibits A and C hereto), including (although not repeated herein) that the Fleet Limitation should not have been included on the face of the CON in the first place because it exceeded the Director's statutory authority to do so. A.R.S. § 41–1030(B) (prohibiting the Department from basing a licensing decision on a licensing condition that (as here) is not specifically authorized by statute).

[21] NOH, ¶ 8.

[22] Statutes generally lay out broad parameters, while regulations supplement for practical administration. "Standards laid down by the legislature may be broad and in general terms." *Ethridge v. Arizona State Bd. of Nursing*, 165 Ariz. 97, 104, 796 P.2d 899, 906 (Ct. App. 1989). When authorized to do so by the act itself, administrative bodies may "make rules and regulations *supplementing* legislation for its complete operation and enforcement." *Haggard v. Indus. Comm'n*, 71 Ariz. 91, 100, 223 P.2d 915, 921 (1950) (emphasis in original). "The extent and character of these

of Necessity") tells us, with all the specificity one could ask for, **the precise sorts of CON-related amendments which require public hearings**. This is the starting point in determining whether or not a hearing is required in a given circumstance. R9-25-905(A)(1) to (6) lists those precise circumstances; if a CON holder wants to do any of these things, it must apply for an amendment to its CON. Tellingly, there is **no catch-all** after the enumeration of these six specific events; if what the CON holder wants to do is not listed, there is no need for it to apply to amend its CON. After all, why would the Department go to the effort of enacting a rule which specifically delineates those circumstances if it can simply determine on an *ad hoc* basis that this is, after all, not truly an exhaustive list?[23] It would have been simple enough for it to have added a subsection 7, providing that other circumstances may also compel a hearing, but it did not do this, and it therefore can only require that a CON holder apply for an amendment if one of these six categories applies.[24]

Not only does R9-25-905 **not** apply, but there is another regulation that expressly **does** apply. **R9-25-1001** *et seq* **expressly deals with adding ambulances**. When a CON holder (including all the would-be intervenors) wants to purchase ambulances, all that is required (regardless of whether the CON overlaps other CON holders) is that it must (1) apply for a certificate of registration, (2) pay a fee, and (3) permit the Department to inspect

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rules and regulations must be fixed in accordance with common sense and the inherent necessities of governmental coordination." *Id.*

[23] Moreover, the fact that an item is omitted is interpreted to mean that is was not intended to be included. *City of Surprise v. Arizona Corp. Comm'n*, 437 P.3d 865, ¶ 13 (Ariz. 2019).

[24] ABC's request does not fall within R9-25-905(A)(3)-(5). Changes to **service area** are indisputably not implicated here. And increasing fleet size has nothing whatsoever to do with changes in **type of service** or **level of service. These two terms are specifically defined in the Regulations**: "level of ground ambulance service" refers to ALS or BLS service; and "type of ground ambulance service" refers to IFT, convalescent or immediate response services. R9-25-901(26) and (51). **ABC is already authorized** to perform ALS and BLS services, and to perform IFT and convalescent transports, and it is **not attempting to change or expand any of these categories.**

the vehicle (R9-25-1001 to R9-25-1006) ("to ensure that the vehicle is operational and safe and that all required medical equipment is operational").[25] No hearing is required; "public necessity" is irrelevant.

Here, it is clear beyond dispute that what ABC wishes to do - add ambulances - **does not fall** within any of the six subsections of R9-25-905, and it is there that this analysis should appropriately end.[26]

b. <u>If a hearing is held, the test is not "public necessity"</u>

Compounding its error, and without explanation, the Department jumps immediately to **R9-25-903** (without having first considered R9-25-905) and insists that a showing of "public necessity" is required here.[27] However, the Department mis-reads the applicability of R9-25-903 here.

First, it appears that the Department's view (that if a hearing is required, public necessity automatically must be shown) stems from the Department's misreading of the introductory language of 903: "In determining public necessity for an initial or amended Certificate of Necessity, the Director shall consider the following…" It appears that the Department interprets this language as **mandating** that public necessity be shown **in every circumstance where an amendment is sought**. Not only is this interpretation contradicted by the Regulations, but it also produces unusual results. If, say, a CON holder wishes to change its address (one of the six circumstances that is in fact enumerated in R9-25-905), that applicant, according to the Department's interpretation, would have to put on evidence

[25] A.R.S. § 36-2232(A)(11); A.R.S. § 36-2212.
[26] The would-be intervenors can add ambulances without a hearing. The notion that R9-25-905 (A) can somehow be read as being "flexible" in its applicability to the circumstances under which a hearing can be required finds no support in the ambulance laws.
[27] NOH, p. 3, ¶ 9.

of, among other things, the geographic distribution of health care institutions in its service area, the population demographics of its service area, and response times-- in order to change its address! In order to avoid this anomalous interpretation, we respectfully submit that the proper way to construe the introductory language to R9-25-903 is that these are the factors that are to be addressed only **in those circumstances where public necessity must be shown**. R9-25-903 **does not say** that all public hearings require a showing of public necessity; it says only that "where public necessity must be shown," then the listed factors must be taken into account by the Director. Here, given that ABC is a duly certificated CON holder, and is not seeking to amend its CON in any of the respects set forth in R9-25-905, it is simply erroneous for the Department to conclude that ABC is required to make a public necessity showing, even if the Department could somehow legally justify its position that a hearing is here required.

Second, R9-25-903 only applies **if R9-25-905 applies**. Here, R9-25-905 does not apply to adding ambulances (see above), therefore R9-25-903 does not apply. This is how it should be, and how it is for every other CON holder. Adding ambulances is an administrative function already regulated by the Department (R9-25-1001 *et seq.*). It is re-iterated that the Department agrees with this position: "The Bureau generally agrees with ABC that if no such limitation/restriction existed on the ABC C.O.N., **ABC would be free to increase the size of its ambulance fleet in accordance with Department rules**."[28]

Third, the Department's position is grossly unfair to ABC, and unjustifiably subjects ABC to an administrative burden that is imposes on **no other provider** - all of whom can

[28] Department's Response to AMR CON Holders' Motion for Intervening Party Status and To ABC's Objections, p. 3:12-14.

add ambulances whenever they wish to, so long as they simply register the ambulances, pay a fee, and pass inspection, without any requirement of a hearing or any showing of "public necessity." By insisting that what ABC seeks is tantamount to a **new service** requiring a hearing (including proof of "public necessity"), the Department seeks to impose on ABC an unjust and unfair impediment to ABC's ability to expand its ambulance fleet in the same manner as every other provider is permitted to do. If adding ambulances is not considered a "new service" for any other provider, it cannot possibly be deemed a "new service" for ABC.

c. <u>If public necessity is held to be the appropriate test, the correct framing of the issue is "whether public necessity requires the retention of the Fleet Limitation on ABC's CON"</u>

Were the ALJ to determine that there is to be a hearing and that public necessity in some way is relevant, we respectfully submit that, based on the Department's explanation as to why the Fleet Limitation was imposed in the first instance - that it was to protect an existing provider that was in dire financial straits - the only issue to be determined here is whether, given the vastly different Maricopa County CON landscape today, that purported prophylactic is still necessary, or whether instead it no longer serves the purpose for which it was imposed in the first instance.[29]

When the Department originally imposed the Limitation on ABC, the Department's stated concern was to "help fill the current uncertainty and potential additional need **created**

[29] To be clear, in saying this, ABC does not in any respect intend to diminish what we have explained regarding, respectfully, the Department's incorrect application of the relevant laws; we take this position only in the event that the ALJ determines a hearing to be necessary, and further determines that public necessity would somehow be an issue in that hearing.

by Rural/Metro's bankruptcy."[30] The Limitation was not based on or supported by any evidence at ABC's hearing.[31] Rural Metro itself did not participate in the creation of the Limitation.[32] The Department memorialized the rationale for the Limitation as follows: "[b]y granting a CON to ABC that is limited by number of ambulances, **the financial impact on the Intervenor [Rural/Metro] will be minimal** and is outweighed by the public good that will come from granting this CON to the Appellant [ABC]."[33] And: "This limitation was created to provide an important service to the public—an additional ambulance provider with expertise in specialty transports, including behavioral health—while also **limiting the financial impact on currently certified providers**."[34]

Thus, if a hearing is conducted, the only appropriate enquiry is whether those conditions still exist sufficient to justify the retention of the Fleet Limitation. If they do not, there is no public necessity for the retention of the Fleet Limitation on ABC's CON.

F. <u>CONCLUSION</u>

R9-25-905 governs CON-related amendments that require a hearing. ABC's request – to add ambulances – does not fall within any of the listed categories. Moreover, R9-25-1001 governs adding ambulances, which is treated as an administrative function not requiring a hearing. It violates the Regulations to insist on a hearing for ABC's Application.

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[30] Settlement Agreement., p. 6:19-20 (emphasis added).

[31] A review of the transcript and filings from ABC's application proceedings (spanning 2011 to 2014) reveals no evidence to support the *concept* of a fleet-limiting condition to minimize impact on Rural Metro, or any *actual numbers* that would in fact minimize financial impact on Rural Metro.

[32] In fact, Rural Metro, as intervenor in that case, was not permitted by the Department to participate in the settlement negotiations, and had no opportunity to put on any evidence regarding the Limitation. In other words, an existing provider, which fully participated in ABC's CON hearing, was nonetheless deemed by the Department to have **no cognizable interest** in the issue of ABC's fleet size (or any limitations thereon). It is thus utterly inconsistent for the Department to **now** maintain that current CON holders have a legally recognizable interest here such that an evidentiary hearing on fleet size (to include the issue of public necessity) is required.

[33] *Id*, p. 2:12-15 (emphasis added).

[34] *Id*, p. 2:3-6 (emphasis added).

Moreover, "public necessity" is irrelevant. R9-25-903 does not require that "public necessity" must be shown for every hearing. On the contrary, it does not even apply to every CON amendment under R9-25-905.

If the ALJ finds that a hearing is required, the only issue here should whether, given the vastly different Maricopa County CON landscape today and the unfair impact on ABC, those conditions still exist sufficient to justify the retention of the Limitation. If they do not, there is no public necessity for the retention of the Limitation on ABC's CON.

RESPECTFULLY SUBMITTED this 19th day of June, 2019.

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

CERTIFICATE OF SERVICE

ORIGINAL filed using the OAH electronic document filing system https://portal.azoah.com/oedf this 19th day of June, 2019, with copies provided to all parties on the approved mailing list this 19th day of June, 2019, by posting through the designated OAH website at https://portal.azoah.com/oedf/documents/2019-EMS-0151-DHS/index.html.

By: /s/ Adriane Hofmeyr

EXHIBIT A

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May 13, 2019

Attention: Kevin Ray
Office of the Attorney General
2005 N. Central Avenue
Phoenix, Arizona 85004-1592
kevin.ray@azag.gov

Dear Kevin,

Re: ABC AMBULANCE'S APPLICATION TO REMOVE FLEET-SIZE LIMITATION FROM CON NO. 139

Thank you for your email dated April 12, 2019, in response to our request regarding what standard the Department expects ABC to meet on the issue of removing the fleet-size limitation from ABC's CON No. 139.

It is our understanding that the Department is not necessarily opposed to ABC's application; rather, it is interpreting the regulations necessary to amend a CON.

We understand that the Department's position is that a hearing is required in these circumstances because the fleet-size limitation is included on the face of the CON, therefore its removal constitutes an amendment to the CON itself, and that amendments to CONs are covered by the "public necessity" standard under R9-25-903(A)(4), (A)(6) and (B).

However, we respectfully have a different position for you to consider:

First, adding the fleet limitation on the face of the CON was in error because (1) it was a deviation from the form shown in Exhibit A to the settlement agreement; (2) it was unnecessary; and (3) it was beyond the authority of the Director to do so.

Second, whether or not the fleet limitation was appropriately included on the face of the CON, its inclusion on the face of the CON cannot expand the Department's statutory authority under R9-25-905(A).

Third, there is no ground to examine public necessity for ABC to change its fleet size because (1) the Department did not consider it a public necessity issue at the time it was imposed on ABC; (2) the limitation was not supported by or based on any evidence presented at ABC's hearing; and (3) regulation of fleet size is a purely administrative matter already governed by rule and statute. Alternatively, and without waiving our argument that no hearing is required, if this matter does proceed to a hearing, then the closest applicable rule would be R9-25-905(B).

Fourth, it is appropriate to remove the fleet limitation from the settlement agreement because the rationale underlying the limitation (the Department's concern about minimizing financial impact on Rural Metro) was illusory (it was not imposed to limit financial impact on then-new CON holder AMR) and it disappeared within a year (when it granted an unfettered CON to the next applicant). The continued enforcement is harming ABC, and the Department has the authority to reconsider its decisions.

Should the Department agree with our analysis, ABC CON 139 should be reprinted as shown in exhibit A without the fleet limitation; the notice of hearing withdrawn; and the settlement agreement amended to remove the limitation on fleet size.

1. The Department's inclusion of the fleet limitation on the face of the CON was in error and the CON should be republished without the limitation

CON No. 139 was granted to ABC as part of a settlement agreement between the Department and ABC after litigating the Department's initial denial of a CON. The Department and ABC reached an agreement, which was filed in court on or about April 7, 2015, and the litigation was dismissed on April 30, 2015.

The Department expressly concluded that (1) ABC was fit and proper,[1] and that "there is public necessity for the service of the Appellant [ABC]."[2] However, the granting of ABC's CON was made conditional upon a number of licensing requirements, including:

a) ABC was to obtain accreditation from CASS within 36 months;[3]
b) ABC was to provide interfacility arrival time reports to the Department annually;[4]
c) ABC was to provide audited financial statements to ADHS;[5]
d) ABC's fleet size would be limited - a maximum of 10 ambulances in year one, up to 5 additional ambulances in year two, and up to 5 additional ambulances within the next three years, for a maximum of 20 ambulances registered through year 5. For each year thereafter, ABC shall have a maximum of 2 additional ambulances per year.[6]

This last condition was imposed for one reason only: to limit financial impact on the sole intervenor, Rural Metro.[7] The settlement agreement did not mention limiting financial impact on then-new CON holder, AMR of Maricopa LLC, or any other overlapping CON holder.

The Department agreed to issue a CON "as soon as this appeal has been dismissed" "in the form shown as Exhibit A hereto."[8] Exhibit A contained no reference to any of the licensing conditions just listed.

[1] *Id*, § 5, pp. 2-3.
[2] *Id*, § 6, p. 4.
[3] Stipulation and Settlement Agreement, p. 7.
[4] *Id.*
[5] *Id*, p. 7.
[6] *Id*, pp. 1-2.
[7] *Id*, p. 2:3-6.
[8] *Id*, § 9, p. 7.

However, when the Department issued CON No. 139 to ABC (in May 2015), the Department included **one** of the conditions from the settlement agreement on the face of the CON – the fleet-limiting condition. Including this condition on the face of the CON was in error:

a) Including the limitation on the face of the CON was a deviation from the settlement agreement

The parties agreed that the Director would issue a CON to ABC "in the form shown in Exhibit A hereto." No mention was made in the agreement that any of the conditional licensing requirements would be included on the face of the CON. It is unknown why the Department deviated from Exhibit A to the settlement agreement by choosing to insert only one of the conditions. This would make no difference to ABC if the Department were not now treating this one condition differently to the others for the sole reason that it appears on the face of the CON.

As you know, at least one of the settlement terms has already been re-negotiated, directly between the Department and ABC, without the Department requiring ABC to re-prove public necessity: in late 2017, the Department agreed to amend the requirement for CAAS accreditation, and ABC complied.

The harm caused by including the condition on the face of the CON is only now apparent, given that the Department will not treat the amendment of the settlement agreement as it pertains to the fleet-limiting condition the same way it treated the prior amendment.

b) Including the limitation on the face of the CON was unnecessary

There was no legal need for the fleet-limiting licensing requirement to be included on the face of the CON in order to bind ABC. ABC was and is in any event bound by the terms of the settlement agreement.

c) Including the limitation on the face of the CON was beyond the Director's authority

There is a good legal argument to be made that, by purposefully including the fleet-limitation condition on the face of the CON, the Director exceeded his authority.

A.R.S. § 41–1030(B) prohibits the Department from basing a licensing decision "in whole or in part on a licensing requirement or condition that is not specifically authorized by statute."[9] *Arizona Dep't of Water Res. v. McClennen*, 238 Ariz. 371, 374, 360 P.3d 1023, 1026 (2015). "The powers and duties of administrative agencies ... are strictly limited by the statute creating them." *Cleckner v. Arizona Dep't of Health Servs.*, 246 Ariz. 40, 433 P.3d 1200, 1203 (App. 2019).

I think you would agree that the Department is not free to insert any condition it chooses onto the face of a CON (irrespective of whether a party agreed to it or not). The Department can only impose a condition on a CON applicant if the condition is "specifically authorized by statute." Here, limiting the size of an ambulance fleet as a licensing requirement is not authorized by statute:

[9] A CON fits within the definition of "license" in A.R.S. § 41–1001(12).

Constitutionally, the Department is authorized to regulate ambulances and ambulance services "in all matters relating to services provided, routes served, response times and charges." A.R.S. Const. Art. 27, §1. So empowered, the legislature enacted statutes to "regulate ambulances," contained in the provisions of A.R.S. § 36-2212 (apply for a certificate of registration, pay a fee, and permit an inspection) and A.R.S. § 36-2232(A)(11) (the Director's powers to inspect vehicles), the goal of which is "to ensure that the vehicle is operational and safe and that all required medical equipment is operational."[10] Within these parameters, the Department enacted regulations to administer the process of registering ambulances, contained in the provisions of R9-25-1001 to R9-25-1006. Nowhere in either the statutes or the regulations is there any reference whatsoever to limiting the number of ambulances a provider may operate. It is clear that the legislature has never interpreted the constitutional authority to "regulate ambulances" or "ambulance services"[11] to include the concept of limiting fleet size once an applicant has proved it is fit and proper and that public necessity requires the service (as ABC did). It is clear that the legislature has not authorized the Director to limit fleet size as a licensing requirement. It is clear that the Director, in drafting the regulations, did not perceive or anticipate that limiting fleet size would be used as a means of controlling CON holders.

Moreover, limiting fleet size does not fall within any other power granted to the Director by the legislature. A.R.S. § 36-2232 dictates and limits the director's powers and duties in regulating "ambulances and ambulance services." The only power that conceivably gives the Director broad "catch-all" powers is that s/he may "regulate ambulance services in all matters affecting services to the public to the end that this article may be fully carried out."[12] And the only power that relates specifically to vehicles is the power to inspect each ambulance "to ensure that the vehicle is operational and safe and that all required medical equipment is operational."[13] Imposing a licensing requirement that limits fleet size does not fall within any of these categories, not even the "catch-all" (which expressly references "services" which is not a vehicle issue – see footnote 11 below).

In sum, a licensing requirement limiting fleet size is not authorized by statute (it is not even envisaged by statute), nor by the regulations. Therefore, the Department's licensing requirement limiting ABC's fleet size included on the face of ABC's CON exceeded the Department's authority.

2. <u>In any event, the inclusion of the fleet limitation on the face of ABC's CON cannot expand the Department's statutory authority under R9-25-905(A)</u>

R9-25-905(A) contains the exclusive list of amendments that require an application (and, at least in some instances, arguably a hearing). Increasing fleet size is not on that list (for good reason: increasing fleet size is an administrative process covered by R9-25-1001 to R9-

[10] A.R.S. § 36-2232(A)(11).

[11] Limiting fleet size clearly does not fall within the parameters of "routes service," or "response times and charges." Nor does it fall within the meaning of "services provided." The first line of the constitutional provision itself differentiates between "ambulances" (the vehicles) and "ambulance services" (the types and levels of services provided). In other words, the constitution itself does not include the vehicles within the meaning of "services." The regulations define "services" – "level of service" refers to ALS or BLS service (unrelated to vehicles) and "type of ground ambulance service" refers to whether its IFT, convalescent or immediate response (also unrelated vehicles). R9-25-901(26) and (51).

[12] A.R.S. § 36-2232(A)(7).

[13] A.R.S. § 36-2232(A)(11).

25-1006, elaborated on below). Unless clear direction to the contrary, omitted factors are deemed intentionally omitted.[14]

For the Department to require a hearing and to require that public necessity be proven before it will permit ABC to increase its fleet size is essentially the Department saying that its choice to include the limitation on the face of the CON conferred upon it new powers that are not granted to it by statute and which exceed the powers expressly granted to it by statute. However, "the powers and duties of administrative agencies ... are strictly limited by the statute creating them." *Cleckner v. Arizona Dep't of Health Servs.*, 246 Ariz. 40, 433 P.3d 1200, 1203 (App. 2019). Inclusion of the fleet limitation of the face of the CON cannot and does not expand the Department's powers. R9-25-905(A) does not encompass changes to fleet size and therefore this rule does not apply here. Not only is a hearing not required, but proving "public necessity" is inapposite.

3. <u>There is no ground to examine public necessity for ABC to change its fleet size</u>

Public necessity was not the touchstone that resulted in the fleet-limiting condition; it should not be the test for its removal.

a) The Department did not consider the fleet-limiting condition an issue of public necessity at the time that it imposed the condition

Of primary relevance is the fact that, at the time that the Department imposed the fleet-limiting condition, the Department itself did not consider it an issue of public necessity. Having concluded that ABC was fit and proper, and that public necessity required its services, the Department imposed the condition expressly and explicitly to protect the interest of only Rural Metro: "[b]y granting a CON to ABC that is limited by number of ambulances**,** the financial impact on the Intervenor [Rural/Metro] will be minimal and is outweighed by the public good that will come from granting this CON to the Appellant [ABC]."[15] However, at the time of the imposition of this condition (April 2015), Rural Metro was *not the only IFT CON holder* in Maricopa County – AMR of Maricopa LLC was granted a CON in February 2015 (after ABC's hearing had concluded, but prior to the settlement agreement). The fleet limitation was not imposed to minimize impact on AMR, another IFT CON holder in Maricopa County. In other words, the Department did not impose the condition to minimize financial impact on *CON holders in Maricopa County generally*; it imposed the condition only to minimize financial impact on the *intervening party* (Rural Metro) *specifically*. It thus appears that the fleet limitation was not a general public-necessity issue; it was a settlement tool in the litigation with ABC. If it was not a public necessity issue when it was imposed, it should not be a public necessity issue to remove it.

b) The limitation was not based on or supported by any evidence at ABC's hearing

That public necessity was not the touchstone of the condition is reinforced by the fact that the condition was not based on any evidence at ABC's hearing. The number of ambulances that the Department permitted ABC to operate was a number chosen by the Department

[14] "*Expressio unius est exclusio alterius*—the expression of one item implies the exclusion of others—is appropriate when one term is reasonably understood as an expression of all terms included in the statutory grant or prohibition." *City of Surprise v. Arizona Corp. Comm'n*, 437 P.3d 865, ¶ 13 (Ariz. 2019).
[15] Stipulation and Settlement Agreement, p. 2:12-15.

(without any basis that was shared with ABC) purely as a means to negotiate a settlement. A review of the transcript and filings from ABC's application proceedings (spanning 2011 to 2014)[16] reveals no evidence whatsoever to support (1) the *concept* of a fleet-limiting condition to minimize impact on the existing CON holder, or (2) the *actual numbers* that would purportedly do the trick. There was no financial model discussed or used to evaluate the number of ambulances found in the fleet limitation. The Department chose the fleet-limiting numbers not based on any evidence at the hearing. This again shows that the limitation was not a public necessity issue.

c) Increasing fleet size is purely an administrative issue, and not conceptually a matter of public concern

Increasing fleet size is expressly envisaged by the statute and regulations, and is treated as simply an **administrative matter**. All that is required of a CON holder (regardless of whether the CON overlaps other CON holders) when it purchases additional ambulances is that it must (1) apply for a certificate of registration, (2) pay a fee, and (3) permit the Department to inspect the vehicle ("to ensure that the vehicle is operational and safe and that all required medical equipment is operational"). A.R.S. § 36-2232(A)(11); A.R.S. § 36-2212; R9-25-1001 to R9-25-1006. No hearing is required; other CON holders do not get to weigh in on the desirability or otherwise of adding ambulances to a fleet; it is not considered to have an impact on service or the public; and "public necessity" is certainly irrelevant. Therefore, conceptually, increasing fleet size is not in and of itself a matter of public concern.

That adding vehicles is considered an administrative function (as opposed to a CON-amendment function) is reinforced by the language of R9-25-905(A)(1)-(6) (the regulation dealing with CON amendments), which specifically lists the types of amendments to a CON. Noticeably absent from this list is a CON holder's desire to increase its fleet size.

Moreover, despite the language in the opening lines of R9-25-903(A) (that appear to incorporate "amended" CONs into a public necessity inquiry), we know that not every amendment in R9-25-905(A) undergoes a public necessity inquiry. The first two items listed in R9-25-905(A) (changes to legal name and address) do not undergo a hearing and public necessity test. So clearly the Department does not consider *all* amendments to CONs to require proof of public necessity. The likely distinction between R9-25-905(A)(1)-(2) and R9-25-905(A)(3)-(6) is that former (name and address changes) are considered **administrative** amendments, while the latter (level of service, type of service, service area and response times) are considered a new service and thus are regulated by A.R.S. § 36-2233(B)(2). We already know that increasing fleet size is considered an **administrative** issue by the statute and regulations; and we already know that limiting fleet size was not imposed because public necessity required it. Therefore the "public necessity" test referenced in R9-25-903, under the authority of A.R.S. § 36-2233(B)(2), should not apply to ABC's request to do what every other CON holder is able to do through a simple administrative process (ABC is not requesting to have a service, or any part of a service, or any item listed in 905(A)(3)-(6) amended).

[16] The index alone of ABC's Record on Review was 27 pages.

4. In the event that a hearing is held, the closest applicable rule would be R-9-25-905

Without waiving its position that no hearing is required, if a hearing is in any event held, the closest to a standard that could defensibly be imposed on ABC would be the standard set out in R9-25-905, the regulation that expressly deals with amendments to CONs. R9-25-905(B) includes its own factors, including *inter alia* that an "amending certificate holder" shall submit "a statement explaining the **financial impact** and **impact on patient care** anticipated by the proposed amendment." R9-25-905(B)(4). "Public necessity" is not mentioned in this list. The drafters' intent is taken to exclude omitted factors. [17]

5. It is appropriate to remove the condition from the settlement agreement

a) The rationale for the condition ceased to exist a year after the Department made ABC's CON conditional (and most likely did not exist at the time of the settlement), and therefore it should be removed from the settlement agreement[18]

The Department issued a CON to ABC in May 2015 subject to a condition to limit financial impact on Rural Metro. However, on May 18, 2016, the Department issued a CON to Maricopa Ambulance (CON No. 147) unfettered by conditions to limit impact on existing providers. In other words, a year after making ABC's CON conditional, the rationale for the condition apparently ceased to exist.

Moreover, it would appear that the rationale did not even exist *at the time that the Department imposed the condition on ABC.* In February 2015, after ABC's hearing closed, but before the settlement agreement was entered into, the Department issued a CON to AMR of Maricopa, LLC, *without any restrictions* attempting to limit financial impact on Rural Metro (still the sole provider in February 2015). In stark contrast with small, start-up ABC Ambulance, AMR of Maricopa LLC was owned by "the largest provider of ambulance transportation services in the country."[19] And yet the Department appeared to be more concerned with the financial impact that *ABC* would have on Rural Metro than the impact that *AMR* would have on Rural Metro.

The Department's actions (not limiting the fleet size of AMR, and immediately granting an unfettered CON to the next applicant) invalidates the rationale underlying the limitation in ABC's CON. Without a defensible, underlying rationale for the commercially-harmful condition on ABC's CON, the condition becomes arbitrary. It is also grossly unfair, given that no other CON holder in Maricopa County (or in Arizona, it is believed) has such a commercially-harmful condition imposed upon their CON. ABC alone must operate a financially viable service with substantially fewer ambulances than every other overlapping private CON holder (all of which applied for a CON after ABC). The Department has no justifiable underlying reason to maintain the limitation and has made no argument or opposition to removing the limitation. To continue to enforce this disparate treatment, or to require ABC to re-prove public necessity in order to remove this condition is not rational.

[17] *See City of Surprise v. Arizona Corp. Comm'n, supra*.
[18] This argument applies equally to its removal from the face of the CON.
[19] Applicant's Closing Brief filed on November 14, 2014 in AMR of Maricopa LLC's application for a CON, p. 4:8-9.

b) Continued enforcement of the fleet limitation is harming ABC

ABC should have the ability, like every other CON holder, to increase (or decrease) its fleet size to maximize the viability and commercial success of its operation. ABC is unable to grow its business any greater than its limited fleet permits. ABC's business is thus hamstrung by this now-unjustifiable and outdated limitation that does not apply to any other CON holder.

Moreover, as the Department knows, although ABC is not currently at capacity (even with its limited number of ambulances), ABC's fleet-size limitation has twice been used against ABC in applications by newcomers for new CONs for interfacility transport services in Maricopa County in an attempt to show that ABC is *de minimus* when it comes to assessing public necessity.

The limitation also has kept certain health care institutions from considering ABC because of the perception that ABC is limited and might not be able to fully serve their needs

c) The Department has the authority to reconsider and amend the settlement terms

As the Department argued to the court at the time of the settlement agreement: 'Administrative agencies of the State have the power to reconsider decisions, since the authority to reconsider decisions is an integral and inherent in the power to decide. "The question then arises whether the Commission has jurisdiction to further reconsider its decisions. As to this, the answer must be in the affirmative. The power to reconsider is inherent in the power to decide." *Wammack v. Indus. Comm'n of Ariz.* 83 Ariz. 321, 326, 320 P.2d 950, 954 (1958).'[20]

The Department has the authority to reconsider the decision that it made in 2015 to impose a fleet-limiting condition on ABC.

6. Conclusion

The Department is requested to republish ABC's CON without the fleet-limiting condition, and to remove the condition from ABC's settlement agreement. Alternatively, if the Department insists on holding a hearing on ABC's application, the Department is requested to issue a notice of hearing that does not contain the requirement that ABC re-prove public necessity. The closest appropriate factors would be those contained in R9-25-905(B).

Regards,

/s/ Adriane Hofmeyr
Adriane J. Hofmeyr

[20] *See* ADHS Response to CON-Holder Appellees' Motion for Consideration filed on May 22, 2015 in Maricopa County Superior Court under case no. LC2014-000185, p. 2:17-22.

EXHIBIT B

Gmail by Google

Adriane Hofmeyr <adriane@hofmeyrlaw.com>

ABC CON AMENDMENT

1 message

Ray, Kevin <Kevin.Ray@azag.gov> Fri, May 17, 2019 at 10:51 AM
To: "Adriane Hofmeyr <adriane@hofmeyrlaw.com> (adriane@hofmeyrlaw.com)" <adriane@hofmeyrlaw.com>
Cc: "Ray, Kevin" <Kevin.Ray@azag.gov>

Adriane, the Bureau considered your latest argument and was not persuaded.

I've attached the Notice of Hearing in this matter.

ABC-2019.05.17-NOH.pdf
1514K

EXHIBIT C

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May 27, 2019

Attention: Kevin Ray
Office of the Attorney General
2005 N. Central Avenue
Phoenix, Arizona 85004-1592
kevin.ray@azag.gov

Dear Kevin,

Re: NOTICE OF HEARING ISSUED ON MAY 17, 2019 RE CON NO. 139

Thank you for your email dated May 17, 2019, to which was attached the Notice of Hearing And Appointment of Administrative Law Judge In the Matter of ABC Ambulance, Applicant, under Docket No. 2019-EMS-0151-DHS (EMS No. 01381) ("NOH").

Without waiving any of the arguments made to the Department in our letter dated May 13, 2019, we request that the Department refine the wording of the NOH to provide a more definite and detailed statement of the issue to be determined. In particular, we request that the Department amend the NOH as follows (changes in **bold**):

- Paragraph 9: In determining whether there is public necessity to [~~issue an amended CON~~] **retain paragraph 4 on CON No. 139**, **the removal of which has been** ~~as~~ requested by the Applicant, the Director shall consider the factors listed in A.A.C. R9-25-903(A)(4), (A)(6) and (B).

  This amendment makes it clear that, while the concept of public necessity may apply in this hearing,[1] it applies in a limited way compared to during a hearing for an initial Certificate of Necessity, and fine-tunes the exact issue to which the public necessity factors will be applied.

- Paragraph 1: Add the line at the end: **The agreement also provides that "By granting a CON to ABC that is limited by number of ambulances, the financial impact on the Intervenor will be minimal and is outweighed by the public good that will come from granting this CON to the Appellant."**[2]

  This addition incorporates both references in the settlement agreement that explain the rationale underlying the limitation. Including only the first reference is misleading (it does not refer to the only intervenor at those proceedings).

[1] Again, our position that it does not apply is not waived.
[2] Settlement Agreement, p. 2:12-15.

Two further observations:

(1) The first paragraph in the Notice of Hearing is inaccurate: ABC did not request the Director to amend its CON "in accordance with ... R9-25-903." On the contrary, ABC's position is that R9-25-903 is not applicable to ABC's request.

(2) The factors to be considered at the hearing make no mention of R9-25-905(B). Does this mean that ABC is not required to establish those factors at the hearing?

Regards,

/s/ Adriane Hofmeyr
Adriane J. Hofmeyr