On November 16, 2016, the Big Lakes Regional Emergency Medical Services Council ("Big Lakes REMSCO") approved an application by Mercy Flight, Inc., d/b/a Mercy EMS ("Mercy EMS"), for an expansion of its operating territory, pursuant to Public Health Law ("PHL") § 3008. By letter dated December 14, 2016, LaSalle Ambulance, Inc., and Town's Ambulance, Inc., jointly doing business as American Medical Response ("AMR") appealed the Big Lakes REMSCO's determination and requested that the New York State Emergency Medical Services Council ("SEMSCO") deny the application. Also by letter dated December 14, 2016, Twin City Ambulance Corp., ("TCA") appealed the determination and requested that the SEMSCO deny the application.

Pursuant to the New York State Department of Health issued Policy Statement #06-06, William J. Lynch, Esq., Administrative Law Judge ("ALJ"), was assigned to hear the appeal and make findings of fact and a recommendation to the State EMS Council. On August 25, 2017, the ALJ issued his report which recommended that the determination of the Big Lakes REMSCO be affirmed.
NOW, on reading and filing the Record herein, we hereby adopt the Report of the ALJ as our own; and

**IT IS HEREBY ORDERED:**

1. Big Lakes REMSCO's determination approving the application by Mercy EMS for an expansion of its operating territory is affirmed.

2. This Order shall be effective upon service on the applicant by personal service or by certified or registered mail.

DATED: Albany, New York

_______, 2017

THE STATE EMERGENCY MEDICAL SERVICES COUNCIL

By: DONNA JOHNSON
Executive Secretary
New York State Emergency Medical Services Council
To: New York State Emergency Medical Services Council

On November 16, 2016, the Big Lakes Regional Emergency Medical Services Council ("Big Lakes REMSCO") approved an application by Mercy Flight, Inc., d/b/a Mercy EMS ("Mercy EMS"), for an expansion of its operating territory, pursuant to New York Public Health Law ("PHL") § 3008. By letter dated December 14, 2016, LaSalle Ambulance, Inc., and Town’s Ambulance, Inc., jointly doing business as American Medical Response ("AMR") appealed the Big Lakes REMSCO’s determination and requested that the New York State Emergency Medical Services Council ("SEMSCO") deny the application. Also by letter dated December 14, 2016, Twin City Ambulance Corp., ("TCA") appealed the determination and requested that the SEMSCO deny the application.

Mercy EMS is represented in this appeal by Terence S. Hannigan, Esq., of the Hannigan Law Firm PLLC. AMR is represented in this appeal by Patrick J. Fitzgerald, Esq., of the law firm of Girvin & Ferlazzo, P.C. TCA is represented in this appeal by Brad M. Gallagher, Esq., of the law firm Barclay Damon, LLP.
The Bureau of Emergency Medical Services ("EMS Bureau") of the New York State Department of Health ("DOH") issued a Policy Statement # 06-06, regarding the EMS Operating Certificate Application Process ("CON"). Policy 06-06 states that in the event of an appeal, the Department shall request the assignment of an Administrative Law Judge ("ALJ") to hear the appeal and make findings of fact and a recommendation to the SEMSCO. William J. Lynch, Esq., was assigned as the ALJ to render an opinion on this appeal and to make the requisite findings of fact and recommendation to the SEMSCO.

The EMS Bureau provided the following items as the record for this appeal:

1. Mercy EMS CON Application Forms DOH-3777 and DOH-3778, signed August 9, 2016
2. Mercy EMS CON Application Supporting Forms, Documents, Application Narrative
3. Statistical Response Data
4. Niagara County Sheriff Certification of Call Data Records
5. NYS DOH Statement of Fitness and Competency, dated October 6, 2016
7. Letter dated October 25, 2016, from the Genesee County Office of Emergency Management Services to the Big Lakes REMSCO in Support of the Application
8. Big Lakes REMSCO CON Committee Checklist to Determine Application Completeness
9. Letter dated October 26, 2016, from AMR to Big Lakes REMSCO in Opposition to the Mercy EMS Application
10. Letter dated October 28, 2016, from Big Lakes REMSCO to AMR

12. Big Lakes Regional EMS CON Committee Meeting

13. Transcript of Public Hearing held on November 1, 2016

14. Copy of Powerpoint Slides Presented by AMR at Public Hearing

15. November 3-4, 2016 Email Correspondence in which Big Lakes REMSCO advised AMR that no additional submissions could be made to the Hearing Officer


17. Transcript of Big Lakes REMSCO Meeting and Vote on Application

18. AMR Appeal Letter and Brief dated December 14, 2016
   a. Mercy EMS Application
   b. Public Hearing Transcript
   c. DOH Policy #06-06
   d. Removed - Evidence which was not made part of the Hearing Record
   e. Letter to Big Lakes REMSCO
   f. TCA Position Paper in Opposition to Application
   g. Public Hearing Officer’s Report
   h. AMR Powerpoint Slides
   i. Removed – Evidence which was not made part of the Hearing Record
   j. Transcript of 911 Dispatch Center
   k. Big Lakes REMSCO Policy
   l. AMR Letter to Big Lakes REMSCO
m. Big Lakes REMSCO Letter to AMR


20. CD with video of REMSCO Committee and Full Council Meetings

By letter dated February 23, 2017, I provided the parties with an opportunity to submit written legal arguments regarding their positions on the appeal. In response to that request, I received the following documents:


22. A Letter and Brief with exhibits from Mercy EMS dated March 16, 2017
   a. Public Hearing Officer’s Report
   b. Niagara County Sheriff Certification
   c. Transcript of the Public Hearing
   d. Letter from AMR to Niagara County Fire Departments
   e. Letter from AMR to the Supervisor of the Town of Niagara
   f. Letter from TCA to Town of Niagara
   g. Mercy EMS Powerpoint Presentation
   h. Resolution of the Niagara County Legislature

**FINDINGS OF FACT**

The following Findings of Fact were made after a review of the entire record in this matter. Letters and numbers in parentheses refer to the document in the record as listed above. These citations represent evidence found persuasive by the ALJ in arriving at a particular finding.
Conflicting evidence, if any was considered and rejected in favor of the cited evidence.

1. Appellant AMR is permitted to operate ambulance service in all of Niagara County. (Ex. 13).

2. By letter dated July 12, 2016, AMR notified the Niagara County Fire Departments that as of August 15, 2016, AMR would provide transport service to the City of Niagara Falls exclusively. (Ex. 22[d], Ex. 13).

3. By letter dated July 14, 2016, AMR notified the Supervisor of the Town of Niagara that it was terminating its agreement and was discontinuing service to the Town of Niagara in 30 days. (Ex. 22[e], Ex. 13).

4. Appellant TCA is also permitted to operate ambulance service in all of Niagara County. (Ex. 13).

5. By letter dated July 29, 2016, TCA notified the Supervisor of the Town of Niagara that TCA would not attempt to provide primary ambulance service to the Town of Niagara. (Ex. 22[f]).

6. In early August 2016, the Niagara County Emergency Medical Services Council, the Niagara County Fire Advisory Board, and the Niagara County Fire Chiefs Association wrote letters to the Niagara County Legislature attesting to the need for additional ambulance services. (Ex. 2, p. 22-25).

7. The Niagara County Legislature passed a unanimous resolution declaring that public need existed for the provision of ambulance and life support services in the County, and endorsing an application by Mercy EMS to obtain operating authority for those services on a countywide basis. (Ex. 22[h]).

8. Mercy EMS submitted an application to the Big Lakes REMSCO for an expansion of its operating territory, as per PHL § 3008. (Ex. 1-8).

9. In its application, Mercy EMS describes its existing primary operating territory as Genesee County, Town of Concord (Erie County), Village of Springfield (Erie County). The proposed new or expanded primary operating territory is Niagara County. (Ex. 1, p. 1).
10. The DOH completed a fitness and competency review of Mercy EMS as described in PHL § 3005(8), and found there was no bar to the entity or the individuals involved. (Ex. 5).

11. The Big Lakes REMSCO deemed Mercy EMS’s application complete. (Ex. 8, p. 4).

12. The Big Lakes REMSCO published a notice in the Niagara Gazette on October 13, 2016, advising that a public hearing would be held on November 1, 2016, regarding Mercy EMS’s application. (Ex. 6).

13. The Big Lakes REMSCO held the public hearing as scheduled at the Public Safety Training Facility, Lockport, New York. Lisa Coppola, Esq., served as the Hearing Officer. (Ex. 13).

14. At the public hearing, approximately 20 people testified. Representatives of Mercy EMS, Donald Trzepacz and Tim Hannigan, made a presentation and were given an opportunity to reply to the testimony. (Ex. 13).

15. Appellants’ representatives, Mark Addario, Tom Maxian, and Terry Clark, were the only people who spoke in opposition to the Mercy EMS application. (Ex. 13, pp. 40-65).

16. The following individuals spoke in support of the application: James Voutour, Sheriff of Niagara County; Mark Stevens, Chief of the Bergholz Fire Company; Jim Volkosh, Middleport Fire Company No. 1, Inc.; Paul Gurnett, Niagara County Chairman of the Fire Advisory Board; Laura Kelemen, Director of Mental Health and Substance Abuse Services for Niagara County; Lee Wallace, Supervisor for the Town of Niagara; Chad Shepherd, Niagara County EMS Coordinator; David Godfrey, Niagara County Legislator and Chairman of the Committee for Public Safety for the County; Bill Tobin, Chief of the Wolcottsville Volunteer Fire Company; Dan Hosie, Fire Chief, Town of Niagara; Jim Sutor, Chief of Police, Town of Niagara Fire Department; Mark Kasprzak, Volunteer Fire Chief at the Shawnee Volunteer Fire Company in the Town of Wheatfield and Director of Emergency Communications at the Niagara County Sheriff’s Department; Dan Leven, Niagara County Fire Chief’s Association and Chief at the Upper Mountain Fire Company in Lewiston; Jonathan Schultz, Fire Coordinator, Director of Emergency Services for Niagara County, and Elaine Roman, Niagara County Department of Health. (Ex. 13, pp. 66-126).
17. The ambulance call data from the Niagara County Dispatch Records which became part of the record indicates a high level of unavailability or delayed response. (Ex. 3, 4, 13)

18. Based on the evidence presented at the public hearing, the Hearing Officer issued a report in which she found that there was a “demonstrated absence, reduced availability or inadequate level of care in ambulance or emergency medical service available to a geographic area which is not readily correctable through the allocation or improvement of existing resources.” Therefore, she recommended that the Big Lakes REMSCO approve Mercy EMS’s application. (Ex. 16, p. 4, 6).

19. On November 16, 2016, the Big Lakes REMSCO held a meeting at the Medina Fire Department. The Big Lakes REMSCO approved the Mercy EMS application by a vote of 23 votes in favor, one vote against, and two abstentions. (Ex. 17, p. 34).

20. By letters dated December 14, 2016, AMR and TCA commenced this appeal. (Ex. 18,19).

**DISCUSSION AND CONCLUSIONS**

The State EMS Council and the Department define public need as:

The demonstrated absence, reduced availability or inadequate level of care in ambulance or emergency medical service available to a geographic area which is not readily correctable through the reallocation or improvement of existing resources.

Certified data from the Niagara County Dispatch records document unavailability or delayed responses. The transcript of the Public Hearing contains the testimony of fourteen individuals describing the inadequate level of ambulance service in Niagara County. Mercy EMS’s application has support from several entities including the Niagara County Fire Advisory Board, the Niagara County Fire Chiefs Association, and the Niagara County Emergency Medical Services Council. In addition, the Niagara County Legislature unanimously enacted a legislative declaration attesting
to the need for additional services. A public hearing was properly held providing all interested parties with an opportunity to be heard. The recommendation of the Hearing Officer to approve the application is based upon substantial evidence that Mercy EMS established public need for the service. At a meeting with a quorum in attendance, the Big Lakes REMSCO approved the Mercy EMS application by a vote of 23 votes in favor, one vote against, and two abstentions.

Although Appellants contend that Big Lakes REMSCO erred in granting the application because parts of Niagara County have adequate ambulance service, I find this argument to have no legal basis. The argument assumes that Appellants are entitled to define and narrow the geographic area being considered for the determination of need. However, Appellants offered no basis for their claim that Mercy EMS was obligated to “demonstrate a public need in each and every community within Niagara County.” In this instance, the Big Lakes REMSCO considered a county-wide application by Mercy EMS. Therefore, the totality of Niagara County was considered by the Big Lakes REMSCO when determining whether a need existed, and the record shows that a need for additional ambulance service does exist in Niagara County. Moreover, I note that both Appellants AMR and TCA are able to operate on a county-wide basis, and no statutory or regulatory provision requires Mercy EMS to submit an application for a more limited geographic area.

Appellants claim that, even if a need exists in Niagara County, the need can be corrected through a reallocation of existing resources. However, Appellants have merely shown that Appellants have limited the portions of Niagara County for which they are willing and able to provide service and that there may be a lack of need in those municipalities. The fact remains that portions of Niagara County remain underserved, and Niagara County does not have sufficient
resources to address that need. Nothing requires the Big Lakes REMSCO to carve out of consideration those municipalities within Niagara County which the Appellants have decided to select. The Big Lakes decision to consider Niagara County as a geographic area for determination of need has a rational basis, particularly under these facts in which the Appellants already have county-wide certification, yet have chosen to limit the area for which they provide service.

Appellants allege that the Big Lakes REMSCO violated its policy because there is no record of a 5-person meeting at which a Committee ruled on the completeness of the application by Mercy EMS. However, I find no requirement that the REMSCO CON committee was required to assemble and hold a meeting with its five members to consider whether the application was complete. DOH Policy 06-06 states that the “application shall be reviewed for completeness by the designated REMSCO sub-committee or program staff.” The Policy of Big Lakes REMSCO assigns the task to a subcommittee. Since application review is a task which can be done by either a committee or program staff according to DOH policy, the more rational interpretation of the Big Lakes REMSCO’s policy is that the Committee was not be required to hold a meeting to determine the completeness of the application. Here, the record indicates that the committee members reached out to each other informally to reach a consensus that the application was complete in a process which complied with the REMSCO’s policy.

Based on the record, I conclude that the Big Lakes REMSCO has complied with the requirements of PHL § 3008. Appellants argue, however, that the Big Lakes REMSCO’s determination should be reversed because the Mercy EMS application does not comply with DOH Policy #06-06 in that it did not contain all the information required by that policy. The purpose of DOH Policy #06-06 is to facilitate the approval process by setting out the elements of an CON
application, but it is not intended to benefit third parties such as Appellants. If the application does not comply strictly with the provisions of DOH Policy #06-06, the SEMSCO has the option to remand the matter for the Mercy EMS to supplement any deficiencies, but the SEMSCO also has the discretion to affirm the application as it exists because this argument is not based upon a violation of PHL § 3008.

Having reviewed the record, I recommend that the SEMSCO affirm the decision of the Big Lakes REMSCO to approve the Mercy EMS application in its current form for two reasons. First, the Big Lakes REMSCO rationally based its approval upon a record which established broad public support and a significant public need for additional ambulance service in Niagara County. And second, Appellant AMR created an urgency to the public need for additional ambulance service by sending a letter to the Niagara County Fire Departments on July 12, 2016, which stated that AMR would begin limiting its provision of transport service exclusively to the City of Niagara Falls. On July 14, 2016, Appellant AMR then sent a letter terminating its ambulance service provider agreement with the Town of Niagara. On July 29, 2016, Appellant TCA sent a letter to the Town of Niagara admitting an increased call volume and its inability to provide primary ambulance service to the Town of Niagara at that time. These statements by Appellants acknowledging their inability to provide sufficient ambulance service caused the EMS community in Niagara County to seek out Mercy EMS from a neighboring county to hurriedly submit an application for expansion of its operating territory. In light of these circumstances, the record as it exists is sufficient to warrant approval of the application.
RECOMMENDATIONS

Based upon the foregoing, I hereby make the following recommendation:

1. Big Lakes REMSCO's vote to grant the application of Mercy EMS to expand its operating territory should be affirmed.

DATED: Albany, New York
August 25, 2017

Respectfully Submitted,

WILLIAM J. LYNCH, ESQ.
Administrative Law Judge
TO: Donna Johnson, Executive Secretary
New York State EMS Council
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