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8 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

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10 In the Matter of:

11 **ABC Ambulance**

12 Applicant.
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Docket 2019-EMS-0151-DHS
(EMS No. 01381)

**AMR CON HOLDERS' RESPONSE TO
APPLICANT'S MOTION FOR RULINGS
OF LAW**

14 American Medical Response of Maricopa, LLC; Rural/Metro Corp. - Maricopa; and
15 Professional Medical Transport, Inc. ("AMR CON Holders"), in order to supplement
16 counsel's oral responses made at this Office's Status Conference on June 24, 2019,
17 hereby further respond to the Applicant's Motion for Rulings of Law. The Motion is an
18 alternative attempt to prevent intervention by the existing Maricopa County CON Holders
19 that sought intervention, an attempt to avoid a restriction that Applicant accepted in order
20 to obtain a CON after its Application had been denied, and an attempt to switch the burden
21 of proof in this matter. The Motion is without merit and should not be granted.

22 This response is supported by the following Memorandum of Points and Authorities.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **Introduction**

25 The Notice of Hearing in this matter outlines what matters will be at issue in the
26 pending hearing, and what findings of fact and conclusions of law this Office is to make.
27 The Notice of Hearing was issued by the Director of Arizona's Department of Health
28

1 Services (DHS) pursuant to A.R.S. §36-2234(A). That statute **requires** “a public hearing
2 on any proposed action related to . . . certificates of necessity unless subsection C, E or
3 M of [the statute] applies.” Nowhere in the Motion does Applicant ABC propose that
4 subsection C, E or M applies. As such, the public hearing in this matter is mandatory.
5 ABC does try to craft an argument under which a hearing would not be required by the
6 regulations adopted by the Director. However, ABC cites no authority allowing regulations
7 to overcome a statutory mandate.

8 The Motion requests three alternative rulings, as follows:

- 9 1. Requiring a public hearing on the issue of fleet size violates the Regulations;
- 10 2. If a hearing is held, the appropriate test is not “public necessity”; and
- 11 3. If “public necessity” is held to be the appropriate test, the correct framing of
12 the issue is “whether public necessity requires the retention of the Fleet Limitation on
13 ABC’s CON.”

14 These are all without merit and will be addressed in the order presented.

15 **The Public Hearing is on ABC’s Application to Amend Its CON, It is Not a Hearing on**
16 **“the Issue of Fleet Size”; the AMR CON Holders Defer to DHS/BEMSTS on the Issue**
of Whether a Public Hearing is Mandated by Statute

17 As noted above, the instant hearing has been set pursuant to the mandate of A.R.S.
18 §36-2234(A). While, throughout its Motion, ABC argues that an increase in an ambulance
19 transport company’s fleet size is a routine administrative matter and should not require
20 hearing, its arguments ignore the unique nature of the CON granted to ABC, which was
21 only granted under circumstances where ABC agreed to limit the number of ambulances
22 in its fleet. As such, ABC is not situated similarly to other CON holders who have no such
23 limitation. At no time subsequent to issuance of its initial CON, which ABC desperately
24 wanted, has it ever complained about the validity of that fleet limitation, or the legitimacy
25 of having the limitation contained on the face of its CON so that the limitation could be
26 enforced by DHS/BEMSTS. Apparently, ABC’s position is that the day after its initial CON

1 was issued (based upon a number of factors including the requirement for a fleet
2 limitation), it could have administratively (without a hearing) gotten rid of that important
3 criteria. This is utter nonsense.

4 Ultimately, DHS' authority to require a hearing on proposed actions (such as an
5 application to amend) relating to Certificates of Necessity ("CON"), and what proposed
6 amendments will qualify for exemption and which will not, is a matter that the AMR CON
7 Holders will defer to DHS/BEMSTS on here.

8 **Pursuant to the Notice of Hearing, "Public Necessity" is Indeed at Issue**

9 The AMR Con Holders, as Intervenors herein, do have a vested interest in the
10 question of whether "public necessity" supports the ABC application to amend. As was
11 detailed in their Motion for Intervening Party Status (incorporated by this reference herein),
12 the factors this Office is to consider and make findings and recommendations on to the
13 Director include whether public necessity supports the requested amendment (See Notice
14 of Hearing, p. 3, item 9). In making this determination, the Director is required to consider
15 the factors listed in AAC R9-25-903(A)(4), (A)(6) and (B). These factors include the
16 existence of current ground ambulance service to the subject area and the availability of
17 other CON holders in the subject area. *Id.*

18 Applicant ABC proposes that because it received an initial CON, public necessity
19 for its services has already been determined, thus negating the need for that determination
20 here. This is illogical. It is also founded upon the erroneous proposition that ABC can
21 unilaterally remove the fleet restriction imposed by DHS (pursuant to its agreement with
22 ABC) in order to establish public necessity for the ABC CON in the first place. The Director
23 has correctly determined that in order to prevail on its application seeking removal of this
24 critical CON limitation, ABC must prove its requested amendment is supported by "public
25 necessity."

1 **Applicant ABC Attempts to Convince This Office to Switch the Burden of Proof in**
2 **This Matter by Proposing That the Inquiry (Public Necessity) Should be Whether**
3 **Public Necessity Supports Retention of the Fleet Limitation.**

4 As intervening parties, the AMR CON Holders also have an interest in the applicable
5 burden of proof in this matter. Pursuant to A.R.S. §41-1092.07(G)(1) and AAC R2-19-
6 119(B) that burden is clearly placed upon the Applicant. Any applicant making a request
7 to modify a licensed or permit has the burden of proving that the proposed amendment /
8 modification should be granted. *Id.* DHS/the Director already determined that public
9 necessity required the imposition of the fleet limitation. ABC now requests that limitation
10 be removed. Contending that it is up to DHS/BEMSTS (or the Intervenors) to prove that
11 ABC's CON should continue to have the same parameters as were constructed by DHS
12 in order to establish public necessity for issuance of ABC's CON in the first place is nothing
13 more than a request to reverse the burden of proof. Were ABC correct, DHS/BEMSTS
14 could repeatedly find itself subject to applications to amend CONs on a variety of grounds,
15 such as changing response criteria originally determined to support public necessity for
16 issuance of the CON, with the applicant then sitting back and saying it now is up to
17 DHS/BEMSTS and/or any intervenors to prove public necessity continues to require the
18 subject response criteria (or whatever else the applicant wants to amend to remove or
19 change). That reversal of burden is not only contrary to law, it makes no sense.

20 For of the above stated reasons, the Motion should be denied .

21 RESPECTFULLY SUBMITTED THIS 27th day of June, 2019.

22 **FLETCHER STRUSE FICKBOHM & WAGNER PLC**

23 /s/ RONNA L. FICKBOHM
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1 Pursuant to Case Management
2 Order 1, electronic filing and
3 service of the foregoing through
4 <https://portal.azoah.com/oedf/>,
5 has been done this 27th day of
6 June, 2019.

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By: /s/ Linda Clark