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**BEFORE THE UTAH DEPARTMENT OF HEALTH
STATE OF UTAH**

In Re:

GOLD CROSS AMBULANCE

RECOMMENDED FINAL ORDER

File No. Washington 2011-02

Presiding Officer: Maxwell A. Miller

Pursuant to Utah Code Ann. § 26-8a-407(3)(c), **Ground ambulance and paramedic licenses – Proceedings**, (“recommended decision” after “conversion to a formal hearing”) and Utah Code Ann. § 63G-4-208(1), **Procedures for formal adjudicative proceedings – Orders**, (“presiding officer shall sign and issue an order”), Presiding Officer, Maxwell A. Miller hereby issues this Recommended Final Order *In re: Gold Cross Ambulance*, which proposed Final Order is subject to acceptance, modification, rejection or remand by the Executive Director of the Utah Department of Health, Bureau of Emergency Medical Services (“BEMS”), Mr. Paul Patrick. Utah Code Ann. § 26-8a-407(4).

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By this Recommended Final Order, Presiding Officer Miller recommends that the BEMS grant the Gold Cross Services, Inc. (“Gold Cross”) applications for Paramedic Rescue and Paramedic Ground ambulance licenses for St. George, Utah, which applications Gold Cross submitted to the BEMS on May 23, 2011. Pursuant to Utah Code Ann. § 63G-4-208(1), this Recommended Final Order includes Presiding Officer Miller’s Findings of Fact and Conclusions of Law, which are further explained in the statutorily required statement of the reasons for the presiding officer’s decision, herein designated as the “Memorandum” section of this Recommended Final Order.

SUMMARY

In summary, by this Recommended Final Order, Presiding Officer Miller decides as Findings of Fact and Conclusions of Law:

(1) Gold Cross proved at the formal hearing held from December 3 through December 6, 2012, in St. George, Utah, that application of the “public convenience and necessity” statutory criteria, codified at Utah Code Ann. § 26-8a-408, to the facts of this case “require the approval” of the Gold Cross applications. The evidence hereinafter recited and analyzed proves that Gold Cross: (a) is a fiscally responsible provider of Emergency Medical Services (“EMS”)¹; (b) will improve the quality of ambulance care delivered to the patients in the city of St. George; (c) will improve access to EMS within St. George; and (d) will benefit the regional EMS system.

This Recommended Final Order further finds:

¹ Emergency Medical Services are “a type of emergency services dedicated to providing out-of-hospital acute medical care, transport to definitive care, and other medical transport to patients with illnesses and injuries which prevent the patient from transporting themselves.” Wikipedia, the Free Encyclopedia, “Emergency Medical Services.” EMS thus includes both ambulance transport and appropriate patient care prior to hospital admission.

(2) The current licensed ambulance provider of such services, DA Services, Inc. d/b/a Dixie Ambulance (“Dixie Ambulance”) (a) is in violation of Utah administrative rules; (b) does not meet industry operational standards governing EMS staffing requirements and ambulance response times; (c) is not financially viable; and (d) is likely unable to continue providing quality ambulance services that St. George deserves and requires into the future.

As St. George’s population grows, the city’s already significant and increasing need for enhanced (a) ambulance resources and services; (b) sophisticated EMS programs; and (c) coordination between ambulance providers, other medical service providers, and government authorities (St. George, Washington County and the Utah Department of Health, Bureau of Emergency Medical Services) requires a more capable, and more financially viable ambulance provider than Dixie Ambulance. Gold Cross will provide such required ambulance services to St. George.

Once the BEMS Executive Director enters a “final written order,” and if the order would otherwise constitute final agency action, “any party may file a written request for reconsideration with the agency, state the specific grounds upon which relief is requested” within 20 days after the order is issued. Utah Code Ann. § 63G-4-302(1)(a). In the alternative, any party may seek judicial review of the final agency action by filing a “petition for review of final agency action resulting from formal adjudicative proceedings” with the Utah Supreme Court or the Utah Court of Appeals within 30 days after the agency’s final order is issued. Utah Code Ann. § 63G-4-403(1) and (2); and Utah Code Ann. § 63G-4-401(3).

FINDINGS OF FACT

All of the findings of fact, as summarily listed below, are extensively analyzed in the memorandum portion of this Recommended Final Order, which is the statutorily required “statement of reasons for the presiding officer’s decision.” *See* Utah Code Ann. § 63G-4-

208(1)(c). Such findings of fact and supporting analysis are based upon the formal hearing record, which encompasses: (1) recorded witness testimony given under oath at the formal hearing, held in St. George from December 3 through December 6, 2012; (2) the formal hearing exhibits 1-109, comprised of thousands of pages of documents that include expert witness reports, statistical information, pleadings and briefs, local government letters and reports, and other related documents submitted at the formal hearing; and (3) deposition transcripts that were part of the formal hearing record.

1. By its applications dated May 23, 2011, Gold Cross requests BEMS licensure for paramedic rescue and paramedic ground transport licenses for the city of St. George, Utah.

2. The EMS services for which Gold Cross seeks BEMS licenses are currently provided under valid licenses the BEMS issued to Dixie Ambulance in an area that is larger than, but which completely envelops St. George.

3. By its applications, and as further reaffirmed at the formal hearing, Gold Cross committed both orally and in writing to provide EMS services to any areas of Dixie Ambulance's remaining licensed areas outside St. George, which areas are left without such services if Dixie Ambulance ceases operations after BEMS approval of the Gold Cross applications.²

4. Access to ambulance services for St. George will be improved by Gold Cross.

5. Gold Cross EMS response times were shown to be superior to Dixie Ambulance EMS response times. Further, Dixie Ambulance's response times are likely slower than the national ambulance industry standard.

² The Presiding Officer is cognizant of the impact that BEMS approval of this Recommended Final Decision may have on the communities surrounding St. George, particularly those communities in Dixie Ambulance's licensed area outside of St. George. Such communities include the cities of Washington and Santa Clara, and portions of Washington County. Dixie Ambulance claims that granting the Gold Cross applications "would probably put Dixie Ambulance out of business." Respondent Dixie Ambulance's Hearing Brief, p. 12.

6. Gold Cross' use of multiple EMS technologies to improve response times, which Dixie Ambulance does not use, will necessarily maintain or improve ambulance response times, and thereby public access, to EMS in St. George.

7. Gold Cross' commitment to achieving set goals for timely and efficient ambulance service (in addition to use of EMS technologies) which Dixie Ambulance has not done with respect to EMS response times, will likely improve ambulance response times, and thereby access to ambulance service in St. George. Dixie Ambulance's commitment to improve access to ambulance service in St. George is inadequate.

8. Gold Cross' use of one ambulance more than Dixie Ambulance uses during the day, and two ambulances more than Dixie Ambulance uses during the night, could improve ambulance response times, and thereby access to EMS, in St. George.

9. St. George will require extensive EMS resources into the future because its population is increasing, and includes retired persons and tourists who visit or move to St. George, and who may require EMS services. St. George alone requires three to four ambulances. Dixie Ambulance does not have the resources, particularly financial, to meet St. George's needs moving forward. Gold Cross has all of the necessary resources to meet St. George's ambulance needs.

10. St. George requires an EMS system that is coordinated with local and state government entities, especially for future use. Dixie Ambulance has to date failed to establish efficient ambulance coordination with local government entities in St. George. Gold Cross will establish an efficient ambulance and EMS communication system for St. George.

11. Gold Cross can efficiently operate given the call/demand volume in St. George. Dixie Ambulance may be able to operate efficiently on the call/demand volume outside of St.

George, depending on Dixie Ambulance's managerial decisions, financial resources, corporate viability and other factors that will determine whether Dixie Ambulance continues ambulance services outside of St. George if the BEMS approves the Gold Cross applications for St. George.

12. No person in Dixie Ambulance's current ambulance service area outside of St. George, but within Washington County, will be left without ambulance service if the Gold Cross applications are granted.

13. The quality of EMS will be improved in St. George by Gold Cross when the BEMS approves the Gold Cross applications for licensure.

14. Gold Cross has established robust, written EMS protocols in accordance with an agreement with its Off-Line Medical Director. Dixie Ambulance's protocols, which are written or are oral, are inadequate. Dixie Ambulance has largely failed to establish any protocols beyond drug and treatment protocols.

15. Dixie Ambulance has no preventative maintenance program that is either written or adequate by industry standards for any of its medical equipment or for its ambulances. Dixie Ambulance's lack of such a program potentially endangers lives in the exclusive area in which Dixie Ambulance provides EMS services.

16. Gold Cross invests in technology that affects patient outcomes. Dixie Ambulance does not invest in such technology, and does not have the financial capacity to invest in such technology. Dixie Ambulance's failure to set goals and implement programs to improve its ambulance service and EMS technologies may negatively affect patient outcomes.

17. Gold Cross measures patient outcomes for its rendered ambulance services both qualitatively and quantitatively. Qualitative measurement of patient outcomes includes achievement of Gold Cross set goals and objectives for patient EMS. Quantitative measurement

includes the number of patients Gold Cross served. Dixie Ambulance has at times qualitatively measured patient outcomes. The fact that Dixie Ambulance has no goals or programs to begin tracking patient outcomes more quantitatively may negatively affect patient outcomes.

18. Both companies, Dixie Ambulance and Gold Cross, employ workers who are adequately qualified for ambulance service, although Dixie Ambulance does not employ an adequate number of workers to meet the Utah Administrative Code requirements.

19. Dixie Ambulance does not send two paramedics to all critical calls. It therefore fails to meet the standard established by the Utah Administrative Code for quality of care. Utah Admin. Code R426-15-200(1)(e).

20. The cost to the public of granting the Gold Cross applications is negligible.

21. Gold Cross is financially viable.

22. Dixie Ambulance is not financially viable. It therefore fails to meet the standard established by the Utah Administrative Code that impacts access to emergency medical services and quality of care, and which requires financial viability for the providers' current plan of operations. Utah Admin. Code R426-14-300(1)(f)(i)(B).

23. Dixie Ambulance is insolvent, meaning that its financial condition is such that "the sum of the debtor's debts is greater than all of debtor's assets at a fair valuation." Expert Report of Merrill Norman, quoting Utah Code Ann. § 25-6-3(1), Ex. 34, p. 3. Dixie Ambulance's public "goodwill" does not increase its fair market value because such goodwill cannot be quantified or sold, and because Dixie Ambulance has no competitors in its "exclusive" service area of St. George. The Dixie Ambulance BEMS license does not increase Dixie Ambulance's corporate market value because the BEMS license is not a saleable or transferrable asset.

24. Dixie Ambulance is not able to meet its current and possibly future financial obligations. Currently it is “breaking even,” and has recently incurred more debt by purchasing two new ambulances.

25. Efficient management of Dixie Ambulance is questionable because the company is not financially viable.

26. Dixie Ambulance does not have the resources and may not have the capability to meet St. George’s present and future EMS needs.

27. Numerous St. George citizens have expressed support for Dixie Ambulance. However, many of the supporters who spoke at the public conference held at the Abbey Inn in St. George on December 3, 2012 did not disclose relevant knowledge of Dixie Ambulance’s entire operations, inadequacies or financial viability. Most of the Dixie Ambulance supporters at the December 3, 2012 public conference primarily based their opinions on the personal “bed-side manner” of Dixie Ambulance personnel or quality of ambulance service that each supporter observed when receiving individual service.

28. Some leaders in the St. George community and Washington County at large have expressed support for Dixie Ambulance. However, other St. George public officials have expressed support for neither candidate, but rather for BEMS approval of the best possible ambulance service for St. George as determined by a formal hearing and objective analysis of the formal hearing evidence by the Presiding Officer.

CONCLUSIONS OF LAW

1. Under Utah Code Ann. § 26-8a-408, **Criteria for determining public convenience and necessity**, an EMS provider may legally seek a license to provide services in an area already included in an existing EMS provider’s exclusive licensed area. Application of Utah Code Ann. § 26-8a-504, **Discipline of designated and licensed providers**, is unnecessary

for the Presiding Officer to reach the Findings of Fact, Conclusions of Law and Recommended Final Decision, as stated herein.

2. An applicant for a license to provide EMS services under Utah Code Ann. § 26-8a-408 bears the burden of establishing that public convenience and necessity require BEMS approval of the application. Section 408 includes multiple factors the Presiding Officer “shall consider,” as distinguished from a mandatory finding of fact that all listed criteria factors are met beyond any doubt. “The quality of services shall be maintained [as equal to the current provider] or improved.” Utah Code Ann. § 26-8a-408(3). The Utah Supreme Court has held that the standard of proof the Presiding Officer should apply in adjudication of cases involving “public convenience and necessity” is that there is a reasonable basis in the evidence to conclude “that existing services are in some measure inadequate, or that public need as to the potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service.” *PBI Freight Service v. Public Service Commission of Utah*, 598 P.2d 1352, 1355 (Utah 1979). The Utah Supreme Court further held that “if there is in the record competent evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such fact finds justification in the evidence, and this Court cannot disturb it.” *Id.*

3. Thus, Gold Cross must provide evidence that both access to and quality of emergency medical services will be “maintained or improved” and that the cost to the public of granting the Gold Cross applications is “justified.” *Id.* at 408(4). However, Gold Cross need not prove that every criterion that the Presiding Officer must nonetheless consider, as codified and listed in Utah Code Ann. § 26-8a-408, weighs in its favor in order to prove that granting the Gold Cross applications will maintain or improve ambulance services for St. George.

4. Local desires, either in favor or against Gold Cross or Dixie Ambulance, are not dispositive in adjudication of the Gold Cross applications. Utah Code Ann. § 26-8a-408(5)(f) only mandates that the Presiding Officer “shall assess and consider public comment on any aspect of the application or proposed license.”

5. “Financial viability” is a standard of care that Utah Admin. Code R426-14-300(1)(f)(i)(B) mandates for EMS licensed providers. As authorized by Utah Code Ann. § 26-8a-408(6)(a), the Presiding Officer considered the financial viability of Dixie Ambulance, the current ambulance provider in St. George, and holds, both as a finding of fact, and as a conclusion of law, that Dixie Ambulance is not financially viable.

6. The “Two-Paramedic Rule,” Utah Admin. Code R426-15-200(1)(e), creates a standard for quality of EMS care. Dixie Ambulance violates this rule as explained in the Memorandum section of this Recommended Order. Utah Code Ann. § 26-8a-504(1)(b) provides that the BEMS may revoke the Dixie Ambulance license because it has “violated statute or rule.” Dixie Ambulance’s violation of the Two-Paramedic Rule is not relevant to this formal hearing for revocation purposes under Section 504 because the BEMS has not initiated a Section 504 proceeding. However, Dixie Ambulance’s failure to comply with the Two-Paramedic Rule is relevant in determining whether Gold Cross or Dixie Ambulance can best satisfy the public convenience and necessity criteria codified at Utah Code Ann. § 26-8a-408. By failing to comply with the Two-Paramedic Rule, Dixie Ambulance fails *ipso facto* to provide quality EMS care for the St. George public.

7. Utah Admin. Code R426-14-300(1)(f)(i)(B) requires the financial viability of EMS licensed providers. Financial viability is a broader concept than “balance sheet insolvency,” which occurs when liabilities exceed assets. “Financial viability is the ability of an

entity to continue to achieve its operating objectives and fulfill its mission over the long term.”
See VentureLine, “Financial Viability Definition.” Dixie Ambulance is not financially viable for purposes of Utah Code Ann. § 26-8a-408. By failing to comply with R426-14-300(1)(f)(i)(B), Dixie Ambulance fails *ipso facto* to provide quality EMS care.

8. Gold Cross met its burden of establishing that public convenience and necessity require the approval of the [Gold Cross] application[s] for all of St. George, Utah as required by Utah Code Ann. § 26-8a-408(8). BEMS should thus approve the Gold Cross applications for EMS licenses in St. George because Gold Cross will (1) replace Dixie Ambulance’s current inadequacies; and (2) implement better quality EMS care for St. George.

9. As Utah Code Ann. § 26-8a-404(3) authorizes, the Gold Cross applications have applied for EMS licenses to an “exclusive geographic area” (St. George) that is smaller than Dixie Ambulance’s present geographic service area (St. George and outlying communities). Yet Gold Cross has satisfied the statutory requirement to “demonstrate how the remainder of that area [meaning the area not included in the Gold Cross applications although included in the Dixie Ambulance service area] will be served.” Utah Code Ann. § 26-8a-404(3). Gold Cross has committed to provide service to any such areas should the incumbent provider, Dixie Ambulance, discontinue its service.

10. Utah Code Ann. § 26-8a-408(2) provides that “The issuance or amendment or a license may not create an orphaned area.” Dixie Ambulance has repeatedly asserted, both in memoranda submitted to the Presiding Officer and oral argument and testimony at the formal hearing, that BEMS approval of the Gold Cross applications would create an orphaned area, meaning an area without ambulance service. Dixie Ambulance’s argument is that granting the Gold Cross applications will force Dixie Ambulance out of business, which would thereby create

an orphaned area now included in Dixie Ambulance's licensed exclusive area, but outside of St. George, and thus not included in the Gold Cross licensed "exclusive area." *See, e.g.,* Respondent Dixie Ambulance's Hearing Brief, p. 13.

11. Because the mere issuance of a license to Gold Cross will not create an orphaned area, Utah Code Ann. § 26-8a-408(2) does not preclude the BEMS from granting the Gold Cross applications. Following issuance of Gold Cross licenses, no orphaned area will then or thereafter result because the BEMS may lawfully license other providers to serve any abandoned area, and because Gold Cross has committed to provide ambulance service to any areas left without EMS service if called upon to do so. Utah Code Ann. § 26-8a-404(3).

MEMORANDUM OPINION

I. INTRODUCTION

Utah's Emergency Medical Services System Act ("EMS Act") governs licensure for providers of medical rescue services and patient transport services ("EMS providers"). Utah Code Ann. § 26-8a-101, *et seq.* The Utah Legislature intended that the EMS Act would "ensure emergency medical service quality and minimize unnecessary duplication" by establishing "*exclusive geographic service areas*" and "maximum [billing] rates" Utah Code Ann. §§ 26-8a-401(1)(a) and (b) (emphasis added). Under the EMS Act, an entity seeking to provide such services may submit an application to the Utah Department of Health, Bureau of Emergency Medical Services ("Department" or "BEMS"). *See* Utah Code Ann. § 26-8a-404.

On May 23, 2011, Gold Cross Ambulance Services, Inc. ("Gold Cross") submitted two applications to the BEMS. One application is for a paramedic rescue license, and another application is for a paramedic ground ambulance license. The geographical service area for both applications is St. George, Utah. *See* Gold Cross Ambulance: License Application City of St. George, Utah, signed May 23, 2011, Hearing Record, Ex. 24. These applications were opposed

by a corporate-group that consists of DA Services, Inc. dba Dixie Ambulance (“Dixie Ambulance”), presently licensed to provide such EMS to St. George, and RAM Properties, LLC, which owns all property (both real and personal) that Dixie Ambulance leases from RAM Properties to operate such EMS. The Dixie Ambulance license also authorizes paramedic rescue and transport services to areas outside St. George in Washington County, Utah, but which nonetheless entirely envelops St. George. The Dixie Ambulance licenses expire on January 31, 2013.³

After an informal hearing on the Gold Cross applications, the Department elected to convert the informal adjudicative proceeding to a formal adjudicative proceeding in accordance with Utah Code Ann. § 63G-4-202. *See* Utah Code Ann. § 26-8a-407(2). Both Gold Cross and Dixie Ambulance presented evidence and argument at the formal hearing, which was held in St. George from December 3 through December 6, 2012.

In this case, where one EMS provider seeks a license for an area already being serviced, Utah law instructs the Presiding Officer of the formal hearing to apply the criteria established in Section 26-8a-408 to determine whether or not to recommend that the Department grant the Gold Cross applications, and present a recommended decision to the Department executive director in writing. Utah Code Ann. §§ 26-8a-407(3)(b) and (c). Before analysis and application of the facts in this case to the public convenience and necessity criteria listed in Utah Code Ann. § 26-8a-408, the parties to this formal hearing have raised complex legal questions that must first be addressed and resolved.

³ As of the formal hearing, December 3 through December 6, 2012, Dixie Ambulance had not submitted its Application for Paramedic Re-Licensure and its Application for Intermediate Ground Ambulance Re-Licensure to the BEMS. After the formal hearing, on December 7, 2012, Dixie Ambulance submitted its renewal applications. On December 18, 2012, Dixie Ambulance was granted a one-month extension of its renewal license, or from January 31, 2013 to March 1, 2013. If Presiding Officer Miller’s Recommended Final Decision is affirmed, granting the Gold Cross applications, the Dixie Ambulance re-licensure application is effectively denied and mooted as to St. George, although not as to other Washington County areas outside St. George.

II. QUESTIONS OF LAW

A. May Utah Code Ann. § 26-8a-408 be used to replace a licensed EMS provider, and must the standards for revocation of a license by the Department, set forth in Utah Code Ann. § 26-8a-504, also be met?

Gold Cross specifically requests that the Presiding Officer revoke Dixie Ambulance's license pursuant to Utah Code Ann. § 26-8a-504(1)(b) ("Section 504") for a number of alleged rule violations, and simultaneously grant Gold Cross' applications under Utah Code Ann. § 26-8a-408 ("Section 408"). Petitioner Gold Cross's Preliminary Statement, p. 7.

Although Dixie Ambulance stridently opposes the Gold Cross applications, it nonetheless concedes that Gold Cross' attempt to replace Dixie Ambulance in St. George as the ambulance service provider by means of the applications submitted to BEMS under Section 408 is a lawful procedure. Dixie Ambulance recognizes that Section 408 is one of "three separate processes by which an ambulance license for a current area may be obtained or modified." Respondent Dixie Ambulance's Hearing Brief, p. 7. Dixie Ambulance accurately recognizes that an EMS provider's licensed exclusive area "remain[s] in existence until the natural expiration of [its] respective exclusive license or until the time that there is . . . an award of an application of 'public convenience and necessity' to another provider." *Id.* pp. 8-9.

However, in this formal hearing, Dixie Ambulance has repeatedly argued that the Presiding Officer's consideration of financial solvency is limited to the applicant Gold Cross, not the current provider Dixie Ambulance, based upon Utah Code Ann. § 26-8a-408(4)(a).⁴ *Id.* p. 2. Respondent Dixie Ambulance's Memorandum in Support of Motion in Limine, p. 10. Dixie Ambulance also argued that its financial viability should be ignored in determining, pursuant to Section 408(3), whether the quality of service in the area shall be maintained or improved. Dixie

⁴ Utah Code Ann. § 408(4)(a) provides "The cost to the public shall be justified. The officer shall consider: (a) the financial solvency of the applicant."

Ambulance further argued that Section 408(6), specifically “Other related criteria [such as the current provider’s financial viability] the officer considers necessary,” does not include Dixie Ambulance’s financial viability, notwithstanding the Presiding Officer’s orders that expressly hold to the contrary. Dixie Ambulance has thus repeatedly attempted to prevent the Presiding Officer from considering Dixie Ambulance’s financial viability.⁵ However, as further explained hereinafter, the statutorily mandated public convenience and necessity criteria the Presiding Officer must consider in adjudication of the Gold Cross applications loses meaning if evidence and analysis in a Section 408 formal hearing does not include comparisons, including financial viability, between the existing provider and the applicant. The Dixie Ambulance litigation strategy that would exclude consideration of Dixie Ambulance’s financial viability effectively increases Gold Cross’ burden of proof since it presumes the financial viability of the present ambulance service provider is irrelevant. *Id.*, p. 10-12, 14-15. *citing* Utah Code. Ann. § 26-8a-407(3)(b); *see also* Respondent Dixie Ambulance’s Memorandum in Support of Motion in Limine, (“Motion in Limine”), p. 4-5.

Dixie Ambulance also attempted to exclude evidence related to Dixie Ambulance’s financial viability when it argued that “Gold Cross lacks any authority to ask for such a ‘revocation’.” *Id.* p. 4. The Presiding Officer acknowledges that this formal hearing is not a revocation proceeding that the BEMS initiated, and which is authorized pursuant to pursuant to Utah Code Ann. § 26-8a-504, **Discipline of designated and licensed providers**. However, granting the Gold Cross applications for an exclusive license within St. George pursuant to Section 408 would functionally and effectively revoke the Dixie Ambulance license for St.

⁵ Dixie Ambulance objected multiple times to the Presiding Officer’s consideration of Dixie Ambulance’s financial viability because the financial viability of an incumbent provider is not specifically listed among the criteria in Section 408, even though the Dixie Ambulance argument was denied multiple times. *See, e.g.*, Order Denying Respondent Dixie Ambulance’s Motion in Limine, p. 3, quoting the Presiding Officer’s May 18, 2012 Order.

George because the Gold Cross applications, if granted, are for an “exclusive area.” This conclusion logically and necessarily follows even though this proceeding was not initiated as a Section 504 revocation proceeding.

Similarly in closing arguments, Hurricane Valley Fire Special Services District (“HVF”), an EMS provider servicing parts of Washington County, cautioned that a ruling in Gold Cross’ favor would set a dangerous and undesirable precedent. Specifically, HVF fears that a ruling for Gold Cross will transfer the power to revoke licenses from the Department to competitor companies, and that those competitors will continue to prevail in replacing adequate service providers simply because competitors “can do a better job.”⁶

By this Recommended Final Order, the Presiding Officer holds that a competitor EMS provider may lawfully seek to replace an incumbent EMS provider under Section 408. Furthermore, the Presiding Officer holds that it is unnecessary to revoke an incumbent’s license under Section 504 by approving a competitor EMS provider’s application for a BEMS license to service the same exclusive area already served. Rather, approval of the application automatically, and by operation of law, amends and/or effectively revokes the incumbent provider’s EMS license. As the Presiding Officer previously explained in a prior issued Order:

The Gold Cross application requests that the [Department] grant the Gold Cross applications. There is no statutory requirement that such requests are invalid if [the Department] does not initiate them. Instead, the Gold Cross and/or the Dixie Ambulance compliance with current rules, regulations and statutes that govern ambulance services in Utah, specifically the criteria for determining public convenience and necessity, are listed in Utah Code Ann. § 26-8a-408. . . . Utah Code Ann. § 26-8a-404(3) further provides that applications for ground ambulance service and paramedic service shall be for all such services arising within the geographic services area, which necessarily means that such licenses are statutorily

⁶ The HVF argument was made on December 6, 2012 and is recorded on the Department’s audio recording of the formal hearing.

limited to monopoly services. In other words, the Utah statutes provide that either Dixie Ambulance, or Gold Cross, not both, will be granted a license . . . in St. George.

Order on Pending Issues and Scheduling Order, p. 10-11.

The Utah statutes' text and structure, as cited above, as well as relevant case-law, support this legal conclusion.

1. Utah's Emergency Medical Services System Act contemplates replacement actions by competitor EMS providers under Section 408.

Section 408 lists the criteria that the Presiding Officer must consider and apply in deciding whether approval of an application for a ground ambulance and paramedic license to an exclusive geographic area, based upon public convenience and necessity is "required." *See* Utah Code Ann. § 26-8a-408. Importantly, the statute directs the Presiding Officer to compare the applicant with an incumbent in multiple aspects. *See* Utah Code Ann. §§ 26-8a-408(3)(a) through (c). For example, the Presiding Officer must consider the staffing and equipment standards of the current licensed provider and the applicant. Utah Code Ann. § 25-8a-408(3)(a). Moreover, the applicant's burden to prove that EMS access and quality shall be maintained or improved necessarily implies a comparison between an applicant and the existing provider since improvement can only be discerned relative to a baseline or existing condition. *See* Utah Code Ann. §§ 26-8a-408(2) through (3). Such statutorily mandated comparisons lose meaning if evidence and analysis in a formal hearing under Section 408 do not include comparisons, including financial viability, between the existing provider and the applicant. Otherwise, Section 408 may only be used by an EMS provider to enter an abandoned geographical area, or an area lacking service from a licensed incumbent provider due to a prior revocation ("empty area").

Other sections of the EMS Act would likewise lose their meaning if Section 408 may only be used to enter an empty area. For example, Section 26-8a-405.1 provides for selection of

an EMS provider by local leaders through a competitive process. The successful provider's license "is not subject to a *request for license from another applicant* under the provisions of Sections 26-8a-406 through 26-8a-409 during the four-year term . . ." Utah Code Ann. § 26-8a-405.1(2)(b)(iii) (emphasis added). In other words, this provision specifically protects *certain* providers selected through a competitive process from being replaced. Such protection is unnecessary if replacement under Section 408 is unlawful.

Moreover, application of Section 408 to empty areas (rather than, as in this case, an application to replace an existing provider of an exclusive area) actually *contradicts* Utah statutes governing empty areas. *See* Utah Code Ann. § 26-8a-505. Where an empty area exists due to a revocation or other reasons, the BEMS may seek the appointment of a "receiver to continue operations," *Id.* at § 505(1), or may "arrange for another licensed provider to provide services on a temporary basis until a license is issued." *Id.* at § 505(2). Elsewhere, the EMS Act provides that the Department may only deny an application if it "contains materially false . . . information, . . . is incomplete, or . . . fails to meet the minimum qualifications and requirements for licensure under Subsection (2)." Utah Code Ann. § 26-8a-404(6). Such prompt granting of applications indicates that empty areas can and should be filled with a licensed provider as soon as practicable. But the burden of proof placed on applicants under Section 408 actually exceeds the minimum requirements for licensure. *See* Utah Code Ann. § 26-8a-408(8). Requiring applicants to meet such a burden to obtain a license to service an empty area can only prolong the Department's use of temporary arrangements. Filling empty areas, therefore, cannot be the purpose for Section 408.

Instead, the purpose for Section 408 is to provide a mechanism by which competitors may replace an incumbent provider. As the Utah Supreme Court held:

This Court has repeatedly stated that ‘convenience’ and ‘necessity’ are not segregated concepts and are not to be considered as separate terms, but must be construed together and constitute a joint concept, which must be construed and considered according to the whole concept and purpose of the act.

As to what constitutes ‘public convenience and necessity’ must fundamentally have references to the facts and circumstances of each given case as it arises, as the term is not, and was not intended to be susceptible of precise definition.

PBI Freight Service v. Public Service Commission of Utah, 598 P.2d 1352, 1355 (Utah 1979), cited by Dixie Ambulance, Respondent Dixie Ambulance’s Hearing Brief, p. 6.

Consistent with the Utah Supreme Court’s decision in *PBI Freight Service*, the whole concept and purpose of Section 408 is for the BEMS to determine whether granting an application for a ground ambulance and paramedic license in an exclusive area “receives the most efficient and economical service possible.” *PBI Freight Service* at 1355.

2. Revocation of an incumbent provider’s license under Section 504 is unnecessary to grant an application under Section 408 for an exclusive service area.

Utah Code Ann. § 26-8a-504, **Discipline of designated and licensed providers**, authorizing Department revocation of a license, is not relevant to this proceeding, notwithstanding Dixie Ambulance and Gold Cross arguments, because this formal hearing is not a revocation proceeding that the Department initiated. As previously explained in this Memorandum, granting the Gold Cross applications for EMS licenses exclusively for St. George pursuant to Section 408, would functionally and effectively revoke the Dixie Ambulance license for St. George because the Gold Cross applications, if granted, are for exclusive geographic services areas. Utah Code Ann. § 26-8a-408(2). Application of Section 408 does not require a Section 504 revocation proceeding.

III. APPLICATION OF THE CRITERIA SET FORTH IN SECTION 408

Section 408 lists multiple factors that the Presiding Officer must consider when evaluating an application for licensure to ground ambulance service. There is no question that the applicant must prove that “public convenience and necessity require the approval of the application . . .” Utah Code Ann. § 26-8a-408(8). Several subsections of Section 408 include the word “shall.” See Utah Code Ann § 26-8a-408(2) (“Access to emergency medical services shall be maintained or improved.”); *id.* at § 26-8a-408(3) (“The quality of service in the area shall be maintained or improved.”); *id.* at § 26-8a-408(4) (“The cost to the public shall be justified.”); *id.* at § 26-8a-408(5) (“Local desires concerning cost, quality, and access shall be considered.”) *id.* at § 26-8a-408(6) (“Other related criteria: (a) the officer considers necessary; or (b) established by department rule.”) *id.* The word “shall” in statutory language normally indicates a mandate because Utah statutes are interpreted according to their plain language, unless a statute is ambiguous on its face.⁷

There is no such ambiguity here. The statute clearly states that in order to succeed on its application for EMS licensure, the applicant must prove that (1) access to emergency medical services will be improved or maintained; (2) the quality of emergency medical services will be improved or maintained; and (3) the cost to the public is justified. To prove that the quality of services, for example, will be improved, the applicant need not prove that granting the applications will engender improvement in each and every criterion listed under Utah Code Ann. § 26-8a-408(3), because those criteria listed in Sections 408(3)(a) through 408(3)(e) must only be “consider[ed].” Utah Code Ann. § 26-8a-408(3). Thus, the statute vests the Presiding Officer

⁷ As the Utah Court of Appeals held in *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration System, Inc.*, 263 P.3d 397, 402 (Utah App. 2011): “When interpreting a statute, our goal “is to give effect to the legislature’s intent.” *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780. “To discern legislative intent, we look first to the statute’s plain language. Also, when interpreting statutes, [w]e presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.”

with discretion to determine from the facts which criteria are most significant in demonstrating the differences in the quality of service each company renders. Indeed, the statute allows the Presiding Officer to consider any other criteria the officer thinks necessary. Utah Code Ann. § 26-8a-408(6)(a). Finally, the applicant must prove nothing concerning public desires since the mandate in Section 408(5) is only that “local desires” shall be considered. Thus, an application may be granted even against local desires.

A discussion of the most relevant criteria follows.

A. Gold Cross will improve access to emergency medical services.

1. Gold Cross will improve response times.

Utah Code Ann. § 26-8a-408(2) requires the Presiding Officer to “consider . . . [the] impact [granting Gold Cross’ application will have] on response times . . .” The Presiding Officer finds that Dixie Ambulance’s response times fall below national industry standards, and that Gold Cross would bring the potential for significant improvement of EMS ambulance response times in St. George. Several additional factors all weigh in favor of Gold Cross. They include: (1) Dixie Ambulance’s inaccurate methods for collecting and evaluating response-time-data; (2) community desires for the best possible ambulance service; and (3) the potential consequences of risking the acceptance of response times that are “good enough,” as distinguished from achievably better response times.

Michael Moffitt,⁸ President of Gold Cross, testified at the St. George December formal hearing that in 2011 Gold Cross met its target response time in Salt Lake City of 8 minutes and 59 seconds (“8:59”) at least 95% of the time. According to several witnesses,⁹ most notably

⁸ Mr. Michael Moffitt testified on December 3, 2012. His testimony is recorded on the Department’s audio recording of the formal hearing.

⁹ Mr. Moffitt, Jerry Overton, Darren Judd. Additionally Mr. Randall testified that Dixie Ambulance strives to meet a nine-minute standard, and that he assumes this is the standard for Charlie, Delta and Echo calls.

industry expert Jerry Overton,¹⁰ 8:59 is the industry standard for all critical 911 calls for emergency services (“calls”), which are either characterized as “Lights and Sirens” calls or “Charlie, Delta and Echo” calls. Deployment Coordinator for Gold Cross, Darren Judd¹¹ testified that in November of 2012 in Salt Lake City, Gold Cross met industry standards for all types of calls 97.4% of the time. Mr. Moffitt also testified on cross examination that Gold Cross responded to 89% of Lights and Sirens calls in Vernal, Utah under the 8:59 standard. For comparison, Dixie Ambulance met this standard anywhere from roughly 65% of the time to 91% of the time.¹²

Gold Cross utilizes modern technology machinery and equipment not only to meet the 8:59 standard but also reliably measure Gold Cross performance. Mr. Moffitt described how Gold Cross runs its own dispatch center, which is connected electronically to the local public safety points (colloquially, 911 dispatch). When a public safety point receives a call, the name and address of the caller are automatically transferred electronically to Gold Cross’ computers as soon as they are input by the technician. The Gold Cross dispatch center then locates the nearest ambulance, whose movements are tracked by a type of Global Positioning System software (“GPS”) called Automatic Vehicle Location (“AVL”). The address is then transmitted to computer equipment in the ambulance and the ambulance goes en route to assist the caller, often before the caller has even hung up the phone. Notification that the ambulance is en route is also transmitted back to the public safety point. Upon arrival, the ambulance staff merely presses a

¹⁰ Mr. Overton testified on December 6, 2012. His testimony is recorded on the Department’s audio recording of the formal hearing. His qualifications can be found in Appendix A of Exhibit 35 of the Hearing Record. Mr. Overton’s knowledge and experience in the industry are extensive. Notably, he testified as an expert for Gold Cross without compensation because of his dedication to improving the EMS industry wherever he can. Mr. Overton’s testimony was extremely persuasive and forms a large basis for the Presiding Officer’s decision and this opinion.

¹¹ Mr. Judd testified on December 4-5, 2012. His testimony is recorded on the Department’s audio recording of the formal hearing.

¹² Determining as a finding of fact the actual Dixie Ambulance’s response times is very complex. This discussion begins on page 24.

button on the computer equipment to record the time. All prior times had been automatically recorded electronically, and when all the necessary response-time data has been collected after the staff has finished treating the patient, the data is automatically transmitted to a Gold Cross database for daily evaluation as well as the state's database, known as POLARIS. All of the clocks used by Gold Cross, according to Mr. Moffitt, are synchronized to an internet-based national time center clock.

In addition to substantiating Mr. Moffitt's testimony of Gold Cross' computer-aided dispatch ("CAD") system, Mr. Judd described in more detail how Gold Cross uses AVL to improve its deployment strategy to minimize response times. A grid is imposed on Salt Lake City, with the size of each square being about four city blocks. All necessary ambulances are deployed each day into a square; the square to which a particular ambulance is assigned is based on a computer analysis of the prior 20 weeks of call locations and other variables such as time of day, day of the week, and traffic patterns. They are deployed in such a way that given the time and day, an ambulance would be able to reach a victim within 8 minutes and 59 seconds.

Importantly, none of the foregoing testimony was significantly contested. However, counsel for Dixie Ambulance raised three minor points that are relevant to the present discussion. First, counsel questioned both Mr. Moffitt and Mr. Judd about an agreement with Salt Lake City, which it was claimed states that Gold Cross must meet a response time of 9 minutes and 59 seconds for critical calls. *See* Memorandum re Briefing on SLC Ambulance Transition, Hearing Record, Ex. 61, p. 5.¹³ Because no evidence was introduced that Gold Cross

¹³ This document, which Mr. Moffitt described as "cannon fodder" used to justify an RFP to replace Gold Cross, indicates that in 2006 Gold Cross may have suffered similar inadequacies in its EMS that Dixie Ambulance now suffers. The Memorandum, Exhibit, 61 does not expressly make reference to the 9 minutes and 59 seconds standard. It does state, however, that "Before its expiration, Gold Cross submitted a proposed contract that included increasing response times . . ." For example, Gold Cross may have lacked full integration with other providers, integrated communications, AVL, etc. This document asserting Gold Cross inadequacies in 2006 was

actually operated to meet only this agreement's standard, rather than the industry standard, such evidence holds minimal weight in establishing Gold Cross' compliance with the industry standard. In contrast, both Mr. Moffitt and Mr. Judd adamantly affirmed that Gold Cross holds itself to the 8:59 standard.

Second, according to Mr. Judd, Gold Cross does not use CAD nor is it electronically linked with the public safety point in Vernal. However, Mr. Moffitt made his intentions clear that Gold Cross would bring its CAD system to St. George. Gold Cross also made this promise in its applications for licensure submitted to the BEMS. *See Gold Cross Ambulance: License Application City of St. George, Utah May 19, 2011, Hearing Record, Ex. 24.* Therefore, this evidence only demonstrates that an EMS provider may be able to operate adequately without a CAD system. However, this point is somewhat trivial because much more than technological improvements and speedier response times justify the Presiding Officer's decision to grant Gold Cross' applications. Even if technological improvements alone are insufficient to justify granting the Gold Cross applications, they still weigh in favor of Gold Cross since with them "[a]ccess to emergency medical services [will likely be] . . . improved." Utah Code Ann. § 26-8a-408(2).

Third, Mr. Judd admitted on cross examination that Gold Cross had not done a study of Gold Cross' response times in those parts of Uintah County outside of Vernal or in Uintah County as a whole. This evidence does not challenge the accuracy of Gold Cross' 89% compliance rate with the industry standard in Vernal. Whatever Dixie Ambulance counsel's intentions were for seeking this admission, Mr. Judd's admission cuts against Dixie Ambulance, not Gold Cross. Gold Cross' failure to perform a study of Uintah County does not prove that

unsubstantiated, but, more important, does not outweigh significant evidence of Gold Cross' present and superior operations. The document nonetheless demonstrates that response times, coordination and integration of EMS programs are important.

Gold Cross is unprepared to enter St. George, even if Gold Cross needs to expand its own studies. However, the Gold Cross admission underscores how problematic it is that Dixie Ambulance does not conduct regular, meaningful studies of its response times in any part of its area.

Each ambulance is assigned a color to indicate its current status: en route, ready for a call, etc. The Gold Cross dispatchers can therefore see the current location and present status of every Gold Cross ambulance in the city. When an ambulance staff is called to render services, the dispatchers use computers to determine how to modify the deployment of the ambulances, for example by moving an ambulance to Sugarhouse in order to fill the vacancy and ensure the next caller can be reached in 8 minutes and 59 seconds.

Other than these aforementioned points and Tony Randall's¹⁴ opinion that Gold Cross could only minimally improve response times, if at all, no other points were made contesting Gold Cross' response times or method of operations. Accordingly, the Presiding Officer accepts the foregoing Gold Cross evidence as relevant and accurate.

Determining Dixie Ambulance's response times, in contrast, is far more complex. A mass of anecdotal evidence and four separate and widely varying studies were introduced as evidence of Dixie Ambulance's response times. Before addressing these studies, Dixie Ambulance's operational methods relevant to response times should be discussed to provide a basis for analyzing and comparing the studies.

Using Mapquest, a common program used for obtaining driving directions, and his knowledge of St. George, Mr. Randall divided St. George into three "staging" zones. *See Dixie Ambulance Staging Map, Hearing Record, Ex. 97.* The boundaries of these zones represent the

¹⁴ Mr. Randall testified on December 3 and 4, 2012. His testimony is recorded on the Department's audio recording of the formal hearing. He is one of the owners and officers of Dixie Ambulance.

maximum distance an ambulance staged in any given zone could travel in eight minutes. According to Mr. Randall three ambulances are staged in the city of St. George between 7 a.m. and 7 p.m., one in each zone at a specific address, and two between 7 p.m. and 7 a.m.

When the public safety point, St. George Dispatch, receives a 911 call, it pages the ambulance that corresponds to the zone in which the call originates. No direct evidence was introduced indicating what happens when a second call originates from the same zone while the corresponding ambulance is still providing services. However, Mr. Randall testified that he always listens to every call. All ambulances are also equipped with 800 MHz two-way radios. Thus, presumably Mr. Randall, if not St. George dispatch itself, pages other ambulances until one can be found to respond to the call. However, Mr. Overton, after reviewing Dixie Ambulance's operating methods, testified that St. George Dispatch has no way of knowing where a particular ambulance is located or whether it is indisposed. No direct evidence was introduced to indicate that the Dixie Ambulance staff in the separate zones communicates with each other so that ambulance locations can be modified to fill voids. Rather, the evidence indicates that each ambulance functions mostly, if not entirely, autonomously.

Importantly, according to Mr. Overton's analysis, the Dixie Ambulance model never changes, except, as Mr. Randall testified, when the ambulance staff itself decides to alter its location to account for changes in traffic or other factors. For example, Mr. Overton noticed that one staging point is near Costco. In his opinion, this staging point should be moved in high shopping seasons so the ambulance can avoid delays due to heavy traffic. But no evidence was introduced showing that ambulances were moved away from Costco, either by instruction from Mr. Randall or on the Dixie Ambulance staff's own perceptions.

When St. George Dispatch receives a 911 call for medical services it notifies the appropriate ambulance using an 800 MHz radio. This indicates that Dixie Ambulance is not even notified that a call has been received until after the caller hangs up, considering that 911 dispatchers would not be able to speak with the ambulance staff and the victim simultaneously. According to Mr. Randall, the ambulance staff must note the time that it is notified of the call on a pad of paper located in the ambulance. If the ambulance staff is unable to record this time, the staff must contact St. George Dispatch later to ask for the time it had been paged. Then, using the same pencil-and-paper method, ambulance crew notes the time it goes en route and the time it arrives. The crewmen discern these times using a wrist watch, or perhaps a digital dashboard clock in the ambulance. This method is also used by the Hurricane Valley Fire Special Services District. Mr. Overton indicated that this pad-and-paper practice that Dixie Ambulance now uses was industry standard into the 1980s when more reliable electronic systems were introduced.

No evidence was introduced showing that Dixie Ambulance routinely collects these time notes for regular study. Rather, Mr. Randall claimed that he listens to every page and can tell if an ambulance was slower than it should have been. More precise, Dixie Ambulance's response time data as recorded on slips of paper is reported to the state using POLARIS, sometimes at the end of a shift, and then, according to Mr. Overton, is thrown in the trash. A monthly running average of these self-reported times is computed by the Department's POLARIS program. Dr. Michael Tremea ("Dr. Tremea"),¹⁵ Dixie Ambulance's Medical Director, testified that through POLARIS he reviews this average as well as a sample of reports for response times. He looks for explanations in cases where an ambulance exceeded the standard response time, and has noticed no problems in Dixie Ambulance's response times. There is no evidence that he

¹⁵ Dr. Tremea testified on December 5, 2012. His testimony is recorded on the Department's audio recording of the formal hearing.

discusses these results with Mr. Randall or any of Dixie Ambulance's other managers or that these results are studied in any systematic way. Likewise, there is no evidence that Dr. Tremea routinely discusses these results with the ambulance staff. At most, it seems he casually discusses particular instances with particular crews. He admitted, however, that Dixie Ambulance has not done systematic studies of response times for critical calls. He also admitted that any scientific study made of Dixie Ambulance's response times must use the self-reported data held by the state. Indeed, three of the studies introduced in this case were based on the POLARIS data.

After reviewing this POLARIS data, Mr. Judd noticed that all the times reported to the state are in minutes, with no seconds. Mr. Randall substantiated this testimony, and testified that this is because St. George Dispatch only gives its times in minutes. The truth of this assertion is questionable. Exhibits 22, 23, 28 and 41 of the Hearing Record, which are all examples of St. George dispatch data, clearly show time stamps on each call in hours, minutes and seconds. *See* Sample Dispatch Data, Hearing Record, Ex. 22, 23, 28, 41. Furthermore, to Mr. Randall's knowledge Dixie Ambulance has no official policy on whether the ambulance crew should round up or down when recording to the nearest minute. However, according to Mr. Randall, the Department has never corrected this practice.

Finally, counsel for Dixie Ambulance emphasized the inaccuracies in the St. George EMS data collection system. According to Chief Tom Kuhlmann¹⁶ of the Hurricane Valley Fire Special Services District, the software used by St. George Dispatch is entirely unreliable. Chief Kuhlman testified, relying on a document that was not admitted into the formal hearing record, that the St. George Dispatch software routinely gives three different results for three different

¹⁶ Chief Kuhlman testified on December 5, 2012. His testimony is recorded on the Department's audio recording of the formal hearing.

queries, and sometimes shows that an ambulance staff treats a patient for only 10 seconds. Furthermore, the dispatch date often shows that two to five minutes elapse before an ambulance is paged. Both times, according to Chief Kuhlman, are palpably incorrect. He also substantiated Mr. Randall's testimony that radio signals cannot be received at certain geographical locations in Washington County using an 800 MHz two-way radio. On both points of evidence, it appears Dixie Ambulance was trying to show that the St. George Dispatch data is untrustworthy, and that the Presiding Officer should find that Dixie Ambulance's response times are shorter than the data demonstrates because of data artifacts that tend to increase the length of Dixie Ambulance's response times. Counsel for Gold Cross rebutted this point with testimony from Mr. Moffitt that the software used in St. George is used throughout Utah and matched Gold Cross' own data from the previous five years.

With that background of Dixie Ambulance's operations and data collection methods, the four studies introduced at the hearing can be analyzed. The first study of Dixie Ambulance's response times was made by Josh Leglar, Data Manager for the Department. *See* Leglar Study of Dixie Ambulance Response Times, Hearing Record, Ex. 60. Mr. Randall testified that he asked Mr. Leglar to measure Dixie Ambulance's response times in St. George using the data that had been submitted to the state through POLARIS. By the exhibit's own terms, Mr. Leglar studied Dixie Ambulance's response times for all call types in St. George in 2009, 2010 and 2011. According to the study, Dixie Ambulance arrived at the caller's location in 13 minutes 90% of the time in 2009 and 2011, and 12.5 minutes 90% of the time in 2010. The average response time for each year was 7.2 minutes in 2009, 7.3 minutes in 2010 and 7.2 minutes in 2011. The median response time for all three years was 6 minutes.

The Presiding Officer rejects Mr. Randall's contention that this data includes "stand-by ambulances,"¹⁷ thereby artificially inflating Dixie Ambulance's response times. Since Mr. Leglar was not present at the formal hearing to testify and explain the methods he used in preparing his study, the Presiding Officer does not rely upon the Leglar study.

The second study of Dixie Ambulance's response times was performed by Mr. Randall himself, and will therefore be called the Randall study. Randall Study of Dixie Ambulance Response Times, Hearing Record, Ex. 75. According to Mr. Randall, he studied data obtained from St. George Dispatch. He compared this data to the times submitted in POLARIS. He then said that he filtered out stand-by ambulances and other non-emergency calls. Finally, to resolve discrepancies he said he consulted actual patient care reports. Counsel for Dixie Ambulance provided the data he used, which appears to be a manually created Excel spreadsheet. *See* Dixie Ambulance Response Times Data, Hearing Record, Ex. 76. He reported, as shown in Exhibit 75 of the Hearing Record, that Dixie Ambulance responded to all Charlie, Delta and Echo calls within 8 minutes 91.28% of the time between July 2010 and July 2011.

The accuracy of the Randall study is somewhat suspect. Seemingly, from Mr. Randall's testimony, he performed this study in response to the Leglar study, specifically the errors he felt the Leglar study contained. Mr. Randall's descriptions of his methodologies were vague. Moreover, Mr. Randall was uncertain whether his study included instances in which a call for an ambulance was cancelled while en route. The Presiding Officer has reviewed the spreadsheets provided and notes a few oddities. First, it is true that it contains cancelled calls. The Presiding Officer did find some instances where it took 9 or more minutes to respond to a cancelled call. However, it appears that many of these cancelled calls are also several minutes under 9 minutes,

¹⁷ "Stand-by ambulances" are ambulances that are either delayed in getting to the caller's location because, for example, the police must first secure the scene, or arrive at a location and wait to render services, such as at the scene of a fire, at a football game or other event likely to produce injuries.

and even zero minutes. No doubt the presence of these calls biases the results in favor of Dixie Ambulance. Second, in the file entitled “2011 A,B,C,D,E” the Presiding Officer found multiple instances in which an ambulance’s response time from notification to arrival at the scene, was only one minute. No doubt calls can originate close to an ambulance’s present location. However, considering the high rate of occurrence of these one-minute response times, the Presiding Officer questions their accuracy, especially since no explanation has been given for them. Third, and even more troubling, the Presiding Officer also found multiple instances in which, according to the document, a patient was treated, and Dixie Ambulance’s response time was actually zero minutes. This is a sheer impossibility. These data points not only sway the results, but also seriously call into question the competence of the analysis.

The Judd study is the third study, which showed that Dixie Ambulance met the industry standard in only one (1) year out of three (3), and that was only for Echo calls. *See* Expert Report of Darren Judd, Hearing Record, Ex. 33, p. 6-7. According to the Judd study, Dixie Ambulance met the industry standard in 2009, 2010 and 2011 as set forth in the following table.

	Charlie	Delta	Echo
2009	71.55%	79.10%	91.43%
2010	68.79%	80.38%	83.12%
2011	65.42%	76.58%	87%

Mr. Judd testified, consistent with his report, that he arrived at these results in a manner described in his report. The only significant point of contention with his method was over how Mr. Judd used an average call processing time, the time elapsed between the moment a caller calls St. George dispatch to the moment the ambulance is paged.¹⁸ The data available from St.

¹⁸ Counsel for Dixie Ambulance made two other arguments against Mr. Judd’s study. Counsel for Dixie Ambulance asked why Mr. Judd did not merely refer to the POLARIS reports, which indicate the time a unit is paged. Mr. Judd

George Dispatch only shows elapsed times for dispatch, travel and service. The elapsed dispatch time includes time elapsed while the call is processed and an ambulance is located and sent en route. Mr. Judd subtracted the call processing time to determine Dixie Ambulance's response time from the moment dispatch attempts to contact an ambulance to the moment it arrives on the scene.

As indicated previously, the parties contested the reliability of the dispatch data that Mr. Judd relied on in his evaluation. The Presiding Officer has studied multiple pages of the data used by Mr. Judd. *See* St. George Dispatch Data, Hearing Record, Ex. 59. This data shows the time that elapsed during the call, travel, and treatment, and the sum of all three. The data appears to have no obvious anomalies, like those in the data Mr. Randall used.¹⁹ The total elapsed times, and total response times all appear normal; most response times are seemingly between about 5 minutes and 20 minutes. Considering that the data itself contains no obvious anomalies, the Presiding Officer is inclined to believe Mr. Moffitt's testimony that St. George Dispatch's software does produce reliable data. Chief Kuhlman merely established that the software system is sometimes chaotic, not that it would always and incorrectly elongate Dixie Ambulance's response times, and never produce reliable data.

responded that this data is inaccurate because it is recorded in minutes instead of seconds, often showing identical paging and en route times. Counsel pointed out that this could still be accurate if, for example, an ambulance was waiting next to its two-way radio for a call. Whatever the significance of these few seconds, the Presiding Officer does not agree that Mr. Judd should have used the POLARIS report data considering that it too contains certain inaccuracies, the loss of a few seconds being only the slightest. The fact that only whole minutes are reported, often at the end of a shift, makes it likely that these reports are possibly minutes off, not mere seconds.

Finally, in response to counsel's questions concerning why he did not merely subtract the appropriate time for each incident using radio logs, Mr. Judd explained that method would be too time consuming. While this approach would have certainly yielded a more accurate result, the Presiding Officer relies on the results obtained on the average given the meticulous description of Mr. Judd's methods and relying on Mr. Overton's expertise.

¹⁹ Not every entry displays an elapsed time for all three categories: call, travel and treatment, or "on scene." However, the total is always displayed if there are any entries in any of the other three categories. This is not necessarily a reason to distrust the accuracy of the data, just the comprehensiveness of the data.

Counsel for Dixie Ambulance attempted to point out on cross examination of Mr. Judd that his average times were not computed in a statistically acceptable manner. Dixie Ambulance introduced through Mr. Randall's testimony a two-week "study" of St. George Dispatch's call processing times. Mr. Randall claimed that the call processing time is actually somewhere between 4 and 6 minutes. In retort, Mr. Overton, the industry expert, testified that he observed the workings at St. George Dispatch for an hour and believes that a 2 minute and 50 second call processing time actually favors Dixie Ambulance. Not having any documentation or descriptions related to Mr. Randall's methodologies, the Presiding Officer accepts Mr. Judd's average on the basis of Mr. Overton's expert opinion, notwithstanding the lack of proof of statistical significance.²⁰ Although Mr. Judd's use of an average was the most significant disputed point, the Presiding Officer finds that's Mr. Judd's study is probably the most accurate description of Dixie Ambulance's response times.

The fourth study, which was admitted over Dixie Ambulance's objection, shows that Dixie Ambulance responded to Charlie, Delta and Echo calls in the City of Ivins in roughly 11 minutes. The Presiding Officer finds little value in this particular study because, as Dixie Ambulance pointed out, no information regarding who prepared it or how it was prepared accompanies it. Nevertheless, these averages far exceed the industry standard, lending support to Mr. Judd's study over Mr. Randall's.

In conclusion, the Presiding Officer finds that Dixie Ambulance's response times are not completely certain or accurate. However, the most credible evidence, which is the Judd study, shows that Dixie Ambulance's response times are slower than the industry standard. The Presiding Officer further finds that such empirical, scientific studies are likely more accurate

²⁰ The Presiding Officer notes that Mr. Randall admitted on cross-examination that 2 minutes and 40 seconds is likely a more true call processing time than 6 minutes or 4 minutes.

than the anecdotal evidence of response times presented by Dr. Tremea and Mr. Randall. In contrast, the uncontested evidence demonstrated that Gold Cross' response times in Salt Lake City are better than the industry standard, and in Vernal fell one percentage point below the industry standard.

However, this discrepancy alone is insufficient to sustain Gold Cross' applications. Significant information is lacking from these studies. The length of time in which Dixie Ambulance responds to 100% of Charlie, Delta and Echo calls has not been reported, and is not easily accessible. It may be that Dixie Ambulance arrives to all of its critical calls within 9 minutes and 30 seconds. Moreover, even if Dixie Ambulance arrives in 11 minutes, or 30 minutes for that matter, the discrepancy in response times does not justify granting the Gold Cross applications if this difference does not affect the health of patients. Indeed, all parties seemed to agree that it is impossible to meet the industry standard when responding to calls in cities lying far outside of St. George. Certainly the citizens of Leeds, Utah are equally susceptible to catastrophic injuries and illness as those in St. George; certainly they deserve, if practicable, the same excellent medical services. Thus, the critical question regarding response times is, how significant is a 15% difference in response times?

Two types of evidence elucidate the answer to this question. Overall, they support granting Gold Cross' applications. First, multiple witnesses testified that for certain illnesses and traumas response time dramatically affects a patient's health. Dr. Brent Mabey, medical director for Gold Cross, testified that a cardiac arrest can cause brain damage in a matter of minutes.²¹ According to Dr. Mabey, other injuries that require prompt responses include bee stings, overdoses, and injuries that cause bleeding. Mr. Overton added that the American Heart

²¹ Dr. Mabey testified on December 4, 2012. His testimony is recorded on the Department's audio recording of the formal hearing.

Association has reported every minute lost after a cardiac arrest leads to a 10% decrease in the chance of survival. Even more important than cardiac arrests for Mr. Overton is myocardial infarction, otherwise known as simple chest-pains, which should be treated within 90 minutes. He also added traumas that require surgery, such as traumas caused by car accidents, stabbings and gun shots, and stroke to the list of injuries and illnesses requiring a fast response. It may be true, as Dr. Tremea opined, that differences in response times rarely make a difference. No evidence was introduced to indicate how often these time-sensitive calls occur. Nevertheless, Mr. Overton's point on an unrelated matter is persuasive in this instance. Mr. Overton testified that Dixie Ambulance's failure to perform regular preventative maintenance on its ambulances according to a log or program endangers the public. No doubt the ambulance will perform adequately on many calls. But the catastrophe that can result, even if rare, when an ambulance does break down with a dying patient held in cargo makes Dixie Ambulance's practices unacceptable.

The Presiding Officer concludes the same can be said of response times. Dr. Tremea is likely correct that the speedier response Gold Cross is likely to bring to St. George will not affect patient outcomes in most cases. However, emergency medical services exist to save people's lives. They exist especially for those rare instances when a patient must receive medical attention emergently.

In this light, Dr. Tremea's remarks and Dixie Ambulance's response times are more troubling because of the obvious lack of goal achievement evident in Dixie Ambulance's operations. Mr. Overton testified that the EMS industry is a data driven industry; even seconds matter. Indeed, Dixie Ambulance's own witness, Chief Kuhlman testified that he likes data he can rely on. Whatever the import of a few seconds in a response time, the resolve to continually

track and improve those response times is clearly important. Gold Cross has demonstrated its dedication to collecting accurate data by implementation of the latest technologies and reviewing such data frequently. By this standard, Gold Cross demonstrates its commitment to reducing response times wherever possible. There is no such evidence of similar commitments for Dixie Ambulance. Whatever Dixie Ambulance's espoused intentions, Dixie Ambulance's methods of data collection and review are too disorganized and inaccurate to prove that Dixie Ambulance has both set a goal to reduce response times and continually works to meet that goal. Neither do Dr. Tremea's time-to-time perusals of POLARIS data demonstrate a response time goal since they are unsystematic and do not appear to be meaningfully discussed with anyone.

Perhaps the inherent inaccuracies of St. George Dispatch's software and the presence of black-out spots in the 800 MHz spots make Dixie Ambulance's task more difficult. These excuses for bad data, however, do not justify Dixie Ambulance's failure to institute any kind of data collection and review system. Moreover, these problems in St. George's EMS system, if they truly exist, support approval of the Gold Cross applications because such problems tend to show that Gold Cross' CAD system is desperately needed in St. George. Rather than accepting Dr. Tremea's excuse that Dixie Ambulance does not have control over dispatch, the Presiding Officer agrees with Mr. Overton and Mr. Moffitt that the ambulance provider should lead the community's EMS system.

The second type of evidence that clarifies the significance of differences in response times is community desires. The public comment period clearly demonstrated that patients value a quick response.²² One participant, Mr. Jerry Campbell, represents a conglomeration of

²² For more discussion of the public comment see page 60.

homeowners associations largely comprised of retired citizens. These roughly 20,000 citizens' major concern is quick response times.

Thus, in conclusion, the uncertain but most likely existing difference between Gold Cross' and Dixie Ambulance's response times are significant because patients who suffer those rare types of time-sensitive maladies depend upon quick responses and the local community likewise appears to desire prompt service. The Presiding Officer finds that Gold Cross will likely improve upon the status quo, if only because it will bring a CAD system that will necessarily reduce dispatch time and a goal-oriented dedication to reducing response times.

2. St. George's steadily increasing population and uncoordinated EMS system require approval of Gold Cross' applications for BEMS services.

Utah Code Ann. § 26-8a-408(2) requires the Presiding Officer to "consider the impact [of granting the application] . . . on response times, call volumes, populations and exclusive geographic services areas served, and the ability of surrounding licensed providers to service their exclusive geographic service areas." Notwithstanding any improvements in access that an applicant may bring to an area, "The issuance or amendment of a license may not create an orphaned area." *Id.* Granting the Gold Cross applications will not create an orphaned area merely by issuance of the Gold Cross license since that license and the Dixie Ambulance license will cover all exclusive areas the Dixie Ambulance license now covers. However, the potential (as distinguished from an immediate outcome of granting the Gold Cross applications) for an orphaned area must be addressed and resolved in the present case because Gold Cross' attempt to extract St. George from Dixie Ambulance's service-area will allegedly drive Dixie Ambulance out of business. *See* Respondent Dixie Ambulance's Hearing Brief, p. 12. Dixie Ambulance's grim prospects, however, do not automatically prevent approval of the Gold Cross applications

because Gold Cross has affirmatively and preemptively committed to servicing any areas that become orphaned.²³ See Gold Cross Ambulance: License Application, Hearing Record, Ex. 24.

Dixie Ambulance's insolvency or lack of financial viability is thus relevant to the present discussion insofar as it impacts access to emergency services outside of St. George. Ultimately, the Presiding Officer finds that BEMS approval of the Gold Cross applications will improve access to ambulance services in St. George, and that such Gold Cross services will at least be maintained in Dixie Ambulance's remaining service area. More likely, access to services in this remaining service area could actually improve whether Dixie Ambulance continues its business or not. Moreover, Gold Cross' proven track-record of establishing clear mutual-aid agreements with adjacent EMS providers can only improve access to emergency services in the area.²⁴

Gary Esplin, St. George City Manager, testified that 75,000 people currently live in St. George. Its population has been increasing at a rate of 10% per year since 2000. Among those, as Mr. Overton commented, are many retired and elderly, higher risk groups for illness and trauma. In addition to its regular citizenry, the Presiding Officer notes that many tourists visit St. George every year because of its proximity to multiple national parks and Las Vegas. The parties and their witnesses agreed that St. George will likely expand, perhaps to even double its current size. Mr. Esplin explained that St. George's large size and rapid growth present tremendous difficulties, such as managing traffic and installing utility lines. Presumably, St. George's roadways will soon be too small to accommodate all its travelers, if they are not

²³ Communities serviced by sub-par EMS providers must effectively endure inadequate service if that provider's financial weakness can alone prevent approval of a Section 408 application because of fear of creating orphans. Securing the continuance of inadequate EMS providers clearly contradicts the whole purpose of Section 408 and the public good. The Presiding Officer, however, does not agree with Gold Cross' argument that granting an application that eventually results in bankruptcy can never create an "orphaned" area. Such a limited interpretation of the statute contradicts the purpose for the Emergency Medical Services System Act and the public good; the purpose of the EMS Act is to ensure that all of Utah's citizens receive EMS.

²⁴ See *infra* p. 45-6.

already. In short, all the evidence clearly demonstrates that St. George is no longer a small town, but is a burgeoning metropolis.

As St. George and the surrounding areas grow, demand for emergency medical services will grow. Currently, according to Mr. Randall, in 2011 in St. George an average of 10.4 calls were made per day. That translates to roughly 3,800 calls per year. The study Mr. Randall made of Dixie Ambulance's response times shows that from July 2010 to July 2011 Dixie Ambulance received 4,100 calls. Randall Study of Dixie Ambulance Response Times, Hearing Record, Ex. 75. In 2012, that number increased to roughly 5000 calls, or roughly 14 calls per day. Outside of St. George, Dixie Ambulance responded to an average of 5.9 calls per day or 2100 calls per year in 2011, and an average of 4.5 calls per day or 1650 calls per year in 2012.²⁵ The proportion of calls outside of St. George according to these numbers was 34% in 2011 and 25% in 2012. In comparison, according to Mr. Moffitt and Mr. Judd, Gold Cross responded to 22,000 calls in Salt Lake City, which includes 190,000 people within city limits,²⁶ and roughly 12,000 - 15,000 calls in Uintah County, which includes approximately 33,000 people.²⁷ None of this evidence was contested.

To respond to these calls, Dixie Ambulance staffs three ambulances from 7 a.m. to 7 p.m., and two ambulances from 7 p.m. to 7 a.m. for its *entire* area. Dixie Ambulance claims that six vehicles are available for use, including those already being staffed and the rescue vehicle it ceased operating in 2010. Dixie Ambulance also claims it has purchased two additional

²⁵ Mr. Miller, the Dixie Ambulance Officer, gave far more conservative estimates. He remembered responding to roughly 8 calls per day in St. George, and 11 to 13 in the entire area in 2011. However, he admitted uncertainty, and largely equivocated on cross examination. Thus, the Presiding Officer relies on Mr. Randall's testimony and Mr. Randall's study to determine Dixie Ambulance's area's call volumes.

²⁶ See www.google.com/publicdata citing U.S. Census Bureau.

²⁷ *Id.*

ambulances.²⁸ In contrast, Gold Cross promises to staff four ambulances round-the-clock, and locate four reserve ambulances in St. George, two of which are dedicated mostly to inter-facility transports. Again for comparison, in Salt Lake City, Gold Cross operates nine dedicated ambulances during the day, and seven at night. It maintains enough reserves to operate 30 ambulances at any given time. In Uintah County, Gold Cross maintains a fleet of six ambulances ready for use, one of which is staffed around-the-clock.

Aside from Dixie Ambulance's and Gold Cross' opinions, there is little evidence to determine the appropriate numbers of dedicated ambulances for St. George. Ultimately, the Presiding Officer must rely on the opinion of St. George City Fire Chief Robert Stoker, who believes that three to four fully staffed ambulances should be dedicated to 911 calls *in St. George alone*. Chief Stoker indicated his concern that before losing its inter-facility business, Dixie Ambulance's resources were stretched too thin. He cited one instance where an ambulance transported a patient from the scene of an accident and then *the same* ambulance returned to transport a second patient. This evidence is admittedly anecdotal. But it is the only evidence available, and it is substantiated by Dixie Ambulance's delayed responses to Dixie Regional Medical Center ("DRMC") to transport patients between facilities.²⁹ Whether these delayed responses were contractually permissible or not, they suggest that Dixie Ambulance's

²⁸ Some of the funds used to pay for these ambulances are currently the subject of a dispute with the Department.

²⁹ The evidence supporting the fact that Dixie Ambulance's response times to DRMC are too long comes from the testimony of Dr. Kim Rowland and Mr. Gary Stone. This evidence is also anecdotal, since no actual study was performed. The fact that DRMC never took advantage of the discounts for late responses, as counsel for Dixie Ambulance pointed out, only proves that Dixie Ambulance responded within the contractually established time limit, which was 1 hour. However, contractual delay and actual delay are separate facts. Thus, concerning Dixie Ambulance responses to DRMC for inter-facility transfers most likely *both* Gold Cross and Dixie Ambulance are correct. Dixie Ambulance met the contract's standard, but was still delayed. Dr. Rowland testified on December 4, 2012. Mr. Stone testified on December 3, 2012. Their testimony is recorded on the Department's audio recording of the formal hearing.

commitment of three ambulances was insufficient to respond to 911 calls *and* inter-facility transport calls.

Counsel for Dixie Ambulance argued that three or four ambulances for Dixie Ambulance's entire service area are sufficient since Gold Cross commits only one ambulance round-the-clock to Uintah County. Gold Cross' fleets in Salt Lake City and Uintah County may serve for comparisons, but are not controlling. Mr. Overton testified that Dixie Ambulance failed to account for any changing demographics, areas of high call density, traffic patterns, or other factors when it made its staging analysis. For example, according to Mr. Overton, a large portion of St. George's elderly population lives in the southern parts of St. George, yet Dixie Ambulance stages its ambulances according to an east-west model. In his opinion, this endangers the public because the ambulances are further away from the at-risk group. The Presiding Officer infers from this staging analysis that decisions concerning the size of a fleet as well as staging the fleet must account for severable variables, not merely call volumes. Thus comparisons between the two cities' call volumes and fleet numbers have limited value without accompanying information concerning demographics, call densities, etc. St. George's large elderly populations, large numbers of tourists, heavy traffic congestion, or any number of other factors, conceivably justify the difference between the fleets committed to it and to Uintah County. Not all calls are equal.

Dixie Ambulance currently possesses a sufficient number of ambulances to operate three to four in St. George alone, and an additional ambulance or two in the rest of its service area. To date, however, Dixie Ambulance has either been unable or unwilling to do so. Quite the contrary, Dixie Ambulance ceased operating its rescue vehicle in November 2010. The Presiding Officer concludes that Dixie Ambulance lacks the financial ability to operate this many

ambulances, even if it has them.³⁰ Importantly, the stress on Dixie Ambulance's resources will only increase into the future, as St. George's population continues to boom. The available evidence, particularly concerning Dixie Ambulance's financial status, strongly indicates that Dixie Ambulance *cannot* grow with St. George. In contrast, Gold Cross has amply proved that it is financially fit and can maintain four dedicated and two reserve ambulances in St. George.³¹ Thus Gold Cross will necessarily improve the number of dedicated ambulances to St. George.

Access to services outside of St. George must also be considered, and collateral damage to Santa Clara, Washington and other communities should be avoided if possible. Fortunately, the access to service in these communities will likely improve by granting the Gold Cross applications. If Dixie Ambulance ceases operations following this decision, Gold Cross will temporarily provide services under Utah Code Ann. § 26-8a-504(2). Because Gold Cross has committed to dedicate four ambulances, access to services in Dixie Ambulance's entire service area will necessarily improve by one dedicated ambulance during the day and two during the night. These communities would also benefit from Gold Cross' superior response times,³² superior quality assurance program,³³ superior equipment,³⁴ and superior commitment to improving services. In the long run, Gold Cross may continue providing this increased service, or these communities may select their preferred provider through an RFP *or* by encouraging such a provider to submit an application under Utah Code Ann. § 26-8a-404.³⁵ Displacing Gold Cross would not require an application for public convenience and necessity, as here, because Gold

³⁰ For discussion of Dixie Ambulance's finances see page 54.

³¹ See *supra* p. 18-35.

³² See *infra* 42-49.

³³ See *infra* 41-49.

³⁴ See *infra* 41-49.

³⁵ Importantly, the former avoids costs to the communities.

Cross would only be servicing the area as a stand-in “until a license is issued.” Utah Code Ann. § 26-8a-505(2).

If Dixie Ambulance maintains its operations,³⁶ the Presiding Officer believes that access to emergency services would also improve. Without St. George, Dixie Ambulance may commit all its resources to servicing Santa Clara, Washington and the rest of its remaining area. Perhaps Dixie Ambulance will need to scale back its operations from current levels to adapt to the changes in revenue. However, *any* ambulances Dixie Ambulance commits to the areas outside of St. George will be an improvement over the status quo since currently no ambulances are committed exclusively to those areas.

³⁶ Dixie Ambulance has argued that the Presiding Officer must consider the effect granting the application will have on Dixie Ambulance, i.e., that it will go bankrupt. *See* Respondent Dixie Ambulance’s Hearing Brief, p. 12. That is, the bankruptcy itself and not just the resulting possibility of orphaning an area should be considered. However, the Presiding Officer’s statutory mandate is to consider the effect of the application on the public, not Dixie Ambulance. The Presiding Officer declines to consider such an effect under Utah Code Ann. § 26-8a-408(6)(a) because granting an application under Section 408 will always reduce the incumbent provider’s revenue. Yet, Section 408 specifically authorizes replacement of an inadequate ambulance service in part or all of its service area for “public convenience and necessity.” Utah Code Ann § 26-8a-408. The Presiding Officer is forbidden by statute to grant the application if doing so results in an “orphaned area,” *not* if doing so results in the bankruptcy of an incumbent provider. Utah Code Ann. § 26-8a-408(2). Thus, Gold Cross needs to prove only that the areas outside of St. George will be serviced, not that Dixie Ambulance will be the company to service them. Gold Cross has done so by its commitment. Yet the facts do not compel Dixie Ambulance’s ruin. Losing 65% to 75% of Dixie Ambulance’s service area is not necessarily a death toll for Dixie Ambulance. A factual distinction exists between the causes of Dixie Ambulance’s potential bankruptcy. A bankruptcy may be caused because a company is left with a service area that *could not* support any service, or a company may file bankruptcy simply because it is unable to handle the shrinkage in revenue. Conflicting testimony was introduced concerning the ability of Dixie Ambulance to continue without St. George. Mr. Moffitt asserted that he did not wish to drive Dixie Ambulance out of business, and that he is aware of other areas where call volumes similar to those outside of St. George support private ambulance companies. In contrast, Mr. Miller, the Dixie Ambulance officer, asserted that Dixie Ambulance would not be able to pay its debts without St. George. Mr. Miller was aware that in Wendover, Utah an ambulance service subsists on a small call volume only because of relatively large mileages travelled per patient. The size of Wendover’s call volume is unknown; likewise the mileages travelled are unknown. However, Dixie Ambulance’s assertion that BEMS approval of the Gold Cross applications will cause Dixie Ambulance bankruptcy when Dixie Ambulance has already encountered financial business challenges, as counsel for Gold Cross pointed out, discredits Dixie Ambulance’s assertion. Thus, the available evidence indicates that it may be possible for Dixie Ambulance to continue operations, *if it makes responsible business decisions*. Indeed, if Dixie Ambulance is as financially robust as its counsel claimed, it will stand a greater chance of successfully continuing operations after losing St. George EMS license than it would in the financial state the Presiding Officer concludes reflects reality, based upon the formal hearing testimony and documentary evidence. The Presiding Officer’s Recommended Final Decision rests on more than finances. But even in a weak financial condition, the Dixie Ambulance bankruptcy is not necessarily inevitable, but conceivably may be avoided through *wise and prudent business decisions*.

B. Gold Cross will improve the quality of emergency medical services.

Section 26-8a-408 explicitly requires the Presiding Officer *to compare* the quality of service provided by the applicant and the incumbent provider. Ultimately, the Presiding Officer finds that quality of emergency medical services will be improved by Gold Cross. In short, Dixie Ambulance's workers provide excellent patient care, particularly compassionate care. However, Dixie Ambulance's management has utterly failed to establish comprehensive and systematic quality control programs and equipment standards, has failed to make meaningful connections with EMS system participants, and has potentially violated state law by its current staffing standards. In contrast, Gold Cross maintains robust quality control programs, equipment standards and relationships with key EMS system participants. Without meaningful goals and programs to promote progress, Dixie Ambulance's current service will likely become even more inadequate by contemporary standards.

According to Mr. Moffitt, Gold Cross' goal is to provide the best quality EMS care for St. George that is possible, and even to become exemplary in the nation. Mr. Overton agreed, recommending that Gold Cross' application be granted because it is an ethical company that invests in technology and personnel to deliver the highest standard of care. The Presiding Officer also agrees. Gold Cross demonstrates its commitment to meeting this goal in many concrete ways.

First, Gold Cross is accredited by the Commission on Accreditation of Ambulance Services ("CAAS") and the National Academy of Emergency Medical Dispatch ("NAEMD"). *See* NAEMD Accreditation Packet, Hearing Record, Ex. 17, p. GC 4253; *see also* Gold Cross Ambulance: License Application City of St. George, Utah May 19, 2011, Hearing Record, Ex. 24, p. GC 35. An applicant for accreditation must submit documentation of its protocols and programs. Dr. Mabey testified that CAAS inspected Gold Cross' quality assurance ("QA")

records in its QA evaluation. He described the process as “intensive.” Gold Cross itself underwent continual changes for two years in order to become accredited. Mr. Overton testified that CAAS accreditation is highly prestigious, which is consistent with Mr. Moffitt’s testimony that only a few hundred ambulance services nationwide are accredited. At the hearing, counsel for Dixie Ambulance attempted to diminish the significance of these accreditations because they are allegedly based on “self-assessments” and “self-determined standards.”³⁷ See NAEMD Accreditation Packet, Hearing Record, Ex. 17, p. GC 4245. The Presiding Officer concludes that Mr. Overton, who indicated otherwise, is correct. Even so, the accreditations still distinguish Gold Cross from Dixie Ambulance because they *prove* that Gold Cross maintains at least some kind of standard for comprehensive written protocols, procedures, and programs in virtually every aspect of its service.

Second, consistent with the Mr. Overton’s descriptions of QA goals, Gold Cross has developed a robust, data-driven QA program that aims at improving patients’ outcomes.³⁸ Dr. Mabey testified that all intubation attempts and cardiac calls are automatically reviewed. In addition Dr. Mabey performs random spot audits. He meets regularly with regional medical directors. He and his staff review all complaints.³⁹ Dr. Mabey testified that he is currently

³⁷ Concerning the NAEMD accreditation, the Presiding Officer believes, after reviewing Gold Cross’ application to NAEMD that “description” is a better term than “assessment.” The application indicates that Gold Cross provides its own *descriptions* of its processes and procedures, which are then evaluated by NAEMD. It is clear that to achieve accreditation from the NAEMD Gold Cross is not writing and grading its own test. For example, the NAEMD required Gold Cross to provide “a QI summary report showing the agency has reached the . . . expected minimum performance levels . . . “ and 25 sample case reviews. NAEMD Accreditation Packet, Hearing Record, Ex. 17, p. GC 4247-8.

³⁸ For Gold Cross’ Off-Line Medical Director Plan, see Gold Cross Ambulance: License Application City of St. George, Utah May 19, 2011, Hearing Record, Ex. 24, p. GC 14.

³⁹ Counsel for Dixie Ambulance questioned Dr. Mabey about the number of complaints Gold Cross receives per month, seemingly intimating that Gold Cross’ quality is poor. Similarly, Dr. Tremea told the tale of a Dixie Ambulance flunky who later found employment with Gold Cross. Such unconvincing evidence becomes virtually useless in light of the several complaint letters written to the Department about Dixie Ambulance. See Complaints to BEMS about Dixie Ambulance, Hearing Record, Ex. 46; BEMS File on Complaints about Dixie Ambulance,

working on publishing his findings from the data that Gold Cross has collected on patient outcomes.

Third, Gold Cross invests in new technologies to improve care.⁴⁰ Mr. Moffitt testified that all ambulances come equipped with detachable laptops or tablets and printers. This enables EMS workers to simultaneously and more accurately record any treatment given to a patient, and to better inform receiving doctors about that treatment. Conceivably this provides EMS workers with access to helpful information and protocols to assist in treatment. Also, Dr. Mabey testified that Gold Cross, possibly in response to newly published scientific studies, has begun equipping its ambulances with so-called “chillers” to reduce the body temperature of a patient whose brain must be protected from a lack of oxygen. Mr. Overton indicated that new technologies are important because they can help save lives. The Presiding Officer agrees.

Fourth, Gold Cross approaches its mission with a “system” philosophy and therefore develops meaningful relationships with other participants in the EMS industry. This approach is preferable according to Mr. Overton. Mr. Moffitt explained that Gold Cross’ functions in northern Utah under numerous mutual aid agreements, not just in Salt Lake County, but also in other counties. Gold Cross has a standard of care agreement with Salt Lake City. Dr. Mabey testified that he meets regularly with other regional medical directors. Gold Cross intends to

Hearing Record, Ex. 48. All that Dixie Ambulance’s counsel proved is that patients complain about EMS providers. Nothing more can be inferred.

⁴⁰ Counsel for Dixie Ambulance suggested that modern technologies should not form the justification for an application for public convenience and necessity because then companies using older, but still more than adequate technologies could always be replaced. The Presiding Officer acknowledges that a policy which forces constant upgrading could possibly risk loss of sufficiently successful present operation. However, this is not that case. Mr. Overton’s testimony indicated that Dixie Ambulance has not even kept pace with the minimum standards of the modern industry. Moreover, Gold Cross’ use of new technology is not an endorsement of the specific technology itself as it is for the obvious Gold Cross commitment to progress and improve its EMS. For example, one could not fault an EMS provider for using the pencil and paper method for recording response times, if it actively worked on improving that method, or established an active savings program to replace the paper pads with better technologies. *But see* e.g., Gold Cross Pro Forma, Hearing Record, Ex. 109 (depreciation savings). No evidence was presented even to imply that Dixie Ambulance is actively working on improving its processes and protocols with better technologies.

implement the so-called IIB protocols, which Gold Cross helped develop to coordinate the efforts of entities providing overlapping services. Mr. Overton testified that the ambulance company needs to be the “driver” of the EMS regional system. The evidence indicated that Gold Cross would provide such needed leadership to St. George, particularly in this time of extreme growth.

In short, Gold Cross will improve the quality of EMS care in St. George. As Mr. Overton indicated on cross-examination, Gold Cross has a clear track record of gathering data, investing in technology, establishing written protocols and programs, and approaching emergency services as a leader in a system.

In contrast, Mr. Overton indicated that Dixie Ambulance’s lack of meaningful and comprehensive procedures, protocols, QA programs and relationships with regional stakeholders are all unacceptable. The Presiding Officer agrees for the following reasons.

First, Dixie Ambulance has absolutely *no preventative maintenance program* for its equipment and its ambulances and has demonstrated no commitment to improving its technology. Mr. Overton indicated that Dixie Ambulance has failed to install the software upgrades on one of the two kinds of defibrillators used. Dixie Ambulance inspects its cots at best *once a year*. Yet, according to Mr. Overton, cots are more likely to fail than other pieces of equipment. Even more significant, Dixie Ambulance has no preventative maintenance program for its ambulances. Mr. Randall would contest this characterization. He testified that the Dixie Ambulance program is not “set in stone,” but that Dixie Ambulance does take its ambulances to a mechanic every 3,000 miles to change the oil and perform a so-called 25-point maintenance check. Even so, without documentation, it is impossible to know what 25 points of the ambulances are being checked. Consistent with Mr. Overton’s testimony that Dixie Ambulance

knows when to change oil, the Presiding Officer assumes that this “program” includes an oil change, and tire pressure and fluids check. Notwithstanding, it is obvious that there are many parts of a vehicle that are destined to fail with time and wear that are not checked during a routine oil change: the brakes, the battery, the alternator, the spark plugs, the belts and hoses, the tires, and the gaskets are just those that the Presiding Officer could list as a layman. The gravity of this failure was best explained by Mr. Overton when he testified by analogy that Delta Airlines does not wait until a jet plane crashes before fixing a malfunctioning part on its plane. Without a comprehensive and regular vehicle and equipment maintenance program, Dixie Ambulance’s vehicles increase the health risks to patients.

Second, Dixie Ambulance’s protocols are woefully inadequate. Dixie Ambulance’s agreement with its medical director, Dr. Tremea, states that the doctor must establish dispatch protocols, destination protocols, drug protocols, treatment protocols, and non-transport protocols. Dixie Ambulance Off-Line Medical Director Agreement, Hearing Record, Ex. 47. This agreement is based on requirements set by administrative rules. *See* Utah Admin. Code R426-15-401(1). Dr. Tremea has written comprehensive drug protocols and patient care protocols, *see* Dixie Ambulance Service Drug Protocol, Hearing Record, Ex. 91, and updates them as needed. Only three documents have been provided relating to *all* of the remaining necessary protocols. *See* Dixie Ambulance Medical Priority Dispatch System, Hearing Record, Ex. 2; Dixie Ambulance Response Time Policy, Hearing Record, Ex. 7; Dixie Ambulance Patient Care Report Policy, Hearing Record, Ex. 15. These documents vary in their usefulness at establishing effective and comprehensive protocols. Save these three, at best for Dixie Ambulance, the remaining protocols are unwritten, and at worst they do not exist. Dixie Ambulance asserts that

some protocols do not need to be written,⁴¹ and, more significantly, that the oral protocols are adequate. Indeed, counsel for Dixie Ambulance spent considerable time attempting to compel a concession from Mr. Overton that the lack of protocols themselves, as opposed to the lack of a writing, endangers the public. Mr. Overton firmly retorted that the failure *to write* the protocols does endanger the public.⁴² The Presiding Officer agrees. Ideally, protocols are the result of a studied decision making process. They represent the best course of action for a particular circumstance. Thus, in the stressful setting of a car accident, an EMS worker can rely on more than his own fuzzy memory or judgment to ensure that a patient receives the best care possible. Moreover, written protocols provide accountability and fair oversight in ways that oral standards never can.

Third, Dixie Ambulance's QA program lacks key components, is purely qualitative and lacks any form of quantitative patient-outcome evaluation. Mr. Overton pointed out that Dixie Ambulance has no audit process for correcting failed intubation attempts. *See Dixie Ambulance Drug Protocol, 2012, Hearing Record, Ex. 91, "Airway Pediatric-Failed."* Failed intubations, according to Mr. Overton, show a lack of quality care. While Dr. Tremea does review cardiac calls and some randomly selected calls,⁴³ the rest of Dixie Ambulance's QA program is limited

⁴¹ For example, both Dr. Tremea and Mr. Randall testified that Dixie Ambulance needs no protocol concerning which hospital to transport a patient to because there is only one in St. George. This assertion is unpersuasive for at least three reasons. First, DRMC is now split between two campuses. Second, Mr. Overton testified that not all cardiac patients should be transported to the ER, but some should go to a cardiac unit. Even if the ER and the cardiac unit in St. George are housed in the same campus, a protocol should be written to distinguish between the two types of patients. Third, Dixie Ambulance's area is quite large. Conceivably, under certain circumstances it would be faster to transport a patient to the hospital in Cedar City rather than to St. George. Dixie Ambulance's assumption that no protocol is needed demonstrates that Dixie Ambulance has not thought about these possibilities. Such assumptions unnecessarily endanger lives because Dixie Ambulance is thus not prepared to handle different circumstances.

⁴² Oral protocols also violate state law in certain instances. R426-15-401(2) ("shall develop patient care standards which include *written* standing orders and triage, treatment and transport protocols . . .") (emphasis added).

⁴³ Here also Mr. Overton suggested that reviewing cardiac calls is insufficient, since myocardial infarction calls are a better standard to judge EMS quality.

to Dr. Tremea writing comments to the EMS crews on the Patient Care Reports and mentally noting the outcome of some patients who have been admitted to the ER.⁴⁴ Dr. Tremea's mental notes of whichever patients he happens to check on are not a comprehensive study of the outcome of patients, or the impact of the EMS service on patient outcomes. They are anecdotal observations with limited scope. Thus, Dixie Ambulance's QA program has significant inadequacies.

Fourth, Dixie Ambulance has no meaningful relationships with participants in St. George's EMS system. Chief Stoker testified that the fire department, which is the first responder, and Dixie Ambulance have no agreements about coordination, no staffing protocols, no staging protocols, and no agreement of any kind about emergency services. Dixie Ambulance never consulted the fire department before it ceased operating its rescue vehicle or before it switched its staffing model. Dixie Ambulance has no standard of care agreement with the city. Dixie Ambulance claims that is a sign of trust from the city. However, the city's discreet contacts with Gold Cross concerning Dixie Ambulance's response times indicate otherwise. Dixie Ambulance has established no dispatch protocols. Finally, it is clear from the testimony concerning the arguments between DRMC and Dixie Ambulance over inter-facility transfers that the relationship between Dixie Ambulance and the hospital's administration is severely strained. As Mr. Overton testified, the EMS system contains multiple participants who need to be unified in order to progress towards better service, and that the EMS provider is primarily responsible for unifying the participants. Dixie Ambulance has failed to do this.

⁴⁴ Dr. Tremea's observations and conclusions are discussed with management at monthly meetings.

1. Dixie Ambulance fails to provide quality care by failing to comply with the Two Paramedic rule.

Both parties spent considerable time presenting evidence and argument relating to the so-called “Two Paramedic Rule.” That rule states: “if on-line medical control determines the condition of the patient to be ‘critical,’ the ambulance driver and two Paramedics shall accompany the patient on board the ambulance to the hospital, if Paramedics are on scene.” Utah Admin. Code R426-15-200(1)(e). It appears there is no definition in the Utah administrative rules for either of the words, “critical” or “scene.” Because Dixie Ambulance staffs one EMT and one paramedic on each of its ambulances, Gold Cross asserts that Dixie Ambulance must send two ambulances to all Charlie, Delta and Echo calls. *See* Expert Report of Jerry Overton, Hearing Record, Ex. 35, p. 4. Yet Gold Cross argues that Dixie Ambulance does not routinely send two ambulances to such calls, and is therefore in violation of the rule. *Id.*; *see also* Expert Report of Darren Judd, Hearing Record, Ex. 33. Dixie Ambulance countered with testimony indicating that a second ambulance can meet the ambulance carrying the patient somewhere en-route to the hospital in compliance with this rule.⁴⁵

This line of argument directly results from Gold Cross’ attempts to prove that Dixie Ambulance’s license must be revoked under Utah Code Ann. § 26-8a-504(1)(b). However, inasmuch as the instant proceeding is *not* a revocation proceeding, and such a revocation

⁴⁵ Chief Kuhlman testified that to his knowledge this practice is common throughout Utah. According to Mr. Kuhlman, some providers practice a “fly by” system to comply where two ambulances will communicate as they pass each other on the road. Mr. Kuhlman, Mr. Miller, a Dixie Ambulance officer, and Mr. Randall all testified that the Director of the Department orally condoned this practice. The Presiding Officer specifically asked all of these witnesses if any writing from the Department had been produced to substantiate these claims. Apparently, no writing has ever been produced interpreting the rule this way. The Presiding Officer is wary of interpreting the rule as Dixie Ambulance argues in light of Utah Code Ann. § 63G-4-208(3) and the fact that “a practice may be common and remain an offense . . .” Bolt, Robert, *A Man for All Seasons*, Vintage International, New York, 1990, p. 99. Nevertheless, the Presiding Officer recommends that the Department clarify the rule to eliminate some of these apparent misunderstandings.

proceeding is unnecessary to grant an application under Utah Code Ann. § 26-8a-408,⁴⁶ the Presiding Officer has no need, nor any authority, to interpret this rule for the purpose of determining whether Dixie Ambulance's violation of state administrative rules triggers a Section 504 revocation proceeding. The Presiding Officer interprets the rule only insofar as it has bearing on the quality of and access to emergency services, and believes that the plain language of the rule requires two paramedics to be *at the location of the patient* (i.e., the "scene" is the location of the patient) before transport to the hospital. The *exception* to the rule, phrased as "if on the scene" prevents an ambulance from unnecessarily waiting. Nevertheless, neither the word "scene" nor the rule itself can be stretched to mean a second paramedic may rendezvous with the ambulance carrying the patient at the doors of the hospital, or simply pass by in an adjacent lane of traffic. In such practices, the exception effectively invalidates the rule.

The Presiding Officer recognizes that the rule is controversial.⁴⁷ Nevertheless, the rule sets a standard for quality of care, and there is a rational basis for it. Dixie Ambulance presented evidence that typically only one EMS worker treats a patient, while the other stands back and watches. Even so, the rule ensures that another equivalently trained worker is available to provide oversight, a second perspective, emotional support to the worker and the patient, and a back-up if it is ever needed, in those cases where such help would be needed the most. No evidence or argument indicated that two paramedics could not benefit the patient by orally communicating with each other, whether on-site or in the ambulance.

Because the rule sets a standard for quality for care, an ambulance company that fails to abide by the rule *ipso facto* provides inadequate quality of care. Darren Judd presented virtually

⁴⁶ See discussion, *supra* p. 15, which concludes that application of Utah Code Ann. § 26-8a-408 may effectively revoke an incumbent's license, even though the Section 408 proceeding, "Criteria for determining public convenience and necessity," is not a Section 504, "Discipline of designated and licensed providers," proceeding.

⁴⁷ Indicated by the testimony of Chief Kuhlman.

uncontested⁴⁸ evidence that Dixie Ambulance did not send two paramedics to all “critical” calls. Expert Report of Darren Judd, Hearing Record, Ex. 33, p. 4-5. Even assuming only the Echo level is critical, Dixie Ambulance sent only one paramedic on nearly half of the calls, and sent no paramedics in 4% of the calls. *Id.* Whether these practices actually impact quality of care is not for the Presiding Officer to determine here—*the wisdom of the rule is not on trial*. The rule *defines* quality of care, and by failing to abide by the rule standard, Dixie Ambulance has failed to provide quality care to the public.

2. Gold Cross is more financially capable of providing the best dependable ambulance service in St. George, Utah.

The “Criteria for determining public convenience and necessity,” Utah Code Ann. § 26-8a-408, mandates that “The cost to the public shall be justified.” Section 408(4). The statute then directs the “officer” to consider (a) “the financial solvency of the applicant;” and (d) “the cost efficiency of the applicant.” Given that language, Dixie Ambulance has repeatedly, although unsuccessfully, argued that the only relevant financial data the Presiding Officer should consider in this formal hearing is limited to Gold Cross, the applicant, and that Dixie Ambulance’s financial viability, or lack thereof, as the current ambulance provider in St. George, is irrelevant and/or beyond the scope of the formal hearing.

For example, the Dixie Ambulance Motion in Limine, submitted November 14, 2012, argued that “any evidence and/or testimony regarding the financial status, financial information, financial solvency, or other financial information of Respondent Dixie Ambulance,” including expert witness testimony and various supporting exhibits pertaining to Dixie Ambulance financial viability, should be excluded from evidence. Dixie Ambulance’s Motion in Limine and Memorandum in Support of Motion in Limine, p. 2. The rationale for the Dixie Ambulance

⁴⁸ Dixie Ambulance’s strategy was to challenge the interpretation of the rule, as indicated.

argument was: (a) the “criteria listed in Section 26-8a-408 are exclusive and specific criteria; (b) Section 26-8a-408(4) expressly states that the “financial solvency of the applicant” (Gold Cross) shall be considered; yet (c) there is no express statutory listing for financial solvency of the existing provider as a statutory criterion. *Id.* at 10.

However, the Dixie Ambulance November 14, 2012 Motion in Limine argument disregards the Presiding Officer’s May 18, 2012 Order, which holds that all statutory criteria, and specifically: (1) Section 408(4)(e), “the cost effect of the application on the public, interested parties, and the emergency medical services system[;]” (2) Section 408(3)(f), “the negative or beneficial impact on the regional emergency medical service system to provide service to the public[;]” (3) Section 408(2), the maintenance of existing services and the impact on such services; and (4) Section 408(6), any other “related criteria: (a) the “officer considers necessary” include the existing provider, Dixie Ambulance’s, financial viability, which shall be considered.

By this Recommended Final Order, and as clarified at the formal hearing, the financial viability, both of the applicant Gold Cross and the currently licensed provider Dixie Ambulance, is a broader concept that mere “financial solvency of the applicant” (Gold Cross) as stated in Section 26-8a-408(4)(a). Financial viability is the ability of an entity to continue to achieve its operating objectives and fulfill its mission over the long term, which includes management ability, lack of money for improvements and equipment, and revenue sources and services.

The Presiding Officer’s November 21, 2012 Order Denying Respondent Dixie Ambulance’s Motion in Limine reinforced the Presiding Officer’s previous May 18, 2012 Order. The November 21, 2012 Order expressly held: “evidence related to Dixie Ambulance’s financial situation is relevant in determining whether Dixie Ambulance or Gold Cross should be granted

or denied an exclusive license to provide paramedic ambulance service in St. George.” November 21, 2012 Order, p. 5. The November 21, 2012 Order further held in reserve Gold Cross’ request for an award of attorney’s fees in opposing “Dixie Ambulance’s re-assertion of the same argument a mere two weeks before the adjudicative proceeding.” *Id.* Gold Cross argued that Dixie Ambulance’s disregard of Presiding Officer orders “shows Dixie Ambulance is acting in bad faith.” *Id.* p. 6, quoting the Gold Cross Memorandum in Opposition to Respondent Dixie Ambulance’s Motion in Limine, p. 13.

Notwithstanding the Presiding Officer’s previous two orders, on December 3, 2012, Dixie Ambulance moved to exclude the public from the public hearing with respect to any and all oral testimony concerning Dixie Ambulance’s financial viability. The Presiding Officer denied Dixie Ambulance’s motion to exclude the public from the public hearing with respect to evidence concerning Dixie Ambulance’s financial viability, although the documentary evidence (as distinguished from oral testimony at the public hearing) remained undistributable to the public subject to a previously entered protective order. Dixie Ambulance’s repeated attempts to exclude any and all evidence (and also exclude the public from a public hearing) pertaining to Dixie Ambulance’s financial viability, justify an award of attorney’s fees against Dixie Ambulance, and in favor of Gold Cross on this issue, as Gold Cross requested in its November 20, 2012 Memorandum opposing the Dixie Ambulance Motion in Limine.⁴⁹ The amount of the attorney’s fee award will be later determined.

⁴⁹ Gold Cross argued that “Dixie Ambulance’s effort to re-argue an issue twice decided against it is wholly improper.” Petitioner’s Memorandum in Opposition to Respondent Dixie Ambulance’s Motion in Limine, p. 13. The Order Denying Respondent Dixie Ambulance’s Motion in Limine stated that “Presiding Officer Miller does not, by this order [dated November 21, 2012], rule upon the Gold Cross request for attorney’s fees, but will take the Gold Cross request for attorney’s fees under advisement.” *Id.* p. 6. By this Recommended Final Order, the Presiding Officer grants Gold Cross its requested attorney’s fees because of Dixie Ambulance’s repeated attempts to exclude any evidence (and also exclude the public from a public hearing) pertaining to Dixie Ambulances’ financial viability.

3. The Dixie Ambulance lack of financial viability jeopardizes continuance of its emergency ambulance services for St. George.

The Expert Report of Merrill Norman, Exhibit 108, which Dixie Ambulance sought to exclude from evidence at the formal hearing, opines that “Dixie Ambulance is in violation of Utah’s minimum requirements for licensure because it is not financially solvent.” Norman Report, p. 2. Merrill Norman is a certified public accountant (“CPA”) who has practiced for more than 40 years, and has testified as an expert witness in numerous regulated industry hearings before many federal and state courts. Mr. Norman testified that Dixie Ambulance was insolvent, meaning that its financial liabilities exceeded its assets, because “the sum of its debts is greater than the fair market value of its property.” Specifically, as of December 31, 2011, Dixie Ambulance’s total liabilities, as listed on the Dixie Ambulance Balance Sheet, were \$75,425.23, and its total assets were \$69,941.22, thus resulting in a negative net worth for Dixie Ambulance of \$5,484.01. Norman Report, Exhibit 108, p. 3. Dixie Ambulance also has a bad debt collection ratio of approximately 60% for average accounts receivable of approximately \$700,000. *Id.*, p. 4, quoting T. Randal Deposition Tr. at 18:23-24.

The Gold Cross Pretrial Brief reinforces the same facts and arguments as summarized above from the Norman report, but further asserts the indisputable fact that Dixie Ambulance’s financial records prove that Dixie Ambulance, as distinguished from RAM Properties, has almost no assets. That is because the Dixie Ambulance owners formed a separate, purportedly independent company, namely RAM Properties of St. George, which owns all the real and personal property that Dixie Ambulance uses, including the building from which Dixie Ambulance operates and the EMS equipment, including ambulances, that Dixie Ambulance operates. RAM Properties leases such real and personal to Dixie Ambulance.

As of December 31, 2011, the Dixie Ambulance Balance Sheet displays an “equity” withdrawal for “draws” to Andrea Miller, co-owners of RAM Properties, in the amount of \$564,026, and Tony Randall, in the amount of \$611,063, although no period of time was specified. Norman Report, p. 3. Dixie Ambulance Balance Sheet, DA 000227, Ex. 12. Exhibit 108, which Mr. Norman prepared, further displays the owners’ “cumulative draws,” with which Mr. Hall concurs, as \$2,063,589. Exhibit 108, Combined Adjusted Balance.

The RAM Properties balance sheet also proves that the entity is insolvent. As of December 31, 2011, the RAM Properties balance sheet depicts a negative net worth of \$527,981.82, and a negative net worth each calendar year from 2007-2010. RAM Properties of St. George, LLC Balance Sheet, Ex. 12. An additional financial problem is that Dixie Ambulance has a bad debt collection ratio of approximately 60% on an average accounts receivable of approximately \$700,000, according to Tony Randall, a Dixie Ambulance officer. *See T. Randall Dep. Tr. at 18:23-24; 161:14-16 (more than a 50% bad debt ratio).*

In attempted rebuttal of Mr. Norman, Dixie Ambulance submitted the Expert Report of David Hall, also a CPA. Mr. Hall claimed that Dixie Ambulance had proven its financial viability by: (a) three new secured loans, which demonstrate bank approval substantiating Dixie Ambulance’s financial stability; (b) Statements of RAM Properties, LLC and Dixie Ambulance Cash Flows through December 2011 and the Dixie Ambulance Service Solvency Analysis for December 31, 2011, which, contrary to the balance sheets submitted to BEMS and cited above, depict a total equity balance of \$75,988 (derived from \$1,673,301 in total assets less \$1,597,313 in total liabilities); and (c) allegedly incorrect assumptions in the Norman report, such as using what Mr. Hall describes as Mr. Norman’s “fair market value” methodology, rather a “fair valuation” methodology that Mr. Hall advocates. One such fair valuation methodology that Mr.

Hall uses, and to which he testified, was assigning \$1,194,406 to Dixie Ambulance “goodwill” as an intangible asset. Another added fair valuation was the Dixie Ambulance license, which Mr. Hall testified at the formal hearing was also an intangible asset.

However, neither of such adjustments make sense because: (1) although goodwill may be an intangible asset for certain accounting purposes, in this instance, Dixie Ambulance goodwill is not a saleable or transferrable asset to any hypothetical purchaser of Dixie Ambulance property because the license is limited exclusively to Dixie Ambulance as the licensed operator, whose goodwill cannot therefore be sold to anyone; and (2) the Dixie Ambulance EMS license is exclusive to Dixie Ambulance, and is likewise not subject to sale or “fair market value” assessment, which, Presiding Officer Miller holds, either includes or is the equivalent of “fair value,” meaning: “the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.” Utah Code Ann. § 59-2-102(12).

The Gold Cross CPA expert, Mr. Norman, disagreed with the Dixie Ambulance CPA expert’s inclusion of “goodwill” and “license” as Dixie Ambulance fair value assets. That is because, as Mr. Norman testified at the formal hearing, and as further illustrated in Exhibit 108, Mr. Hall’s adjustments are without support, meaning support as an accepted valuation methodology. According to Mr. Hall, the Dixie Ambulance total equity is \$75,989, yet according to Mr. Norman, the Dixie Ambulance total equity is a negative \$246,526. *Id.* Combined Balance Sheets (Hall) and (Norman). The Presiding Officer accepts the expert testimony of Mr. Norman, rather than Mr. Hall, because Mr. Norman’s testimony and exhibits are more rationally based upon and consistent with valuation methodology and the above-explained legal principles. Hence, the Presiding Officer hereby holds, as a Finding of Fact and

Conclusion of Law, that Dixie Ambulance is not financially viable. Consequently, continuance of Dixie Ambulance as the exclusive ambulance provider jeopardizes reliable public ambulance service St. George, Utah contrary to the criteria for determining public convenience and necessity, specifically: (1) “The quality of service in the area shall be maintained or improved,” as provided in Utah Code Ann. § 26-8a-408(3); and (2) the financial viability of Dixie Ambulance, which the Presiding Officer considers necessary as provided in Utah Code Ann. § 26-8a-6(a).

In addition to Dixie Ambulance’s questionable financial viability, formal hearing Exhibit 107, Report of Review of EMSGP Grant Costs Approval Process, Review Report No. OIA-13-12 raises Dixie Ambulance management and/or financial concerns. The report, dated October 15, 2012, includes an appendix that concludes “Our audit disclosed that DAS [Dixie Ambulance] received reimbursement for [ambulance] costs that were not incurred during the grant period. As a result DAS received payments it was not entitled to.” Exhibit 107, Report Appendix, p. 4. “It was reported to BEMSP grant personnel that the ambulance reviewer had gone to DAS, prior to the end of the grant period, and verified that it has already received the ambulance identified in the Competitive Grant. However, DAS did not order the ambulance from Rocky Mountain Ambulance until August 28, 2012, which was well outside of the grant period.” *Id.* at 5.⁵⁰

With respect to Gold Cross’ financial viability, which is an explicit criterion codified at Utah Code Ann. § 26-8a-408(4)(a), the Gold Cross Pretrial Brief maintained that “The evidence will show that Gold Cross is a fiscally responsible provider of EMS services that receives its

⁵⁰ On December 19, 2012, Dixie Ambulance submitted a letter to the BEMS stating that the Dixie Ambulance return of grant funds is not an admittance that the use of the grant funds by Dixie Ambulance was intentionally improper, and that Dixie Ambulance does not waive a request for administrative review of the BEMS audit. The Presiding Officer does not opine on the merits or lack of merit of the Dixie Ambulance audit since the December 19, 2012 Dixie ambulance letter is not part of the December 3 through 7 formal hearing record, although the audit itself, Exhibit 107, was an exhibit submitted at the formal hearing and does raise concerns as to why grant payments were made to Dixie Ambulance for unallowable costs.

funding from State-approved user fees. Gold Cross will operate in St. George within the established rates and without any tax subsidy. Gold Cross is also cost efficient.” Petitioner’s Pretrial Brief, p. 20. Exhibit 53, Gold Cross Services, Inc., Financial Statements with Accountants’ Review Report, reports on the balance sheet for December 31, 2011 that Gold Cross had total assets (including current assets such as cash and accounts receivable plus property and equipment) of \$10,495,562, less total current liabilities and long term liabilities of \$8,969,285 for a positive balance of \$1,526,277. For 2011, Gold Cross reported net cash provided by operating activities of \$1,287,465. Exhibit 53, GC 00004131, and GC004135.

In response, Dixie Ambulance never challenged the Gold Cross financial solvency and viability, either in its brief or at the formal hearing with argument or evidence, but instead implied, but does not prove, that Gold Cross’ costs are excessive. Dixie Ambulance further asserted without any proof whatsoever that “without the 911 transports from Santa Clara, the city of Washington, or other parts of Washington County under Dixie Ambulance’s license, the evidence will show that Gold Cross will be operating at a financial loss.” Respondent Dixie Ambulance’s Hearing Brief, p. 22. Instead, Dixie Ambulance repeatedly asserted that “if Dixie Ambulance loses St. George to Gold Cross, it [Dixie Ambulance] will most likely go out of business.”⁵¹ *Id.* at 19.

Presiding Officer Miller acknowledges, pursuant to Utah Code Ann. § 26-8a-408(8), that “[i]n a formal adjudicative proceeding, the applicant bears the burden of establishing that public convenience and necessity requires approval of the application for all or part of the exclusive geographic service area requested[;]” and the Dixie Ambulance argument in its Hearing Brief

⁵¹ Dixie Ambulance further claims that “This [forcing Dixie Ambulance out of business] will leave Santa Clara, the city of Washington, or unincorporated portions of Washington County as orphaned area under Section 26-8a-408(2) and on this ground alone, the evidence supports denial of Gold Cross’ application.” *Id.* The Presiding Officer disagrees with this assertion.

that “The Burden of Proof in this action rests squarely upon Gold Cross, the applicant.” Respondent Dixie Ambulance’s Hearing Brief, p. 16. With respect to the financial solvency of the applicant Gold Cross, which Utah Code Ann. § 26-8a-408(4)(a) requires, and the questionable financial viability of the current provider Dixie Ambulance, that the Presiding Officer considers necessary pursuant to Utah Code Ann. § 26-8a-408(6)(a), Gold Cross has met the burden of proof that requires its applications be granted.

C. Local leaders support the process outlined in Section 408 and granting the EMS license for St. George to the most efficient provider.

Utah Code Ann. § 26-8a-408(5) requires the Presiding Officer to compare the records of service of each company, locally established goals, and comment from local governments on the applicant’s plans for operations, and any public comment made on the subject. While thorough analysis of the facts related to these criteria weigh in favor of Gold Cross or of neither company,⁵² the public comments made on this matter largely, although not entirely, favored Dixie Ambulance.

1. Public comments support Dixie Ambulance, but such public support does not outweigh Dixie Ambulance’s demonstrable shortcomings.

Utah Code Ann. § 26-8a-408(5)(f) requires the Presiding Officer to consider “public comments on any aspect of the application.” Accordingly, the Presiding Officer must “set aside

⁵² First, from the evidence produced, Gold Cross’ record of service is superior. Most of the distinguishing factors are discussed in the body of this opinion, e.g., commitment to technology, data-collection, response times, etc. Counsel for Dixie Ambulance spent considerable time pointing out that Gold Cross has actually never operated anywhere under a paramedic license, and is therefore inferior to Dixie Ambulance, which has operated successfully for over 10 years. Notwithstanding Dixie Ambulance’s shortcomings, which are discussed in the body of this opinion, Gold Cross proved that it does provide paramedic services under its mutual-aid agreements. Second, the evidence indicated that St. George really has no goals or system with effective collaboration. As indicated, St. George would benefit from an EMS provider that can lead the way to establish an effective system and set goals for improving it. Third, the record contains multiple letters written by local leaders to the Department complaining about Gold Cross. Kuhlman Letter, Hearing Record, Ex. 77; Mike Miller (Vice President Dixie Ambulance) Letter, Hearing Record, Ex. 79; Mike Miller Letter concerning DRMC, Hearing Record, Ex. 81. The subjects of these letters are about specific incidents, rather than the Gold Cross operations in their entirety. Gold Cross also has supporters; e.g., testimony of Gary Stone, Chief Administrator at Dixie Regional Medical Center; testimony of Kim Rowland, and emergency recovery physician; and supporters of the “public convenience and necessity” process; see Mayor McArthur Letter, Hearing Record, Ex. 83.

a separate time during the proceeding to accept public comment on the application.” Utah Code Ann. § 26-8a-407(3)(a). On December 3, 2012 from 6:00 p.m. to 8:00 p.m., the Abbey Inn in St. George hosted an estimated 300 people who made comments on the Gold Cross application. The Department recorded this comment period and the Presiding Officer took copious notes, which were submitted to the Department. Importantly, while Section 408 contemplates consideration of the public comments made at the Abbey Inn, it does not necessarily preclude consideration of evidence of public desire that is and was introduced and submitted at the formal hearing. Thus, the Presiding Officer must also consider such comments that local authorities made as sworn formal hearing testimony. Ultimately, the Presiding Officer finds that the public as a whole ultimately desires the best EMS service for St. George. Even assuming the Presiding Officer were to find that the public as a whole supports Dixie Ambulance, such support is insufficient to override the Presiding Officer’s findings of fact concerning the Dixie Ambulance lack of financial viability, poor management, and generally inadequate operations, as mandated by the criteria set forth in Section 408.

One speaker took a spontaneous poll by show-of-hands, which demonstrated that virtually the entire crowd supported Dixie Ambulance. Notably, some of the members of the crowd wore Dixie Ambulance uniforms. The Presiding Officer presumes that these employees’ family members and friends were also likely present. By this same poll, many people admitted knowing either Mr. Miller, the Dixie Ambulance officer or Mr. Randall, also a Dixie Ambulance officer personally. The crowd, however, was not entirely comprised of interested individuals. Roughly 40 people spoke at the Abbey Inn, some of whom appeared to have no connection to Dixie Ambulance other than through the emergency services Dixie Ambulance had rendered to

them. Because of the impracticality of relating the contents of every speech, the general public comment themes will be summarized with discussion of several important comments.

All but one of the speakers spoke in favor of Dixie Ambulance. Gold Cross was portrayed as a foreign corporation (headquartered outside of Washington County) that essentially sought to deprive a local business (Dixie Ambulance) of revenue. In contrast, Dixie Ambulance was portrayed as the ethical, neighborly, family-owned ambulance company that remembers every patient treated. Many participants extolled the integrity and heart of Dixie Ambulance's owners and employees. A few speakers mentioned Dixie Ambulance's charitable contributions, including waiving fees and even donating an ambulance to a poor Mexican town. Many participants believed Dixie Ambulance responded quickly, which is the only evidence of *perceived* response times. Moreover, Mr. Esplin testified that the St. George Fire Department responds simultaneously with Dixie Ambulance, and often arrives first. Thus even the perceived speed of response is not necessarily attributable to Dixie Ambulance.

Many participants described the "superior care" they or their loved-one received from Dixie Ambulance. It was apparent that to these supporters, "care" really meant the so-called bed-side manner, since all spoke only of compassionate service, and most, if not all of the speakers, but for a nurse, likely have little clinical knowledge. However, even the nurse referred more to Dixie Ambulance's compassion, bed-side manner and willingness to help. The only public comment concerning Dixie Ambulance's clinical abilities came in the form of a letter written by the doctors of Southwest Emergency Physicians, a corporate group of doctors that has been contracted to staff multiple emergency departments in hospitals in southern Utah. *See Southwest Emergency Physicians Letter, Hearing Record, Ex. 88.* These physicians attested that

Dixie Ambulance provides “knowledgeable . . . compassionate care,” and proclaimed their support. *Id.*

In summary, the bulk of approximately 300 people at the public comment period expressed a desire that the Dixie Ambulance EMS service be maintained and expanded with the city; “*after all, if it ain’t broke, don’t fix it.*” The 1500 people who signed a petition in support of Dixie Ambulance, which was published in a local newspaper, likely feel similarly. *See* Newspaper Petition, Hearing Record, Ex. 98.

A few individual comments deserve more attention. Dean Cox, a Washington County Administrator, spoke fervently for Dixie Ambulance and wrote a letter to the Department containing the same comments, which was introduced into evidence at the hearing. *See* Washington County Administrator Letter, Hearing Record, Ex. 87. The fire chief and the manager of ambulance services in Enterprise, Utah, both spoke in favor of Dixie Ambulance. They commented that Dixie Ambulance has a good relationship with Enterprise and they worry about services in the rest of Washington County if the application is granted. Less supportive was Gayle Bunker, a St. George city councilwoman, who spoke *personally* and not in her political capacity. She proclaimed her total support for Dixie Ambulance, but also recognized the value of providing the best services. *All things equal*, she said, she wishes to keep Dixie Ambulance.

Even assuming all the public comments made are true, one speaker’s comments mute the public support for Dixie Ambulance at the Abbey Inn conference. Jerry Campbell spoke as president of the ALPC, an association comprising 130 homeowners associations, collectively 21,000 people. Representing this group, which is more than a *quarter* the size of St. George, he endorsed *neither* company. Rather, he expressly placed trust in the state to make a prudent

selection. He asked that the Presiding Officer primarily consider response times. Also important to the ALPC is the proper maintenance of the vehicles, compliance with laws and rules, and financial solvency.

As the proposed Recommended Final Order has previously found, Gold Cross will likely improve upon Dixie Ambulances response times.⁵³ Moreover, Dixie Ambulance has no preventative maintenance program;⁵⁴ and Dixie Ambulance's compliance with laws⁵⁵ and its financial viability⁵⁶ are *seriously questionable*.

The public at large is presumably unaware of these and other Dixie Ambulance potential and/or existing problems. Presumably, if Dixie Ambulance's supporters knew about these troubles many opinions could change. Only hints of knowledge of any such problems were displayed during the comment period. For example, one man explained that Dixie Ambulance has budget troubles because of the numerous bills they write-off to benefit poor clients, and another attributed its strained finances to fighting corporate raiders. Finally, one man simply exclaimed that people make mistakes. No evidence presented at the formal hearing substantiates any of these claims.

2. Informed comments from local leaders support an informed formal hearing adjudication of the Gold Cross application based upon the criteria for determining public convenience and necessity.

The state of Utah entrusted the care of its people to Dixie Ambulance by granting it a license; and the state expects Dixie Ambulance to comply with the state's laws and rules and to continually provide quality services into the future. Because the state is responsible for the welfare of its citizens, and recognizing the seriousness of an EMS provider's inadequacy, the

⁵³ See *supra*, p. 32.

⁵⁴ See *supra*, p. 46.

⁵⁵ See *supra*, p. 50, p. 54.

⁵⁶ See *supra*, p. 53-59.

legislature has written into law numerous ways to replace such a provider. *See* Utah Code Ann. §§ 26-8a-405.1, 408, 504. If the public wishes a more democratic process for selecting an EMS provider, it could pressure the city to conduct an RFP. *See* Utah Code Ann. § 26-8a-405.1. Under present law, Gold Cross seeks to replace Dixie Ambulance on the basis of *necessity to the public*. *See* Utah Code Ann. § 26-8a-408. Under present law, the Presiding Officer's statutory mandate is to determine what is in the best interest of the citizens of St. George and Washington County according to statutory criteria and pertinent facts. The Presiding Officer cannot therefore disregard Dixie Ambulance's severe financial, response time and other troubles as testified at the formal hearing in favor of general public sentiment. Notable absences from Dixie Ambulance's supporters at the public comment hearing were Dixie Regional Medical Center's administration,⁵⁷ St. George Dispatch, St. George's city manager,⁵⁸ St. George's fire chief,⁵⁹ and the city of St. George itself. Indeed, the mayor of St. George explicitly and officially supports the "certificate of public convenience and necessity process" of this formal hearing. McArthur Letter, Hearing Record, Ex. 83

When the public comment period is balanced against the ALPC's desires and this list of absences, the Presiding Officer cannot reasonably conclude that continuance of the Dixie Ambulance license, rather than granting the Gold Cross application, is in the public interest. Rather, considered in total, the Presiding Officer concludes that the evidence adduced at the hearing clearly shows that Dixie Ambulance has not provided better emergency services than Gold Cross could provide to St. George.

⁵⁷ As discussed elsewhere, Dixie Ambulance's relationship with the hospital is strained. *See supra*, p. 49.

⁵⁸ Mr. Esplin testified for Dixie Ambulance, but testified that St. George just wants the best care possible.

⁵⁹ Chief Stoker testified for Dixie Ambulance, but did not endorse Dixie Ambulance. Rather, he testified that his hope is for St. George to get the best care possible.


CONCLUSION AND FINAL RECOMMENDED DECISION

As stated and summarized at the outset of this document, the Presiding Officer hereby enters his Recommended Final Decision that the Gold Cross Applications be approved for the following reasons:

(1) Gold Cross proved at the formal hearing held from December 3 through December 6, 2012 in St. George, Utah, that application of “public convenience and necessity” statutory criteria, codified at Utah Code Ann. § 26-8a-408 requires the approval of the Gold Cross applications. The evidence herein recited and analyzed further proves that Gold Cross: (a) is a fiscally responsible provider of Emergency Medical Services (“EMS”); (b) will improve the quality of care delivered to the patients and citizens in the city of St. George; (c) will improve access to EMS within St. George; and (d) will benefit the regional EMS system.

(2) The current licensed ambulance provider of such services, DA Services, Inc. d/b/a Dixie Ambulance (“Dixie Ambulance”) is (a) in violation of Utah administrative rules; (b) does not meet industry operational standards governing EMS staffing requirements and ambulance response times; (c) is not financially viable; and (d) is likely unable to continue providing quality ambulance services that St. George deserves and requires into the future.

DATED this 22nd day of January, 2013.



Maxwell A. Miller
Presiding Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, I caused to be served a true and correct copy of the foregoing **RECOMMENDED FINAL ORDER** by e-mail on the following parties:

Mike Moffitt, President
Gold Cross Ambulance
1717 South Redwood Road
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